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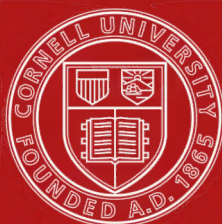
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A treatise on the law of trials in actio



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A TREATISE
ON THE
LAW OF TRIALS
IN ACTIONS
CIVIL AND CRIMINAL

By SEYMOUR D. THOMPSON, LL. D.

Author Thompson on Stocks and Stockholders; Thompson on Homesteads and Exemptions;
Thompson on Corporations; Thompson on Negligence, etc, etc.

SECOND EDITION

By MARION C. EARLY

OF THE ST. LOUIS BAR

Editor Third Edition Bishop on Statutory Crimes; Author Assignments for Benefit of
Creditors, "Cyc.;" Editor Second Edition of Bishop on Contracts.

IN FOUR VOLUMES

VOL I

CHICAGO
T. H. FLOOD & COMPANY

1912

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JUN 10 1912

LAW LIBRARY.

To Herr GUSTAF EDW. FAHLCRANTZ,

v. HÄRADSHÖFDING, ADVOCATE, &c.,

OF STOCKHOLM, SWEDEN.

Sir,—I ask leave to dedicate this work to you, in recognition of the efforts which you have made, through various published writings, to reform and improve the system of trials in your own country, and especially to inculcate the obligation of speaking the truth in forensic controversies. That a distinguished Swedish advocate, after investigating the English system of trial by jury, should recommend its adoption to his countrymen, cannot but be regarded as a compliment to the English-speaking race. And yet, while naturally partial to the institutions of my own great and prosperous country, I feel that it would not be becoming in me to offer the suggestion that the jury system of your country would be improved by adopting ours. A system of jury trial which has been found suitable to our institutions and habits of thought, might be so out of keeping with the ways of thinking of your countrymen, that it would not work well if transplanted into your country. But, allowing that this is so, you have certainly shown that your jury system, if such it may be called, is not without serious defects; and, for having drawn the attention of your countrymen to those defects, you are entitled to their sincere thanks, whether or not you have suggested the most expedient remedy. Your struggle in behalf of the principle that mere formalism and technicality ought to be expelled from the courts of justice and the truth established there instead, is deserving of universal sympathy; and if you shall not succeed in impressing those views upon your countrymen in your own lifetime, your fate will be no worse than that of Bentham, who, having spent his lifetime in a like struggle, died without seeing the fruition of his hopes, but whose writings have, since his death, confessedly shed an influence upon the jurisprudence of his country, surpassing that of any other man. If you are thus "equalled with him in fate," so may you be "equalled with him in renown!"

One who has traveled in your country and who has everywhere observed the pride of honesty which animates the Swedish people, can scarcely understand how it is that you need courts of justice at all. Several hundred thousand of your countrymen have made homes in America. They are among our most honest, industrious, peaceful and law-abiding citizens. Would that we had more of them! It is not to be supposed that a feeling of discontent with the institutions of their native land has caused them to seek homes in our country. Their presence among us is rather to be ascribed to that natural overflow which the New World has received from the overcrowded populations of the Old.

Your writings have impressed me with certain strong points of resemblance between your jury system and ours. Your *naemd*, when the panel is full, is composed of twelve men; and, I believe the jury of all the northern nations of Europe is composed either of twelve men, or of a multiple, or an aliquot part of that number. Your *naemd*, if I correctly understand you, has the power, considered as mere power, of judging of the law as well as of the facts, and of overruling the judge, by an unanimous vote, upon the whole case, or upon any question which arises therein, whether it be a question of law or a question of fact. The extravagant conceptions of liberty and of popular right, with which our American republic commenced its career, invested juries, in several States of the Union, with the same power; and under the constitutions of some of the American States, as you will see by looking through the following pages,¹ juries in criminal cases are invested with the power of judging of the law, of deciding the law in opposition to the decision of the judge, and even of declaring acts of the legislature to be null and void, because, in their opinion, contrary to the constitution, which is the fundamental or organic law. The jurisprudence of those States has thus unwisely invested twelve ignorant men, hastily gathered together, with the power of setting aside the law of the land and of declaring acts of the legislature null and void. When I tell you that such a state of things exist in several of the most progressive States of the American Union, you will of course believe me; but you will none the less be surprised that a people who have the reputation of possessing the practical sense of the American people could have descended to such folly. You must further under-

¹ *Post*, § 2140, *et seq.*

stand that the jury which is clothed with this extraordinary power is not composed of men of the highest probity, chosen by the electors for a term of years, as in the case with your Swedish jury, but that it is composed of men who are selected for the purpose of a single trial,—frequently of *talesmen*, gathered together from the court idlers who happen to be standing around,¹—and that those who happen to have intelligence enough to have read the newspapers and to have formed or expressed an opinion about the case which is to be tried,² are for that reason ineligible and are rejected upon challenge; so that the jury which really tries the case is often composed of the most ignorant men who can be found in the community. When you can consider that this body of twelve dolts, selected because they are ignorant of the facts of the case about to be tried, no matter how notorious those facts may have been, are entrusted with the power of judging of the law against the opinion of the presiding judge, and even in opposition to the Supreme Court, you will at least conclude,—however much you may be impressed in favor of the English system of trial by jury,—that there is one feature of our American system which you cannot recommend to your countrymen. Your Swedish jury, much to their credit, when the judge brings in his decision, founded upon a record which they have not had the opportunity of reading, exercise the mere office of nodding their heads. But not so with our American jury. They not unfrequently, in violation of the plain obligation of the oaths which they have taken, decide the case in opposition to the law as expounded to them by the judge in his instructions, and bring in verdicts which have the result of turning the worst criminals loose upon the community to repeat their crimes.

It is true that, in a majority of American jurisdictions, juries are not invested with the power of judging of the law, except in so far as they have the power, in criminal trials, of bringing in a verdict of not guilty contrary to the law as expounded by the judge, which verdict cannot be set aside,³—the maxim of the English law, embodied in all our American constitutions, being that no one shall be twice put in jeopardy of life or limb for the same offense. But in all American jurisdictions they are nevertheless invested with this power to the extent that the verdict

¹ *Tales de circumstantibus: post.*
§ 23.

² *Post*, § 76, *et seq.*

³ *Post*, § 2133, *et seq.*

of a jury which is even procured by bribery or corruption, if it be a verdict of acquittal, cannot be set aside, but is forever conclusive. With this exception, in a majority of American jurisdictions, juries are not, even in criminal trials, judges of the law, but are bound to accept the law as expounded to them by the judge in his instructions.

But, although they may not be judges of the law, they are, in many American jurisdictions, judges of the facts, in a manner so conclusive that the judge is not permitted to advise them as to the weight of the evidence, or as to the credibility of the witness, or even to intimate to them his opinion upon any question of fact.¹ It is true that this is not the rule in the Federal, and in some of the State courts; but it is the rule in many of the State jurisdictions that the slightest intimation from the bench, of an opinion as to how the jury should find an issue of fact, or as to the weight or probative force of any evidence which has been delivered to them, is sufficient to authorize a court of appeal to reverse the judgment.² The twelve common men, thus selected haphazard from the community to sit as jurors in the particular trial, who have perhaps never sat in a trial before, who find themselves discharging an office new and strange to them, surrounded by strange scenes, like children attending for the first time at schools,—are by that law conclusively presumed to be able to discriminate properly upon all questions of fact, to detect the true from the false in the testimony delivered by the witnesses, to weigh the evidence impartially,—and all this without any aid or assistance from the bench, beyond instructing them in certain general rules which they are told they may or must apply in determining the weight to be attached to the various elements of the evidence.

But unfortunately many of these rules which the judge is authorized, and even required on request of one of the parties, to give to the jury to aid them in weighing the evidence, are not rules of common sense, but are rules which have been filtered down to us from the impure fountains of the scholastic jurisprudence of the middle ages. They come to us in the form of what are called *presumptions*: and so it is that in many cases the jury are instructed by the court that *the law presumes*, or draws a certain conclusion of fact from a certain other fact, although, in the

¹ *Post*, §§ 1037, 2287, *et seq*

² *Post*, §§ 2420, 2421.

case before the jury, viewed in conjunction with its surroundings, an ordinary man, proceeding in accordance with his experience and conscience, would not draw such conclusion, but the reverse. Among these so-called presumptions is the presumption that a man intends the natural and ordinary consequences of his own acts.¹ This is sometimes in accordance with experience and sometimes contrary to experience. A man does many things unguardedly and accidentally, without intending or expecting the natural and ordinary consequences of what he does. Another of these so-called presumptions arises generally in trials for murder, and it is that malice is presumed from the unjustifiable use of a deadly weapon.² The use of the word unjustifiable, and the language in which the courts expound this presumption to juries,³ deprive it of much of its objectionable meaning; but even as thus expounded, it is sometimes in accordance with experience and sometimes contrary to it. A man very often uses a deadly weapon in lethal combat when he is not justified in using it, and yet when the principles of the common law do not impute malice to him. He often uses it in that heat of passion which the common law to some extent indulges out of respect to the infirmities of human nature. This our law concedes; and it would therefore seem that all the circumstances surrounding an act imputed as a crime ought to be submitted to the jury for their free and conscientious verdict as to what the accused intended, without throwing an artificial presumption into the scale against him. Another of these so-called presumptions is that which ascribes guilt of the crime of larceny to the recent, unexplained possession of stolen goods.⁴ Suppose that a thief were to secrete an article of stolen goods in your house, that it should be found there soon after the fact of the larceny, and that you should not deign to offer, or should not have the power of offering, an explanation as to how it came there,—the fact of its being found there without your offering an adequate explanation, would, under the operation of this infamous principle, require a jury to convict you of larceny, to brand you with infamy, and to send you to the penitentiary to undergo a term of penal servitude.⁵ Such a consequence might not result in the case of a man of standing in the community, who

¹ *Post*, § 2528.

² *Post*, § 2531.

³ *Post*, § 2532.

⁴ *Post*, § 2534, *et seq.*

⁵ *Post*, § 2541.

could throw his good character into the scale as evidence in his behalf;¹ but without doubt, under its operation, many obscure persons of indifferent character have been convicted and sent to the penitentiary, in my country, for larcenies which they never committed.

These artificial presumptions have no other effect than to disturb and obscure the judgment of juries in dealing with the evidence. Instead of dealing with the evidence in the natural way, according to their conscience and experience, they are impressed by this lesson, which they receive for the first time from the bench, that they are to decide, not according to common sense, but according to legal sense,—according to some artificial standard of sense which they but dimly understand,—and they are thus driven in many cases to decide wrongly. The view which, in the following pages, I have endeavored to inculcate is, that the jury must be freely allowed to determine the truth; that they must not be fettered by artificial rules and presumptions; that the whole brood of so-called presumptions of law, except those conclusive presumptions which rest upon grounds of public policy, and leaving to their due office those which the law raises in order to fix the burden of proof,—is an heretical brood which should be extirpated from the law; and that the grounds on which the law raises those presumptions should be regarded as mere evidentiary circumstances, to be considered by the jury for what they are worth.

If I understand you aright, you are struggling against similar artificial rules of evidence, inherited from the German scholastic jurisprudence. In this struggle in behalf of truth and against blind and unreasoning technicality in the administration of justice, it is my happy fortune to be able to join hands with you.

You thus perceive that our American system of jury trial is not a homogeneous system; that while we attempt to invest juries, on the one hand, with the extravagant power of judging of the law, and with the conclusive power of judging of the facts, we, on the other hand, hamper their intelligence and conscience with artificial rules which interfere with their free judgment as to the facts. But we have done more than this. Our American judges have shown themselves capable of attenuated refinements, which would move laughter in the law courts of London. It is a canon

¹ *Post*, § 2538.

of Anglo-American criminal law that every person is presumed to be innocent until he is proved to be guilty beyond a reasonable doubt. The phrase "reasonable doubt" is one of the simplest and most easily understood phrases in our language. And yet our American judges, in their charges to juries, have endeavored to improve it by a variety of definitions: paraphrasing it, lengthening it, shortening it, and twisting it around from side to side, and some of them landing in the conclusion that common sense is not a guide on this question!¹ I have found a great number of decisions upon the meaning of these two simple words, and have been obliged to devote many pages to a discussion of the hair-drawn conceptions which those decisions present.²

But the manner in which we treat our juries in other respects is not at all in keeping with the extravagant powers with which we have clothed them. In capital cases, and in many jurisdictions in other cases of felony, we lock them up in charge of a sworn officer, from the time when the evidence is submitted to them for their decision until they return into court with their verdict.³ These twelve men who, in one juridical conception, occupy almost the position of demigods, are now made prisoners, though worshiped, like the Abuna of Abyssinia. Moreover, while we invest them with the exclusive power of judging of the facts without the aid of the judge, we withhold from them in many instances those sources of natural evidence which every right-minded and conscientious man would seek in endeavoring to solve the disputed questions of fact which are committed to him. If a crime has taken place, and they inadvertently and without the consent of the court, visit the scene where it took place, their verdict is avoided and a new trial must be had.⁴ Nay, even a law book,⁵ a county map,⁶ or a deposition⁷ which has been read in the case, if accidentally found in the jury room, will, in some of the narrow conceptions of American jurisprudence, have the dreadful effect of vitiating their verdict; and extravagances or improprieties in argument, which would be thought trivial if the argument were addressed to the judge, will require the granting of a new trial if addressed to the jury.⁸

¹ *Post*, § 2482.

² *Post* § 2461, *et seq.*

³ *Post*, § 2548, *et seq.*

⁴ *Post*, §§ 904, 2605.

⁵ *Post*, § 2586.

⁶ *Post*, § 2588.

⁷ *Post*, § 2578.

⁸ *Post*, § 963, *et seq.*

In the discussions of the following pages, wherever I have encountered these conceptions, I have written of them with that freedom which the subject seems to deserve. If I have not always written wisely concerning them, I have at least written faithfully. If what I have thus written could deserve of my countrymen some small share of the approbation which similar efforts on your part have deserved at the hands of your King and Country, I should be more than satisfied.

I am, with the highest respect, your obliged friend and servant,
SEYMOUR D. THOMPSON.

PREFACE TO FIRST EDITION.

This is an attempt to sketch the leading outlines of a trial before a jury, or before a judge sitting as a jury, from the impaneling of the jury to the signing and filing of the bill of exceptions. The effort of the author has been to aid the judge and practitioner in the work of getting a jury, of examining the witnesses, of presenting the documentary evidence, of arguing the case to the jury, of instructing the jury, and of attending to the custody and conduct of the jury, to the delivery and reception of the verdict, to the motion for a new trial, and to the bill of exceptions. By far the most important subjects which have undergone discussion, and those which have received the greatest attention and the greatest space, relate to the examination of witnesses and to the instruction of juries.

At the threshold of the latter subject lies the constantly recurring question of the relative province of the court and jury. This subject has been discussed in thirty-three chapters, in connection with a great variety of questions. In these chapters the author has not only considered what questions are questions of law for the decision of the judge and what are questions of fact for the jury, but he has also discussed the manner in which questions for the decision of the jury should be submitted to them; giving a great variety of precedents of instructions on questions likely to arise in trials civil and criminal, all of which have met with distinct approval in appellate courts on appeal or error. These are followed by six chapters, treating of the general rules which obtain with reference to the manner of instructing juries. So much space was thus consumed in what the author judged to be a sufficient treatment of the subject of the relative province of court and jury and of the manner of instructing juries, that it became necessary, in order to avoid expanding the work into three volumes, to limit the treatment of the final title, bills of exceptions, to a mere outline sketch.

Some years ago the author published a small work on the theory of instructing juries¹ which met with considerable favor

¹ "Charging the Jury." St. Louis: Published by the Central Law Journal Company.

at the hands of the bench and bar. That work being now out of print, so much of it as was deemed appropriate to this discussion has been preserved in the present work. In order to a complete discussion of the leading incidents of a trial, it also became necessary to traverse some ground which was gone over in a previous work written in part by the present writer.¹ Under an arrangement with the publisher of that work and with Mr. Merriam, my learned co-author, some matter was drawn from it for use in these pages. The matter drawn from these two works has been, as far as practicable, condensed, restated, re-arranged, and brought down to the present time by the citation of more recent decisions.

In several States there exists a system under which the judge submits special interrogatories to juries, requiring of them special findings of fact on particular matters raised by the evidence. It was thought best to have a chapter detailing the practice under such statutes written by a practitioner living in a state where such a system is in vogue. The chapter on the special findings of juries was accordingly contributed by W. W. Thornton, Esq., of Crawfordsville, Indiana. The three chapters on motions for new trial were contributed by Eugene McQuillin, Esq., of the St. Louis bar. Both of these writers are favorably known to the profession as contributors to the law magazines. In their contributions to the present work they have examined and cited a great many statutes and judicial decisions; and it is confidently believed that their contributions will prove useful and satisfactory to the profession.

It is customary for law writers to apologize to the profession for the character of their work. If an author is conscientious and capable, no one can know and feel the deficiencies of his work as much as he knows and feels them himself. There can be no such thing as perfection in a legal treatise, and this is especially true of American law books. Our law is the result of the enactments of nearly fifty independent legislatures and of the judgments of more than fifty independent judicial tribunals. Our reported case-made law is being turned out at the rate of more than thirteen thousand cases a year. On nearly every subject which can engage the pen of a legal writer he is oppressed with a multitude of decisions; and it is within the bounds of literal truth to say that there is scarcely any subject in the Amer-

¹ Thompson and Merriam on Juries. The same publisher.

ican law on which contradictory decisions cannot be found. An author who attempts to struggle with this superabundant mass of material will finally conclude that all effort must stop somewhere. Even while he is writing, new decisions on the subjects which engage his attention are multiplying in such numbers that he cannot hope to retrace his steps and gather them all up and fit them into their proper places. At last he finds that the edifice which his ambition has attempted to build, though to the inexperienced eye it may seem symmetrical in its general outline, and even stately in its appearance, must forever remain unfinished.

The subject of this work is a very wide one. Nearly every title in the law can be touched upon or hinted at in a work on trials. If one who is expert in the art of war were to write a technical history, in fullness of detail, of a battle by land, of a naval battle, and of a siege, it would be found that he had written a history of the art of war. The gathered skill and preparation of years, in the engineer, the ordnance, the quartermaster, the commissary departments, and in the more general work of discipline and drill,—are often expended in a single battle, nay, even in a single charge. It is so in the practice of the law. The gathered learning and experience of a professional life time may be called into requisition in a single forensic struggle. The history of a trial, if written by a competent hand and in fullness of detail, must therefore be in a large measure a history or description of the law itself.

If the author of the present work has not treated of everything which might be supposed to be germane to so great a subject, his apology is that he could not treat of everything in two volumes. An examination of the index, containing 1214 titles, will convey a hint to the reader of the number and variety of subjects which have been drawn into the discussion. It has been found necessary to examine nearly sixteen thousand adjudged cases,¹ and to state, condense and arrange the doctrine of these adjudications in a text embracing 2146 pages, divided into 82 chapters and 2439 sections.² So that, what was originally intended for treatment in a single volume has, notwithstanding efforts at condensation in some of its parts, been expanded into two volumes

¹ The exact number is 15,634.

cle, thus reducing the real, from the apparent number, (2828), to that above stated.

² In numbering the sections intervals have been purposely left at the end of each chapter and arti-

of much more than the usual size. And yet some subjects, which might properly be included in a work on trials, have scarcely been touched upon at all. Very little attempt has been made to deal with minor or collateral matters. But such as this work is, it is given to the profession in the confident belief that it will in some measure lighten their labors.

THE AUTHOR.

PREFACE TO SECOND EDITION.

The first edition of this work was published nearly a quarter of a century ago. The author's analytical treatment of the subject commended the work to the favorable consideration of the Bar throughout this country. The trial of a law suit is a subject of especial anxiety to the beginner while to the more experienced the necessity of guarding every point is appreciated. Trial tactics are in a sense a demonstration of generalship of the respective attorneys conducting the cause and the value of a familiarity with the rules of practice cannot be over estimated.

The aim has been, in the preparation of the present edition, to present a thorough treatise on the law of trials, bringing the citations up to date. The plan necessitated the rewriting, rearranging and enlarging of much of the matter contained in the first edition. The great mass of decisions rendered it inexpedient to do more than to cite the leading cases in support of the particular points under consideration and only matters of general practice have been treated, the practitioner being left to the examination of local procedure for questions of that character. The chapters on impaneling the jury, direct and cross-examination of witnesses and the province of the court and jury have received extensive attention. An effort has been made to present these important subjects in such form as to be of practical help to the trial lawyer. The subject of cross-examination of witnesses has been treated with a view to a correct analysis of the principles, not overlooking the dangers that lie in its unskillful use. The plying of questions on cross-examination may seem an easy matter, but experience indicates that a larger number of cases are lost through errors in cross-examination than through any other single cause. Copious foot notes have been added, and in searching for authorities these should be examined.

The subject of the Grand Jury, its origin and functions, and Causes Appealable, have been treated in new chapters.

Much consideration has been given to the subject of instructions to juries and the principles to be kept in mind in the preparation of instructions have been carefully analyzed. Chapters 65-70 are devoted to a discussion of the elements of instructions. About

four thousand approved forms of instructions comprise a separate volume to this edition. In the selection of these precedents it has been endeavored to present those which exhibit clearness and precision in their hypothesis of fact as well as correct applications of the law. But forms of instructions, however excellent, can serve no other purpose than as guides for the framing of other instructions applicable to the facts of the particular case. It is believed that a study of these forms will be of much aid in understanding the elements to be kept in mind in the drafting of instructions, but the fact should be constantly kept in view that instructions must be based upon the facts of the particular case, and under no circumstances should an instruction be used because the form has been approved, lest serious consequences may follow. It is interesting to note the great number of reversals due to errors in instructions to juries and there is a tendency to materially alter the established practice with respect to reversals in such cases and to order a reversal only when upon consideration of the merits of the case it shall appear that judgment is for the wrong party. Where a jury is waived and the court sits as trier of the facts less strictness as to forms of instructions seems generally to be required.

The notes are numbered from one to one hundred, which appears to be a more convenient form. About ten thousand citations have been added. The index has been amplified so as to extend to the new matter, Volume III being indexed separately.

I desire to extend my thanks to N. C. Collier, Esq., of the St. Louis Bar, who has rendered me valuable assistance throughout the preparation of this edition. I am also indebted to C. P. Williams, Esq., of the St. Louis Bar, for many suggestions in the selection of precedents of instructions.

The work is submitted to the consideration of the profession with the hope that it may meet with its continued approval.

M. C. E.

St. Louis, January 1, 1912.

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THE LAW OF TRIALS

TITLE I.

IMPANELING THE JURY.

CHAPTER I.—OF JURIES AND THE QUALIFICATION OF JURORS.

CHAPTER II.—OF SELECTING, DRAWING AND SUMMONING THE PANEL; AND HEREIN OF SPECIAL VENIRES AND TALESMEN.

CHAPTER III.—OF CHALLENGES.

CHAPTER IV.—OF THE DETAILS OF PRACTICE IN CHALLENGING AND IMPANELING.

CHAPTER I.

OF JURIES AND THE QUALIFICATIONS OF JURORS.

SECTION

1. Preliminary.
2. Waiving a Jury.
3. Regularly the Jury must consist of Twelve Men.
4. What if it consists of more than Twelve.
5. What if the Record is Contradictory as to the Number of Jurors.
6. Waiver of Right to Jury of Twelve Men.
7. Special or Struck Juries.
8. Juries de Mediatate Linguae.
9. Juries of Mixed Races.
10. Qualifications for Jury Duty.
11. Exemptions from Jury Duty.

§ 1. **Preliminary.**—Counsel at the outset are confronted with the task of getting an impartial jury. It will, therefore, be useful to give a sketch of the various steps that usually take place in the organization of a trial jury,—dwelling especially upon the subjects

of challenges and objections and the time and manner of making the same.

§ 2. **Waiving a Jury.**—It may be premised that the right of trial by jury may be waived in civil cases,¹ but, according to the better

¹ *Harris v. Shaffer*, 92 N. C. 30; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Chapline v. Robertson*, 44 Ark. 202; *Heacock v. Hosmer*, 109 Ill. 245; *Vitrified Wheel & Emery Co. v. Edwards*, 135 Mass. 591; *Pasour v. Lineberger*, 90 N. C. 159; *Franklin v. McCorkle*, 11 Lea (Tenn.), 190; *Leahy v. Dunlap*, 6 Colo. 552; *Heacock v. Lubukee*, 108 Ill. 641; *Wanser v. Atkinson*, 43 N. J. L. 571; *Crump v. Thomas*, 85 N. C. 272; *Tharp v. Witham*, 65 Iowa, 566; *Gregory v. Lincoln*, 13 Neb. 352; *Bamberger v. Terry*, 103 U. S. 40; *Grant v. Reese*, 82 N. C. 72; *Coulter v. Weed Sewing Machine Co.*, 3 Lea (Tenn.), 115; *Davidson v. Jersey Company Associates*, 71 N. Y. 333; *Baird v. Mayor*, 74 N. Y. 382; *King v. Burdett*, 12 W. Va. 688; *Cushman v. Flanagan*, 50 Tex. 389; *Sutton v. McConnell*, 46 Wis. 269; *Merrill v. St. Louis*, 83 Mo. 244; *aff'd*, 12 Mo. App. 466; *Trail v. Somerville*, 22 Mo. App. 1; *Bruner v. Marcum*, 50 Mo. 405; *Tower v. Moore*, 52 Mo. 118; *Brown v. Home Savings Bank*, 5 Mo. App. 1; *Moore v. Crossthwait*, 135 Ala. 272, 33 South. 28; *Ferrea v. Chabot*, 121 Cal. 233, 53 Pac. 689; *Corthell v. Mead*, 19 Colo. 386, 35 Pac. 741; *Rivas v. Summers*, 33 Fla. 539, 15 South. 319; *Waterman v. Glisson*, 115 Ga. 773, 42 S. E. 95; *Brownell Imp. Co. v. Critchfield*, 197 Ill. 61, 64 N. E. 332; *Lothian v. Lothian*, 88 Iowa, 396, 55 N. W. 465; *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Poppitz v. German Ins. Co.*, 83 Minn. 110, 92 N. W. 439; *Westervelt v. Phelps*, 171 N. Y. 212,

63 N. E. 962; *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670. Quite all of the States have statutes on the subject of waiver and there is some variety of opinion as to whether or not waiver in other ways than as pointed out arises. As seeming not to regard statutory mention as exclusive of other ways, *Poppitz v. German Ins. Co.*, *supra*, holds that unequivocal conduct showing intention to waive sufficed. Motion by both parties at close of evidence has been held to so submit questions of facts to the court as to withdraw all issues from the jury, and constitutes inference of waiver. *Empire Cattle Co. v. Atchison, Topeka & S. F. R. Co.*, 147 Fed. 457, 77 C. C. A. 601; *Love v. Scatcherd*, 146 Fed. 1, 77 C. C. A. 1; *Clason v. Ballew*, 152 N. Y. 204, 46 N. E. 332; *Westervelt v. Phelps*, *supra*. But in Idaho it is held, that such a motion by defendant at the close of plaintiff's case does not amount to waiver, where, after its denial, he introduces evidence sufficient to carry the case to the jury. *Albion v. Smith*, 19 S. D. 421, 103 N. W. 655. In Minnesota it was ruled that though each party requests a directed verdict at the close of the case, there is no waiver, especially, if the requests are coupled with other requested instructions. *Poppitz v. German Ins. Co.*, *supra*. *Contra*, *Empire Cattle Co. v. R. Co.*, *supra*. As deeming the statutory ways of waiver exclusive see *Hahn v. Brinson*, 133 N. C. 7, 45 S. E. 359; *Jacobs v. People*, 218 Ill. 500, 75 N. E. 1034. Waiver according to stat-

opinion, not in criminal cases,² though there is some opinion to the contrary.³ A statute authorizing such a waiver in criminal cases has been held not unconstitutional.⁴ This may be done, under various constitutions, statutes and judicial holdings, by not demanding a jury;⁵ by making no objection⁶ or consenting⁷ to an order

ute is as binding on infant as on adult. *St. v. Pockenham*, 40 Wash. 403, 82 Pac. 597.

² *St. v. Carman*, 63 Iowa, 130, 50 Am. Rep. 741 (Seevers, J., dissenting); *St. v. Stewart*, 89 N. C. 563; *St. v. Holt*, 90 N. C. 749, 47 Am. Rep. 544. The rulings generally are that in felony cases there can be no waiver, but it is valid in misdemeanor. As to felonies, see *Collins v. St.*, 88 Ala. 212, 7 South. 260; *People v. Deegan*, 88 Cal. 605, 26 Pac. 500; *Paulsen v. People*, 195 Ill. 207, 63 N. E. 144; *People v. Weeks*, 99 Mich. 86, 57 N. W. 1091; *St. v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Thompson v. Utah*, 170 U. S. 343, 47 L. Ed. 1061. As to validity in misdemeanor cases see *McClelland v. State*, 118 Ala. 122, 23 South. 732; *Brewster v. People*, 183 Ill. 207, 63 N. E. 144. In Iowa it was held, that inasmuch as the right is constitutional there can be no waiver in any criminal case. *St. v. Douglass*, 96 Iowa, 308, 65 N. W. 151. Trial for violation of a town ordinance may be waived, where the case is on appeal. *Town of Lovilia v. Cobb*, 126 Iowa, 557, 102 N. W. 496. The Federal Supreme Court recognizes validity of waiver in trial for petty offenses. *Schrick v. U. S.*, 195 U. S. 65. But the rule in many state courts that there is no violation of the constitutional guaranty of a jury trial, where it is obtainable on appeal, is rejected by that court. *Callam v. Wilson*, 127 U. S. 540, 32 L. Ed. 223. As following such a rule, see *City of Topeka v. Kersch*, 70 Kan. 840, 80 Pac. 29;

St. v. Lytle, 138 N. C. 738, 51 S. E. 66. This same rule may exclude demand in a civil case, if a jury is obtainable on appeal. E. g., appeal from an award of damages in condemnation case. *St. v. Jones*, 139 N. C. 613, 52 S. E. 240; *Low v. U. S.*, 160 Fed. 86. *Pleas of guilty*: Pleas of guilty are not regarded as waivers, as by such a plea there is nothing left for trial according to the course of the common law. *West v. Gammon*, 98 Fed. 426, 39 C. C. A. 271; *St. v. Almy*, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744. Though the plea is by a minor. *Lee v. McClelland*, 157 Ind. 84, 60 N. E. 892.

³ *St. v. White*, 33 La. Ann. 1218; *St. v. Askins*, Id. 1253.

⁴ *Re Staff*, 63 Wis. 285, 53 Am. Rep. 285; *Town of Clinton v. Peake*, 71 S. C. 22, 50 S. E. 741; *Lancaster v. St.*, 90 Md. 211, 44 Atl. 1039; *Craig v. St.*, 49 Ohio St. 415, 36 N. E. 120. Where the jury was defined by a state constitution to be of the vicinage, a statute fixing alternative venue in the county where wound is inflicted or place of death, was held valid. *Com. v. Jones*, 26 Ky. Law Rep. 867, 82 S. W. 643. And so a statute giving the judge the right to summon jurors from an adjoining county, where he is satisfied an impartial jury cannot be otherwise obtained. *Mosely v. Com.*, 27 Ky. Law Rep. 214, 84 S. W. 748. The constitutionality of such a statute cannot be assailed, where in a civil case there is no demand for a jury trial. *Maddox v. Walhall*, 141 Cal. 412, 74 Pac. 1026.

⁵ *Heacock v. Hosmer*, 109 Ill. 245;

of reference; by failing to advance the jury fee prescribed by stat-

Mich. Const., art. 6, § 27. See *Odell v. Reynolds*, 40 Mich. 21; *Cushman v. Flanagan*, 50 Tex. 389; *Wanser v. Atkinson*, 43 N. J. L. 571. When the demand is *in time*: *Gallagher v. Baton Rouge Hebrew Congregation*, 34 La. Ann. 526; *Hall v. Chicago etc. R. Co.*, 65 Iowa, 258; *Vitrified Wheel & Emery Co. v. Edwards*, 135 Mass. 591; *Bonham v. Mills*, 39 Ohio St. 534. When failing to demand, under a rule of court, not a waiver: *Biggs v. Lloyd (Cal.)*, 11 Pac. 831; *Miller v. Bank*, 120 Ga. 17, 47 S. E. 525; *Steuerwald v. Gill*, 83 N. Y. S. 396, 85 App. Div. 605; *Albermarle etc. Co. v. Worrell*, 133 N. C. 93, 45 S. E. 359; *Davis v. Auld*, 96 Me. 559, 53 Atl. 118; *Abbott v. Eastman (N. Y.)*, 88 N. E. 572. In Missouri it was held that a like result would ensue from a city ordinance so prescribing with respect to trial for municipal offense. *De-laney v. K. C.*, 167 Mo. 667, 66 S. W. 166. And in Maryland under a rule of court. *Balto. etc. Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161. If statute prescribes the time of demand and the issue is changed, there is a new starting point. *Reese v. Raum*, 82 N. Y. S. 187, 83 App. Div. 550. As to what is a proper demand, under Alabama statute, see *Moore v. Crossthwait*, 135 Ala. 272, 33 South. 28. Demand or failure to demand within prescribed time applies in case of change of venue. *Chappell etc. Co. v. Sulphur Mines Co.*, 85 Md. 684, 36 Atl. 712.

° *Baird v. Mayor*, 74 N. Y. 382; *City of Waterbury v. Platt Bros. Co.*, 76 Conn. 435, 56 Atl. 856; *Clausenius v. Clausenius*, 179 Ill. 545, 53 N. E. 1006. So if there be no objection to transfer of cause to equity docket. *Vincent v. German Ins. Co.*,

120 Iowa, 272, 94 N. W. 458. Or not appealing from an order of reference. *Montague v. Best*, 65 S. C. 455, 43 S. E. 963. Or not excepting by term bill to compulsory reference. *Smith v. Baer*, 166 Mo. 392, 66 S. W. 166; *Holt v. Johnson*, 129 N. C. 141, 39 S. E. 797. Or failing to object to confirmation of a commissioner's report in condemnation case. *Juvinall v. Jamesburg Drainage Dist.*, 204 Ill. 106, 68 N. E. 550. Where a case has been placed by the clerk on the equity docket, failure to move its transfer to jury docket is waiver. *Gerstle v. Vandergriff*, 72 Ark. 261, 79 S. W. 776.

7 *Grant v. Reese*, 82 N. C. 72; *Harris v. Shaffer*, 92 N. C. 30; *Brooklyn etc. R. Co. v. Brooklyn City R. Co.*, 93 N. Y. S. 849, 105 App. Div. 88. Under the Georgia practice reference to *auditor* does not waive jury. *Hudson v. Hudson*, 98 Ga. 487, 26 S. E. 482. Where a part only of the issues are referred, there is no waiver as to the others. *Tinsley v. Keaney*, 170 Mo. 310, 70 S. W. 691. In Alabama it was held, that, where a jury was demanded and the case is put on the non-jury docket without objection and tried, there is waiver. *Blankenship v. Parsons*, 113 Ala. 275, 21 South. 71. See also *Stevens v. McDonald*, 173 Mass. 382, 53 N. E. 885. Also when parties consent to set a cause for trial when they know no jury will be in attendance. *International etc. R. Co. v. Foster*, 26 Tex. Civ. App. 497, 63 S. W. 952. If there are exceptions to a report, the North Carolina practice allows jury trial, where a jury is demanded as to each specification of fact, the demand being set forth in the exceptions as filed. *Roughton v. Sawyer*, 144 N. C. 766, 56 S. E. 480.

ute;⁸ by consent entered of record;⁹ by a stipulation in writing signed by the parties and filed with the clerk that the case shall be tried by the court;¹⁰ by failing to appear at the trial;¹¹ by not filing a notice under a statute of a desire for a jury trial;¹² by waiving a jury orally in open court;¹³ by demanding a jury without specifying the issues to be tried by the jury, where there are issues triable by the court;¹⁴ by failing to take an appeal from the decision of a

⁸ *Venine v. Archibald*, 3 Colo. 163. But payment of the jury fee at the time the demand for a jury is made is not necessary to make the demand valid. *Odell v. Reynolds*, 40 Mich. 21. Although the statute requires that the fee be deposited on the first day of the term (Rev. Stat. Tex., art. 3066), a deposit on the second day will be sufficient, no prejudice appearing, the statute being directory as to time. *Gallagher v. Goldfrank*, 63 Tex. 473; *Ward v. Lemon & McCabe*, 3 Ariz. 219, 73 Pac. 443; *Delaney v. Police Court*, 167 Mo. 667, 97 S. W. 589; *Pinckney v. Green*, 67 S. C. 309, 45 S. E. 202; *St. v. Neterer*, 33 Wash. 535, 74 Pac. 668. This requirement binds as well one acting in a fiduciary character, as in his own behalf. *Lummis v. Big Sandy etc. Co.*, 188 Pa. 27, 41 Atl. 319. It has been held, under Utah statute, that the court has discretion to excuse an impecunious party. *Toltec Ranch Co. v. Babcock*, 24 Utah, 183, 66 Pac. 876.

⁹ W. Va. Act of 1872, ch. 47, § 35; Md. Const., art. 4, § 4; *Desche v. Gies*, 56 Md. 135 (holding that the record must show the consent). A recital in the record that "neither party requires a jury, and the court is substituted in lieu of a jury to try the case,"—satisfies such a statute. *King v. Burdett*, 12 W. Va. 688; *Tower v. Moore*, 52 Mo. 118; *Bruner v. Marcum*, 50 Mo. 405. "Claim" of jury of twelve men under New York Laws of 1869, ch. 410; *Poyer v. New York Central*,

etc. R. Co., 7 Abb. New Cas. (N. Y.) 371. A record entry, "Neither party requiring a jury,"—imports a waiver of the right. *Chapline v. Robertson*, 44 Ark. 202.

¹⁰ *Bamberger v. Terry*, 103 U. S. 40. Compare *Supervisors of Wayne Co. v. Kennicott*, Id. 554; *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670. Record recital of waiver presumes it in writing, as statute requires, in misdemeanor cases. *Kanorousski v. People*, 113 Ill. App. 468. Affidavits will not be heard to show there was such agreement. *Hahn v. Brinson*, 173 N. C. 7, 45 S. E. 359.

¹¹ 2 Ind. Rev. Stat. 1876, § 340; *Love v. Hall*, 76 Ind. 326; *Leahy v. Dunlap*, 6 Colo. 552; *Pointer v. Jones*, 15 Wyo. 1, 85 Pac. 1050. A rule of court cannot provide for such result. *Fitzgerald v. Wygal*, 24 Tex. Civ. App. 372, 59 S. W. 621. If a default set aside, a jury may be demanded. *Levy v. Roosin*, 87 N. Y. S. 707, 93 App. Div. 387.

¹² *Bailey v. Joy*, 132 Mass. 356; *Camp v. Carroll*, 73 Conn. 347, 47 Atl. 122; *Brown v. St.*, 89 Ga. 340, 15 S. E. 462; *Burnham v. R. R. Co.*, 88 Fed. 627, 32 C. C. A. 64. And in Maryland under a rule of court. *Balto. City etc. Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 379, 39 L. R. A. 161.

¹³ *Gregory v. Lincoln*, 13 Neb. 352; *Steuerwald v. Gill*, 83 N. Y. S. 396, 85 App. Div. 605.

¹⁴ *Greenleaf v. Egan*, 30 Minn. 316; *Meek v. De Latour*, 2 Cal. App.

board of supervisors to the circuit court.¹⁵ The prevailing opinion seems to be that a waiver of a jury at one term, will not estop the party from claiming it at a *subsequent term*,¹⁶ or after a *new trial* has been granted;¹⁷ though there are holdings, influenced by statute, to the effect that a waiver once made is a waiver for all subsequent trials.¹⁸ It has been held that, although in a case regularly triable by jury the parties waive a jury, the *court is not bound* by the waiver, but may refuse to perform the office of a jury, without assigning any reason therefor.¹⁹

§ 3. Regularly the Jury must Consist of Twelve Men.—According to the common law, a legal petit jury consists of neither more

261, 83 Pac. 300; Taylor v. Smith, 118 N. C. 127, 23 S. E. 1005.

¹⁵ Tharp v. Witham, 65 Iowa, 566; Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440.

¹⁶ Cross v. State, 78 Ala. 430; Dean v. Sweeney, 51 Tex. 242; Brown v. Chenoworth, Id. 469. But, if waiver arises by failure to demand at the first term, it does. Blair v. Curry, 150 Ind. 99, 46 N. E. 672. Waiver in inferior court does not apply to the cause on appeal. Dennee v. McCoy, 4 Ind. T. 233, 69 S. W. 858.

¹⁷ State v. Touchet, 33 La. Ann. 1154; Carthage v. Buckner, 8 Bradw. (Ill.) 152; Burnham v. North Chicago St. Ry. Co., 88 Fed. 627, 32 C. C. A. 64; Osgood v. Skinner, 186 Ill. 491, 57 N. E. 1041.

¹⁸ Coulter v. Weed Sewing Machine Co., 3 Lea (Tenn.), 115; Nashville etc. R. Co. v. Foster, 10 Lea (Tenn.), 351; Heacock v. Lubukee, 108 Ill. 641 (Scott, J., dissenting); Worthington v. Nashville etc. Ry. Co., 114 Tenn. 177, 86 S. W. 307; Tracy v. Falvey, 92 N. Y. S. 625, 102 App. Div. 585. This seems confined to discretion of court and permission to withdraw waiver will not be granted, if it is asked for mere delay. Clock v. Baker, 192 Mass. 226, 78 N. E. 455. Conversely—where a demand for jury has

been made, that cannot be withdrawn to the prejudice of the other party. Allsworth v. Interstate Ry. Co., 27 R. I. 106, 60 Atl. 834. Ordinarily, however, it is permissible to withdraw a demand for a jury. Knight v. Farrell, 113 Ala. 258, 20 South. 974. In Florida it was held discretionary with the court to permit the withdrawal of a stipulation waiving a jury, where it was contained in an agreed statement of facts, when new and pertinent facts were discovered, which the adversary party could not consent to have embraced therein. Hartford F. Ins. Co. v. Redding, 47 Fla. 228, 37 South. 62.

¹⁹ McCarthy v. Missouri R. Co., 15 Mo. App. 385. As to the right to trial by jury, and its waiver, see Biggs v. Lloyd (Cal.), 11 Pac. 831, and note; Lewis v. Klotz (La.), 1 South. 539; Railroad Co. v. Morris (Tex.), 3 S. W. 457; Railroad Co. v. Martin (Tenn.), 2 S. W. 381; Caldwell Co. v. Crockett (Tex.), 4 S. W. 607; Ickes v. St., 63 Ohio St. 549, 59 N. E. 233; Host v. Cascade Timber Co., 39 Wash. 279, 81 Pac. 738. If the case be in a court for which no jury is provided, unless accused demands one, he may insist upon being tried by the court. Wadkins v. St., 127 Ga. 45, 56 S. E. 74.

nor less than twelve men,²⁰ and the ancient law was so precise that if the trial were by a jury consisting of more or less than twelve men it was a mistrial.²¹ In criminal trials this is undoubtedly the law in this country at the present time. The constitution of the United States, and it is believed the constitutions of all the States, contain, with some variation of words, the declaration that the right of trial by jury shall remain inviolate. The constitutional jury thus guaranteed is a common-law jury of twelve men.²² In the face of this constitutional guaranty an act of the legislature providing for the trial of common-law cases before a jury of less than twelve men is void.²³ Moreover the rule in civil as well as in criminal cases is

²⁰ Hale, P. C. 161; Bac. Abr. Juries A.; 1 Chit. Cr. L. 505. Twelve is the absolute requirement whether the jury be of the regular panel, a special venire or a special or struck jury. *Eckrich v. Transit Co.*, 175 Mo. 621, 75 S. W. 755.

²¹ *Trials per Pais* (anno 1725) 79.

²² *Cancemi v. People*, 18 N. Y. 128, 135; *May v. Milwaukee etc. R. Co.*, 3 Wis. 219; *St. v. Cox*, 8 Ark. 436; *Work v. St.*, 2 Ohio St. 296; *Brazier v. St.*, 44 Ala. 387, 392; *Turns v. Com.*, 6 Metc. (Mass.), 224, 235; *Lamb v. Lane*, 4 Ohio St. 167; *People v. Kennedy*, 2 Park. Cr. R. (N. Y.) 312; *Byrd v. St.*, 1 How. (Miss.), 163, 177; *Carpenter v. St.*, 4 How. (Miss.), 163, 166; *Redus v. Wofford*, 5 Smed. & M. (Miss.), 579, 592; *St. v. McClear*, 11 Nev. 39; *Smith v. Atlantic etc. R. Co.*, 25 Ohio St. 91, 102; *Gibson v. St.*, 16 Fla. 291, 300; *Wynehamer v. People*, 13 N. Y. 378, 427; *Cruger v. Hudson etc. R. Co.*, 12 N. Y. 190, 198; *People v. Lane*, 6 Abb. Pr. (N. S.) 105, 115; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061; *Mattox v. St.*, 115 Ga. 212, 41 S. E. 709; *Harris v. People*, 128 Ill. 535; *McRae v. Grand Rapids etc. Co.*, 93 Mich. 399, 17 L. R. A. 750; *Lommen v. Minneapolis G. L. Co.*, 65 Minn. 196, 33 L. R. A. 437; *Dean v. Williamette Bridge Co.*, 22 Or. 167, 15 L. R. A. 614; *Miller v. Com.*, 88

Va. 618, 15 L. R. A. 441. And its decision must be unanimous. *Logan v. Field*, 192 Mo. 54, 90 S. W. 127; *St. v. Barker*, 107 N. C. 913, 10 L. R. A. 50; *Mays v. Com.*, 82 Va. 550. Even though a constitution reduces the number, statute providing otherwise is unconstitutional. *First Nat. Bank v. Foster*, 9 Wyo. 157, 61 Pac. 466. This feature can only be displaced by constitutional amendment. *Logan v. Field*, *supra*. A common law jury is not guaranteed, in state trials, by the federal constitution. *Maxwell v. Dow*, 176 U. S. 881, 44 L. Ed. 597; *Franklin v. St. Louis & M. R. Co.*, 188 Mo. 53, 87 S. W. 930. How unanimity in a verdict is arrived at is unimportant from a legislative standpoint. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132; *Murray v. New York L. Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658. It was held in *Thompson v. Utah*, *supra*, that a state constitution, where the state emerged from a territory, was ex post facto legislation in so far as it provided for felonies, committed prior to its adoption, being tried by a jury of less than twelve.

²³ *Vaughn v. Scade*, 30 Mo. 600; *Work v. St.*, 2 Oh. St. 296; *Byrd v. St.*, 1 How. (Miss.) 177; *Dowling v. St.*, 5 Sm. & M. (Miss.) 664; *Norval v. Rice*, 2 Wis. 23; *May v. Mil-*

that the *record must show* that the case was tried by a jury of twelve men (except by consent of the parties), or the verdict will be a nullity, and the judgment entered thereon will be reversed and a new trial granted.²⁴

waukee etc. R. Co., 3 Wis. 219; Foster v. Kirby, 31 Mo. 496; Allen v. St., 51 Ga. 264; Henning v. Hannibal etc. R. Co., 35 Mo. 408. But as *justices of the peace* do not form any part of the ordinary judicial machinery of the common law, it is held that such constitutional provisions do not inhibit the legislature from authorizing a jury of less than twelve in justices' courts, especially since the right to a jury of twelve men is secured in the unlimited right of appeal to a superior court of record. Emerick v. Harris, 1 Binn. (Pa.) 416; Work v. St., 2 Ohio St. 296; Bryan v. St., 4 Iowa, 349; St. v. Beneke, 9 Iowa, 203; Norton v. McLeary, 8 Ohio St. 205; Dawson v. Horan, 51 Barb. (N. Y.) 549; Knight v. Campbell, 62 Barb. (N. Y.) 16 (overruling Baxter v. Putney, 37 How. Pr. (N. Y.) 140); People v. Lane, 6 Abb. Pr. (N. s.) 105; Ward v. People, 30 Mich. 116; St. v. Gutierrez, 15 La. Ann. 190. The statutes generally provide that a justice's jury shall consist of six men, unless the parties agree upon a less number. So, also, in cases in courts which exercise their functions without the aid of a jury by the ancient common law, a trial, even in a criminal case by a jury of less than twelve, will be legal. Duffy v. People, 6 Hill (N. Y.), 75; People v. Justices, 74 N. Y. 406; People v. Clark, 23 Hun (N. Y.), 374. The constitutions of many of the States moreover, provide that in criminal cases trial before courts not of record or before inferior courts, the number of the jury may be less than twelve as prescribed by law. Colo.

Const., 1875, art. 2, § 23; Ga. Const., 1868, art. 5, § 4, subsec. 5; Iowa Const., 1857, art. 1, § 9; Amend. to Fla. Const., 1868, art. 6, § 12, ratified 1875; Mich. Const., 1850, art. 6, § 28; Mo. Const., 1875, art. 2, § 28; Neb. Const., 1866-67, art. 1, § 5 (Const. 1875, art. 1, § 6); S. C. Const., 1865, art. 9, § 7. The La. Act of 1880, No. 35, providing for trial of certain criminal cases by a jury of *five* is valid. St. v. Everage, 33 La. Ann. 120; St. v. Demouchet (La.), 3 South. 565; Collins v. St., 88 Ala. 212, 7 South. 260; City of Denver v. Hyatt (Colo.), 63 Pac. 603. Though the guarantee applies to misdemeanors as well as felonies (Gius v. U. S., 141 Fed. 956, 73 C. C. A. 272), it does not include petty offenses, e. g. a penalty. Schrick v. U. S., 195 U. S. 65, 49 L. Ed. —. Nor forbid legislation, as to civil actions for a moderate sum triable before justices of the peace. Capitol Traction Co. v. Hof, 174 U. S. 1; Hermanck v. Guthmann, 179 Ill. 563, 53 N. E. 966. A statute providing for change of venue upon application by prosecution, where a jury of the vicinage is not attainable because of partiality or prejudice, has been held constitutional. Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762.

²⁴ Cancemi v. People, 18 N. Y. 128; 7 Abb. Pr. (N. Y.) 271; Brown v. St., 6 Blackf. (Ind.) 561; Jackson v. St., 6 Blackf. (Ind.) 461; Maduska v. Thomas, 6 Kan. 153; Brown v. St., 16 Ind. 496; Allen v. St., 54 Ind. 461; Hill v. People, 16 Mich. 351; Com. v. Shaw, 7 Am. Law. Reg. 289; Dixon v. Richard, 3 How. (Miss.) 771;

§ 4. What if it Consists of More than Twelve.—The same consequences will follow where the record shows that the verdict was rendered by a jury of thirteen except by consent of parties.²⁵ This rule has not been accepted in America in civil cases without some qualification. In one case, an action of *assumpsit*, it was held that the verdict by a jury of thirteen was good.²⁶ The Court of Appeals of Kentucky have adopted what seems to be a just and reasonable qualification of the rule, by holding that the objection that the verdict was rendered by a jury of thirteen will be *waived* unless made in the trial court on a motion for a new trial, and that it cannot be raised for the first time on *appeal*.²⁷ Moreover, it is a rule, applicable alike in civil and criminal cases, that, if a jury of more than twelve men has been impaneled and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial may proceed.²⁸

§ 5. What if the Record is contradictory as to Number of Jurors.—Where the entries of the record are contradictory as to the number of jurors who sat at the trial, so much of the record as states that the jury consisted of twelve men will be regarded as stating the truth, and the contrary statement will be rejected as a clerical error,—the legal presumption being that the portion of the record is true which answers the requirements of the law, unless the contrary be made to appear by the bill of exceptions.²⁹

§ 6. Waiver of right to Jury of Twelve Men.—While in cases of felony the constitutional right to be tried by a jury of twelve men cannot be waived by the accused,³⁰ in cases of misdemeanor³¹ the

Ayres v. Barr, 5 J. J. Marsh. (Ky.) 286; Oldham v. Hill, 5 J. J. Marsh. (Ky.) 300; Bone v. McGinley, 7 How. (Miss.) 671; Briant v. Russell, 2 N. J. L. 107; Denman v. Baldwin, 3 N. J. L. 945; St. v. Van Matre, 49 Mo. 268; St. v. Myers, 68 Mo. 266; Jones v. St. (Miss.), 27 South. 382 (not reported in state reports). A statute requiring a non-juror, such as alien, to be challenged before sworn, prevents the jury being invalidated by reason of his presence thereon. Kohl v. Sheriff, 160 U. S. 293.

²⁵ Wolfe v. Martin, 1 How. (Miss.) 30; McCormick v. Brookfield, 4 N. J.

L. 69; Whitehurst v. Davis, 2 Hayw. (N. C.) 113; Parke, B., in Muirhead v. Evans, 6 Exch. 447, 449.

²⁶ Tillman v. Ailles, 5 Smedes & M. (Miss.) 373.

²⁷ Ross v. Neal, 7 B. Mon. (Ky.) 408; Berry v. Kenney, 5 B. Mon. (Ky.) 122.

²⁸ Muirhead v. Evans, 6 Exch. 447; Bullard v. St., 38 Tex. 504; Davis v. St., 9 Tex. App. 634; St. v. Hudkins, 35 W. Va. 247.

²⁹ Larillian v. Lane, 8 Ark. 372; Foote v. Lawrence, 1 Stew. (Ala.) 483.

³⁰ Cancemi v. People, 18 N. Y. 128;

rule is different, especially where the punishment is a pecuniary fine merely.

§ 7. Special or Struck Juries.—This jury differs from the common jury in respect of the fact that it is not impaneled in the ordinary manner. It is ordinarily formed by each party striking a designated number from a list of names, the remaining composing the jury which is to try the cause. No general direction concerning the impaneling of a special jury can be given in a brief compass.³² In America the subject is generally one of statutory regulation, the policy of the statutes being, like that of the rule of the common law, to allow either party the privilege of such a jury in cases of exceptional difficulty or importance.³³ Under some systems, special juries are composed of persons, otherwise qualified for jury duty, who are possessed of certain special qualifications demanded by the peculiarities of the case on trial.³⁴ Under some systems, challenges for cause are allowed before the striking begins.³⁵

St. v. Mansfield, 41 Mo. 470; *Williams v. St.*, 12 Ohio St. 622; *Allen v. St.*, 54 Ind. 461; *Hill v. People*, 16 Mich. 351. But see *St. v. Kaufman*, 51 Iowa, 578, 9 Cent. L. J. 313; *Queenan v. Okla.*, 190 U. S. 548, 47 L. Ed. 1175. This precludes consent to the excusing of one of the panel and proceeding with the remainder (*St. v. Simons*, 61 Kan. 752), though in Iowa it has been held otherwise (*St. v. Grosheim*, 79 Iowa, 75), the consent being entered of record.

³¹ *Com. v. Dailey*, 12 Cush. (Mass.) 80; *St. v. Borowsky*, 11 Nev. 119; *St. v. Cox*, 8 Ark. 436, 447; *Sarah v. St.*, 28 Ga. 576; *St. v. Van Matre*, 49 Mo. 268; *Tyra v. Com.*, 2 Metc. (Ky.) 1; *Moore v. St.*, 124 Ga. 30, 52 S. E. 81; *Jacobs v. People*, 218 Ill. 500, 75 N. E. 1034.

³² See *Thomp. & Mer. Jur.*, §§ 12, 13, 14.

³³ *Patchin v. Sands*, 10 Wend. (N. Y.) 570; *People v. McGuire*, 43 How. Pr. (N. Y.) 67. As to what are such causes and how the fact is to be

brought to the attention of the court, see *Poucher v. Livingstone*, 2 Wend. (N. Y.) 296; *Anon.*, 1 Johns. (N. Y.) 314; *Wright v. Columbian Ins. Co.*, 2 Johns. (N. Y.) 211; *Murphy v. Kipp*, 1 Duer (N. Y.), 659; *Livingston v. Smith*, 1 Johns. (N. Y.) 141; *Walsh v. Sun Mutual Ins. Co.*, 2 Rob. (N. Y.) 646, 17 Abb. Pr. (N. Y.) 356; *Nesmith v. Atlantic Ins. Co.*, 8 Abb. Pr. (N. Y.) 423; *Stryker v. Turnbull*, 3 Caines (N. Y.), 103; *Hartshorn v. Gelston*, 3 Caines (N. Y.), 84; *People v. McGuire*, 43 How. Pr. (N. Y.) 67; *People v. Dunn*, 157 N. Y. 528, 52 N. E. 572. An order may be revoked where it appears that effort to obtain such will prove fruitless. *Bruce v. Beall*, 100 Tenn. 573, 47 S. W. 204.

³⁴ *Golding v. Petit*, 27 La. Ann. 86; *Basham v. Hammond Packing Co.*, 127 Mo. App. 542, 81 S. W. 1227.

³⁵ *R. S. Del.* 1893, ch. 109, § 16; *Ind. Rev. Anno.* 1908, §§ 549, 550; *St. v. Lehman*, 175 Mo. 546, 75 S. W. 116.

§ 8. **Juries de Mediatate Linguae.**—This kind of jury was allowed to an alien. Its distinctive feature was that half of its members were composed of citizens or denizens, and the other half of foreigners. It was used in England under various statutes until recently abolished.³⁶ The right to this kind of jury was recognized in a few early cases in this country,³⁷ denied in others,³⁸ and is generally abolished by statute,³⁹ though in one State it may still be directed by the court.⁴⁰

§ 9. **Juries of Mixed Races.**—While persons of the negro race can not demand as a right,⁴¹ even under the fourteenth amendment of the constitution of the United States and the Civil Rights Law,⁴² that juries to try causes to which they are parties shall be composed in part of persons of their own race; yet a State law⁴³ which confines eligibility to jury duty to *white* male persons, etc., is obnoxious to the fourteenth amendment to the Federal constitution, as denying to colored persons the equal protection of the laws, and hence void.⁴⁴

³⁶ By the Stat. 33 Vict., ch. 14, § 5. See *Thomp. & Mer. Jur.*, § 16, and authorities cited.

³⁷ *Respublica v. Mesca*, 1 Dall. (U. S.) 73; *People v. McLean*, 2 Johns. (N. Y.) 381; *U. S. v. Carnot*, 2 Cranch C. C. (U. S.) 469; *Richards v. Com.*, 11 Leigh (Va.), 690; *Brown v. Com.*, 11 Leigh (Va.), 711.

³⁸ *St. v. Antonio*, 4 Hawks (N. C.), 200; *U. S. v. McMahon*, 4 Cranch C. C. (U. S.) 573; *St. v. Fuentes*, 5 La. Ann. 427.

³⁹ *N. Y. G. L.* 1901, p. 2003; *Code Ala.* 1907, § 7228; *R. C. Md.* 1904, art. 51, § 18; *R. S. Ill.* 1896, ch. 78, § 2; *Gen. Laws* 1905, § 182; *R. S. Mo.* 1909, § 5215; *Comp. L. Mich.* 1871, § 6012; 1 *Bright. Purd. Dig.*, p. 837, § 71; *Ib.*, p. 385, § 45.

⁴⁰ *G. S. Ky.* 1909, § 3077.

⁴¹ *Nashville v. Shepherd*, 3 Baxt. (Tenn.) 373. See, also, *Williams v. St.*, 4 *Tex.* 34; *Carter v. Texas*, 177 *U. S.* 442, 44 *L. Ed.* 839. That negroes, possessed of the general qualifications required, are not on the jury list at all, or in propor-

tion to their numbers in the county, does not prove such a denial where commissioners have power to select with regard to competency and fitness. *St. v. Daniels*, 134 *N. C.* 641, 46 *S. E.* 743; *Miera v. Territory* (N. M.), 81 *Pac.* 586 (not reported in state reports).

⁴² *Virginia v. Rives*, 100 *U. S.* 313, 12 *Cent. L. J.* 229; *Bush v. Kentucky*, 107 *U. S.* 110.

⁴³ *Laws W. Va.* 1872-3, p. 102. Several State statutes confine the selection of jurors to white persons and are to that extent invalid. *R. S. W. Va.* 1879, ch. 109, § 1; *G. S. Ky.* 1879, p. 571, § 2; *G. S. Neb.* 1873, p. 642, § 657; *Gen. Laws Ore.* 1872, § 918. See, also, *Rev. Code Md.* 1878, p. 558, §§ 1 and 2. Others provide against disqualification on account of color. *Stat. Tenn.* 1871, § 4002a; *R. S. La.* 1876, § 2125. The statutes cited under this note have in nearly all the states been amended. The practitioner will consult his own statute.

⁴⁴ *Strauder v. St.*, 100 *U. S.* 303,

§ 10. **Qualifications for Jury Duty.**—Counsel cannot proceed with the work of impaneling a jury without having in mind the qualifications of jurors prescribed by the common law, by constitutional provisions, or by statute. The common-law qualifications may generally be disregarded,⁴⁵ and constitutional provisions prescribe the qualifications of jurors in three States only, so far as the writer has observed.⁴⁶ It is generally the subject of legislation, and the power to prescribe qualifications other than those of the common law, by abolishing the freehold qualification,⁴⁷ or the property qualification,⁴⁸ is fully established.⁴⁹ But where the constitution prescribes the qualification, it is not competent for the legislature to *restrict* it,—as if the constitution makes all qualified voters qualified jurors, and the legislature attempts to restrict the qualification to householders or freeholders.⁵⁰ By some State constitutions religious or political tests are forbidden.⁵¹ Others provide more generally that “the civil rights, privileges, or *capacities* of any citizen. shall in no way be diminished or enlarged on account of his religious principles,”⁵² and by others particular disqualifications are pro-

307, 10 Cent. L. J. 225. See, also, Cases of the County Judges, 3 Hughes (U. S.), 576. Where a State constitution limited the right of suffrage to the white race, and a statute confined the selection of jurors to *electors*, the adoption of the *Fifteenth Amendment* operated to enlarge the list of electors and to qualify colored citizens for jury service. Neal v. Delaware, 103 U. S. 370.

⁴⁵ These ordinarily touch the question of citizenship or freehold. Thomp. & Mer. Jur., §§ 16, 21. Com. v. Wong Chung, 186 Mass. 231, 71 N. E. 292. Where statute gives the court authority to dispense with any designated qualification, when the requisite number possessed thereof cannot be obtained, an accused is entitled to show upon request or motion, that such is not the fact. Taylor v. St., 47 Tex. Cr. R. 101, 81 S. W. 933.

⁴⁶ Const. Fla. 1868, art. 7, § 12; Const. Ga. 1868, art. 5, § 13, subsec. 2; Const. N. H. 1792, part I, art. 21.

⁴⁷ Kirwin v. People, 96 Ill. 206.

⁴⁸ Com. v. Dorsey, 103 Mass. 412; St. v. Wilson, 48 N. H. 398.

⁴⁹ See also Byrd v. St., 1 How. (Miss.) 163, 176. So, the legislature may define the mode of ascertaining such qualifications. Whitehead v. Wells, 29 Ark. 99. And a state excluding those of certain avocations, viz: lawyers, ministers, doctors, dentists, railway engineers and firemen is held not denial of due process of law under the federal constitution. Rawlins v. Georgia, 201 U. S. 638, 50 L. Ed. 899.

⁵⁰ Maloy v. St., 33 Tex. 599; Wilson v. St., 35 Tex. 365; Brennan v. St., 33 Tex. 266. But, contra, see Lester v. St., 2 Tex. App. 432. If constitution guarantees impartial jury, statute cannot restrict challenges for bias, prejudice or partiality. Graff v. St., 155 Ind. 277, 58 N. E. 74.

⁵¹ Const. Tenn. 1870, art. 1, § 6; Const. W. Va. 1872, art. III, § 11.

⁵² Const. Ala. 1819, art. I, § 4;

vided for.⁵³ The statutes generally disqualify those convicted of scandalous crime or guilty of gross immorality.⁵⁴ *Alienage* is a ground of disqualification at common law, except in the case of *mixed juries*,⁵⁵ already considered; and many statutes provide that jurors shall be citizens of the United States,⁵⁷ "residents" of the district,⁵⁸ qualified voters,⁵⁹ of fair character, approved integrity, sound judgment, well informed and the like;⁶⁰ and neither

Const. Ala. 1865, art. I, § 4; Const. Ala. 1875, art. I, § 4; Const. Ark. 1864, art. II, § 4; Cal. Const. 1879, art. IV, § 9; Const. Iowa 1857, art. I, § 4; Const. Iowa 1846, art. I, § 4; Const. Ky. 1799, § 4; Const. Ky. 1850, art. XIII, § 6; Const. Kans. 1857, art. XV, Bill of Rights, § 4; Const. Tenn. 1870, art. I, § 6.

⁵³ Const. Ala. 1819, art. VI, § 5; Const. Tex. 1876, art. XVI, § 2; Cal. Const. 1879, art. XX, § 11.

⁵⁴ Code Va. 1906, § 4293; R. S. W. Va. 1879, ch. 109, § 8; R. S. So. Car. 1902, § 2934; See, also R. S. Wis. 1898, § 2525; Anno. Code Ore., § 965; Cal. Code Civ. Proc., § 199; Comp. Laws Utah, 1907, § 1298; R. S. Tex. 1904, § 3139; Const. Nev. § 27; G. S. Neb. 1907, § 2414; Gen. Laws Colo. 1891, § 2590; R. C. Miss. 1906, § 2684; R. S. Me. 1903, ch. 108, § 2. *Manning v. Boston El. Ry. Co.*, 187 Mass. 496, 76 N. E. 645. Or indicted for such offense within a prescribed time. *Charleston v. St.*, 133 Ala. 218, 32 South. 259. Or for any crime. *St. v. Nichols*, 109 La. 84, 33 South. 92. The Federal Supreme Court holds that, unless expressly enlarged, this applies to a conviction within the state. *Queenan v. Okla.*, 190 U. S. 548, 47 L. Ed. 1175. In Tennessee disqualification attaches to all persons known to be engaged in a general conspiracy against law and order. *Jenkins v. St. (Tenn.)*, 42 S. W. 263 (not reported in state reports). Judicial notice will not be

taken by a state court of infamy arising out of conviction under a Federal statute. *Good v. St.*, 106 Tenn. 175, 61 S. W. 79.

⁵⁵ Post, § 54.

⁵⁶ Ante, § 8; Co. Litt. 156b; *Judson v. Eslava*, Minor (Ala.), 3; *St. v. Primrose*, 3 Ala. 546; *Boyington v. St.*, 2 Port. (Ala.) 100.

⁵⁷ Cal. Code Civ. Proc., § 198; R. S. Wis. 1898, § 2524; Gen. Laws Colo. 1895, § 2591; N. Y. Code Rem. Jus., § 1027; Anno. Code Ore. § 965, Civil Code, § 918; G. S. R. I., p. 36, § 1; Comp. L. Utah, 1907, § 1298.

⁵⁸ Rev. St. U. S., § 872; construed in *U. S. v. Nardello*, 4 Mackey (D. C.), 503; *Hughes v. St.*, 109 Wis. 397, 85 N. W. 333. Temporary absence with intention to return shows qualification. *St. v. Burke*, 107 Iowa, 659, 78 N. W. 677.

⁵⁹ R. S. Tex. 1904; art. 3139; *Miller's R. C. Iowa*, 1897, § 332; Const. Nev., § 27; Code Va. 1904, § 3139; R. S. Del. 1893, ch. 109, § 1; Ark. Dig., 1874, § 3654; Comp. L. Arizona, ch. 47, § 10; R. S. Wis. 1898, § 2524; Comp. L. Mich. 1897, § 5978; R. S. La. 1904, § 2125; G. S. Mass. 1860, ch. 132, § 1; R. S. Me. 1903, ch. 106, § 2; Cal. Code Civ. Proc., § 198; G. S. R. I. 1902, § 2933; R. S. S. C. 1902, § 963; Rev. Ind. 1903, § 1667; *Reed v. Peacock*, 123 Mich. 244, 82 N. W. 53.

⁶⁰ N. Y. Code Rem. Jus., § 1027; Cal. Code Civ. Proc., § 198; R. S. Ill. 1909, ch. 78, § 2; Supp. to Ga. Code 1873, § 654; Fla. Code 1906, § 1570;

mentally nor bodily disabled,⁶¹ and not more than sixty,⁶² or seventy,⁶³ years of age. Freehold,⁶⁴ household⁶⁵ and property⁶⁶ qualifications are retained in some States. *Educational* qualifications are rarely prescribed,⁶⁷ though in one State inability to *read or write* is made a ground of challenge,⁶⁸ and in others inability to understand the language in which the proceedings are conducted disqualifies.⁶⁹ It should be borne in mind that inability to read and

G. S. Ky. 1909, § 3064; Comp. L. Mich. 1897, § 319; Code Ala. 1907, § 7239; R. S. Wis. 1898, § 2524; Ark. Dig. 1904, § 4490; Comp. L. Kans. 1909, § 4897; G. S. Neb. 1907, § 1673; G. S. R. I. 1909, p. 963, § 1; R. C. Miss. 1906, § 2684; G. S. Ky. 1909, § 3064; R. S. S. C. 1902, § 2911; Stat. Tenn. 1896, § 5813. It was held not erroneous to allow a juror to sit in a case, although "he did not read the newspapers and could not tell what age he was," where the statute required simply that jurors should be "sober, intelligent and judicious persons." *Com. v. Winne-
more*, 1 Brewst. 356, 2 Brewst. 378.

⁶¹ N. Y. C. & G. G. L. p. 1999; R. S. Ill. 1909, ch. 78, § 2; Comp. L. Mich. 1897, § 319; Comp. L. Arizona, 1901, § 2787; Code Ga. 1895, §§ 3930, 3906; Comp. L. Kan. 1909, § 4597; G. S. Neb. 1907, § 1673; Comp. L. Utah, 1907, § 1306; Gen. Laws Ore. 1902, § 965; Civil Code, § 918; R. S. Tex. 1897, art. 3138.

⁶² N. Y. Code Rem. Jus., § 1027; Code Va. 1904, § 3139; R. S. W. Va. 1906, § 3757; ch. 109, § 1; Code Ga. §§ 3930, 3906; Comp. L. Arizona, 1901, § 2761; R. C. Miss. 1906, § 2684; R. S. Ill. 1909, ch. 78, § 2. *North Chicago Elec. Ry. Co. v. Moosman*, 82 Ill. App. 172. Disqualification arising during trial is ineffective. *Frank v. U. S.*, 16 App. D. C. 478.

⁶³ R. S. Me. 1903, ch. 108, § 2. In New Jersey, sixty-five years is the limit. *Rev. N. J.* 1896, p. 1853, § 47.

⁶⁴ N. Y. C. & G. G. L. p. 1999; R. S. Tex. 1897, § 3138; Stat. Tenn. 1897, § 5813; Gen. Laws New Mexico, 1880, p. 366; Ind. 1908, § 1665; Code Ala. 1907, § 7239. A tenant by the curtesy initiate is a freeholder. *St. v. Mills*, 91 N. C. 581; *Goodson v. U. S.*, 7 Okla. 117, 54 Pac. 423. A mere licensee is not a freeholder. *St. v. Young*, 138 N. C. 571, 50 S. E. 213.

⁶⁵ R. S. Tex. 1897, § 3138; Gen. Laws New Mexico, 1880, p. 366; Stat. Tenn. 1897, § 5813; G. S. Ky. 1909, § 3064; Ind. 1908, § 1665; Code Ala. 1907, § 7239. *McArthur v. St.*, 41 Tex. Cr. R. 635, 57 S. W. 847.

⁶⁶ N. Y. C. & G. G. L., p. 1999; Comp. Laws Utah, 1907, § 1306; Comp. L. Kan. 1909, § 4597; Cal. Code Civ. Proc., § 198; G. S. R. I. 1909, p. 963, § 1; R. S. Del. 1893, ch. 109, § 2; Code Ga. 1895, § 3907; *Battle's Rev. N. C.*, 1909, § 1957. *St. v. Lowe*, 56 Kan. 594, 44 Pac. 20. By some statutes actual payment of poll tax is sufficient to qualify. *St. v. Weaver*, 58 S. C. 106, 36 S. E. 499.

⁶⁷ Comp. Laws Utah, 1876, p. 55.

⁶⁸ Texas Code Crim. Proc., art. 636, subsec. 14. See *Nolen v. St.*, 9 Tex. App. 419. See post, § 56.

⁶⁹ Cal. Code Civ. Proc., § 198; R. S. Ill. 1909, ch. 78, § 2; Comp. L. Mich. 1897, § 319. See post, § 55. In Louisiana it is discretionary with the court to permit. *St. v. Anderson*, 52 La. Ann. 101, 21 South. 781.

write was no disqualification at common law, since in ancient times very few persons possessed this qualification.⁷⁰

§ 11. **Exemption from Jury Duty.**—The right of exemption from jury duty need not be much considered; ⁷¹ because, unless the statute creating the exemption is couched in such terms as to create a disqualification, it will be a personal privilege merely which may be *waived*, provided the person is not otherwise subject to challenge.⁷² Many of the statutes enact in terms that the exemption by them created shall not be considered as a ground of challenge;⁷³ and others are framed in such terms as to carry the same implication.⁷⁴

⁷⁰ See *Com. v. Winnemore*, 1 Brewst. (Pa.) 356, 380, 2 Brewst. (Pa.) 378; *White v. St.*, 52 Miss. 216, 224; *American Ins. Co. v. Mahone*, 56 Miss. 180; *Citizens Bank v. Strauss*, 26 La. Ann. 736; *St. v. Lewis*, 28 La. Ann. 84; *Campbell v. St.*, 48 Ga. 353. It is not conclusive of a juror's incompetency that he signs a verdict by his mark. *Parman v. Kansas City*, 105 Mo. App. 691, 78 S. W. 1046.

⁷¹ The subject is discussed in *Thomp. & Mer. Jur.*, §§ 34-40, inclusive.

⁷² *Mulcahy v. Reg.*, Irish Rep. 1 C. L. 12; affirmed in *L. R.* 3 H. L. 306; *St. v. Forshner*, 43 N. H. 89; *St. v. Wright*, 53 Me. 328; *Moore v. Cass*, 10 Kan. 288; *Davis v. People*, 19 Ill. 74; *Murphy v. People*, 37 Ill. 447; *Chase v. People*, 40 Ill. 352; *Davidson v. People*, 90 Ill. 221; *Edwards v. Farrar*, 2 La. Ann. 307; *Breeding v. St.*, 11 Tex. 257; *Greer*

v. Norvill, 3 Hill (S. C.) 262; *Booth v. Com.*, 16 Gratt. (Va.) 519; *U. S. v. Lee*, 4 Mackey (D. C.), 489, 54 Am. Rep. 293; *St. v. Forbes*, 111 La. 473, 35 South. 710; *St. v. Lewis*, 31 Wash. 75, 71 Pac. 778.

⁷³ Cal. Penal Code, § 1075; *Comp. L. Ariz.*, 1901, § 2783; *Stat. at L. Minn.* 1905, § 5263; *Bullitt's Ky. Code (Cr.)*, p. 42, § 211; *R. S. La.* 1904, p. 971, § 2; *Ark. Dig. Stat.* 1904, § 4498; *Miller R. C. Iowa*, 1897, § 333; *R. S. Ill.* 1909, ch. 78, § 14; *Comp. L. Nev.* 1900, § 3870; *Gen. Laws Ore.* 1902, § 966; *Laws Utah*, 1907, § 1299. *St. v. Raspberry*, 113 La. 651, 37 South. 545.

⁷⁴ *Fla.* 1906, § 1573; *R. S. Del.* 1893, ch. 109, § 1; *Supp. to Ga. Code of 1895*, §§ 415, 416, 417. That it is not a ground of challenge, see *Green v. St.*, 59 Md. 123, 43 Am. Rep. 542; *Hughes v. St.*, 109 Wis. 397, 85 N. W. 333.

CHAPTER II.

OF SELECTING, DRAWING AND SUMMONING THE PANEL; AND HEREIN OF SPECIAL VENIRES AND TALESMEN.

SECTION

13. Selecting the Jury List.
14. [Continued.] In the Federal and Territorial Courts.
15. Drawing the Panel.
16. Publication of the Panel.
17. Service of it upon the Accused.
18. [Continued.] Nature and Extent of this Right.
19. Summoning the Jurors.
20. Special Venire in Default of Jurors.
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22. Venire, by whom Executed and Returned.
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24. [Continued.] Under what Circumstances Summoned.
25. [Continued.] Conflicting Rulings on this Subject.
26. [Continued.] Further of this Subject.
27. [Continued.] By Whom and How Summoned.

§ 13. **Selecting the Jury List.**—At common law no such thing was known as the preparation of a list of persons who were liable to be summoned to serve as jurors at a succeeding term of court; but the uncontrolled discretion was vested in the *sheriff*, in the *coroner*, or in officials called *elisors*, of summoning such “good and lawful men” as they might choose under the command of the writ of *venire facias*.¹ This led to enormous abuses, chiefly in the packing of juries and the blackmailing of citizens;² to remedy which, American statutes have generally provided, with more or less particularity, for the preparation, a given time before the commencement of any term of court, or at other stated periods, of a list of persons, within the county or other jurisdiction, from whom jurors are to be summoned. The preparation of this list is generally, though not always,³ confided to officials other than the sheriff, such as the judges of general elections, or the county canvassers of the votes polled at general elections;⁴ the trustees of the township or

¹ See Thomp. & Mer. Jur., § 44.

² Rex v. Whittaker, Cowp. 752.

³ Rev. N. J. 1896, p. 1854, § 50.

⁴ R. C. Iowa 1897, § 337.

the councilmen of wards;⁵ other town officers;⁶ special boards,⁷ county courts,⁸ or jury commissioners.⁹ *Penalties* are frequently imposed upon the designated officers for the non-performance of this duty,¹⁰ though in respect of the manner of performing it the statutes are sometimes, though not always,¹¹ regarded as *directory*.¹²

§ 14. [Continued.] In the Federal and Territorial Courts.—
In the Federal courts the practice is now chiefly regulated by statute,¹³ which commits this duty to the clerk of the court, and to a jury commissioner appointed by the judge, who shall be a

⁵ R. S. Ohio 1880, § 5164.

⁶ G. S. Mass. 1902, ch. 176, § 6, et seq.; N. Y. C. & G. G. L. 1906, p. 2039, § 9, et seq.; Comp. L. Kan. 1909, § 4597; R. S. Wis. 1898, § 2526; R. S. Mich. 1897, § 318; G. S. Vt. 1903, ch. 103, § 1; R. S. Me., ch. 108, § 1; G. S. N. H., ch. 209, §§ 1 and 2; G. S. Conn. 1902, ch. X, § 1; G. S. R. I. 1909, p. 964, § 659.

⁷ Gen. Laws Colo. 1905, § 2603; Cal. Code Civ. Proc., § 204; Fla. 1906, § 1571; Battle's Rev. N. C., 1908, § 1957; R. S. Ill. 1909, ch. 78, § 1; R. S. Wis. 1880, § 1681; Stat. Minn. at L. 1905, § 4336, et seq.; R. C. Miss. 1906, § 2688; G. S. Neb. 1907, § 1586; Code Ala., 1907, § 7237; Comp. L. Ariz., ch. 47, § 13; Comp. L. Nev. 1900, § 3875; Ind. Rev. 1908, § 1665; Code Ga. 1895, § 3907; R. S. S. C. 1902, § 2911; Comp. L. Utah, 1907, § 1306; R. S. La. 1904, § 2127; Gen. Laws New Mexico, 1897, § 932; 1 Bright. Purd. Dig., 1909, p. 2064, § 9.

⁸ R. C. Del., 1893, ch. 109, § 2; Code Va. 1904, § 3142; R. S. Mo. 1909, § 7267; Stat. Tenn. 1896, § 5793; R. S. W. Va. 1906, § 3703; Gen. Laws Ore. 1902, § 970; R. C. Md. 1904, art. 51, § 2.

⁹ G. S. Ky. 1909, § 3064; R. S. Tex. 1897, art. 3155; R. S. Mo. 1909, §§ 7265, 7341.

¹⁰ Comp. L. Kan. 1909, § 4596.

¹¹ Gladden v. St., 13 Fla. 623; Buhol v. Boudousquie, 8 Mart. (N. s.) (La.) 425; St. v. McNay, 100 Md. 622, 60 Atl. 273. The names must be selected by the designated officers. St. v. Austin, 183 Mo. 478, 82 S. W. 5. But when the officers were appointed or performed their duties is not generally necessary to validity of their acts. St. v. Teachey, 138 N. C. 587, 50 S. E. 232.

¹² Forsythe v. St., 6 Ohio, 19; Burlingame v. Burlingame, 18 Wis. 285; Colt v. Eves, 12 Conn. 243; Thomas v. People, 39 Mich. 309; Nixon v. St., 121 Ga. 144, 48 S. E. 966; People v. Richards, 1 Cal. App. 566, 82 Pac. 691; People v. Wernerholm, 166 N. Y. 184, 60 N. E. 259; Sharp v. U. S., 13 Okl. 522, 76 Pac. 177; Ullman v. St., 124 Wis. 602, 103 N. W. 6. Parties have no vested rights in strict performance of these regulations. St. v. Barlow, 70 Ohio St. 363, 71 N. E. 726. And the officers will not be permitted to impeach or contradict the record of their acts. St. v. Johnson, 116 La. 856, 41 So. 117. Evidence, on the contrary, to supplement the record to show compliance of what is mandatory is admissible. People v. Durant, 116 Cal. 179, 48 Pac. 75.

¹³ Act Cong. June 30, 1879; Laws U. S. 1879 (Sess. I.), ch. 52; 21 U. S. Stat. at Large, 143.

well known member of the principal political party within the district opposed to that to which the clerk belongs. Practitioners in those courts should direct their attention to this statute, at the same time bearing in mind that, under section 800, of the Revised Statutes of the United States, those courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the State courts.¹⁴ In the territories, the selection and summoning of jurors is governed by territorial statutes,¹⁵ or, in the absence of statutory regulation, by the usages and holdings of the common law,—in accordance with which an open *venire facias* is directed to the marshal, who summons such good and lawful men as he will.¹⁶

§ 15. **Drawing the Panel.**—From the general list thus selected of persons eligible or liable to serve as jurors at the succeeding term of court, the list of names actually to be summoned, called either the *array* or the *panel*, is drawn by lot from a box or wheel, at a time and at a place, either in open court or otherwise, upon public notice, by the designated official or officials, and sometimes in the presence of other designated officials, in a designated manner,—all the conditions and details of the proceeding being generally prescribed by statute.¹⁷ Although, as in the case of the general list,¹⁸

¹⁴ See *Alston v. Manning*, Chase's Dec. 460. For the mode of selection before the passage of the act of 1879, see *U. S. v. Collins*, 1 Woods (U. S.), 499, 503; *U. S. v. Tallman*, 10 Blatchf. C. C. 21; *U. S. v. Gardner*, 1 Woods (U. S.), 514, 519; *U. S. v. Wilson*, 6 McLean (U. S.), 604; *Rich v. Campbell*, 1 Woods (U. S.) 509; *U. S. v. Dow*, Taney Dec. 34; *U. S. v. Insurgents*, 2 Dall. (U. S.) 335, 341; *U. S. v. Fries*, 3 Dall. (U. S.) 515. The Federal courts have the power, and it is their duty, to enforce other well founded objections than those available in the State courts. *U. S. v. Benson*, 31 Fed. 896.

¹⁵ Per Mr. Chief Justice Waite in *Reynolds v. U. S.*, 98 U. S. 145, 154, citing *American Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235; *Clinton v. Englebrecht*, 13 Wall.

434; *Elias v. Territory (Ariz.)*, 76 Pac. 605 (not reported in state reports); *Harmon v. Territory*, 9 Okla. 313, 60 Pac. 115.

¹⁶ *Beery v. U. S.*, 2 Colo. 186. The acts of Congress which regulate the procuring of juries for Federal courts are not applicable to the territories. *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434. See also *Reynolds v. U. S.*, 98 U. S. 145, 154; *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511; *Benner v. Porter*, 9 How. (U. S.) 235.

¹⁷ See *N. Y. Code Rem. Jus.*, § 1042 et seq.; *Rev. N. J.* 1896, p. 1884, § 50; *G. S. Mass.* 1902, p. 1590, § 25; *Gen. Stat. N. H.*, 1901, ch. 209, § 10; *G. S. Conn.* 1902, § 660; *G. S. Vt.* 1906, § 1469; *R. S. Me.* 1903, ch. 108, § 9; *Gen. Stat. R. I.* 1909, p. 970, § 36. If there is a change in the statute between the time of draw-

penalties are frequently prescribed for failing to make a drawing,¹⁹ yet a literal compliance with the terms of the statute is not necessary to the validity of the panel.²⁰ On the contrary, the statutes are generally regarded as directory,²¹ the object being to secure a proper apportionment of jury duty among those liable to perform such duty, as well as to secure impartial juries;²² and the usual presumption of right action on the part of the officials charged with this duty is generally sufficient to cure irregularities in its performance,²³ though obviously a general disregard of the essential provisions of the statute may have the effect of vitiating the array.²⁴

ing and service, this does not invalidate the drawing. *Ray v. Lake Superior etc. R. Co.*, 99 Wis. 617, 75 N. W. 420.

¹⁸ Ante, § 13.

¹⁹ *G. S. Mass.* 1902, p. 1592, § 37; *G. S. Vt.*, 1906, § 1475; *Code Va.* 1904, § 3157; *G. S. N. H.*, ch. 254, § 1; *Dig. Fla.*, 1906, § 1589; *R. S. W. Va.* 1906, § 3720; *R. C. Iowa*, 1897, § 352; *R. S. Del.* 1893, ch. 108, § 23; *R. S. Me.* 1903, ch. 108, § 16; *Code Ala.* 1909, § 7254.

²⁰ See, in addition to the cases previously cited, *Ferris v. People*, 35 N. Y. 125, 31 How. Pr. (N. Y.) 140; 48 Barb. (N. Y.) 17; 1 Abb. Pr. (N. s.) 193; *St. v. Guidry*, 28 La. Ann. 630; *Pratt v. Grappe*, 12 La. 451; *St. v. Miller*, 26 La. Ann. 579; *Mapes v. People*, 69 Ill. 523; *Wilhelm v. People*, 72 Ill. 468; *Frieri v. People*, 2 Abb. App. Dec. (N. Y.) 230, 231 (failure to give notice of the drawing); *Friend v. Hamill*, 34 Md. 298 (informality in the certificate of the drawing). *St. v. Faulkner*, 175 Mo. 546, 75 S. W. 116. The like rule applies both to grand and petit jurors. *Wells v. Territory*, 14 Okl. 436, 78 Pac. 124. Where the duty is ministerial the deputy of the officer may perform it in his absence. *St. v. Turner*, 114 Iowa, 426, 87 N. W. 287; *St. v. Aspara*, 113 La. 940, 37 South.

883. In the absence of specific provisions applicable to a particular irregularity the court has inherent power to correct same. *St. v. Kellogg*, 104 La. 580, 29 So. 285.

²¹ *U. S. v. Collins*, 1 Woods (U. S.), 499, 504. It is ground of challenge that the name of one drawn is not on the general list. *Faulknew v. Snead*, 122 Ga. 28, 49 S. E. 747.

²² *Rafe v. St.*, 20 Ga. 64. Compare *St. v. Revells*, 31 La. Ann. 387. See, also, *St. v. Williams*, 3 Stew. (Ala.) 454; *Com. v. Zillafrow*, 207 Pa. 244, 56 Atl. 539.

²³ *Wheeler v. St.*, 42 Ga. 306; *Brown v. Com.*, 73 Pa. St. 322; *Pasauka v. Daus*, 31 Tex. 72; *Com. v. Vasalka*, 181 Pa. 17, 37 Atl. 405; *Fornio v. Fraza*, 140 Mich. 631, 104 N. W. 147.

²⁴ *Cox v. People*, 19 Hun (N. Y.), 430, aff'd. 80 N. Y. 500, 19 Hun, 439. See also *Jones v. St.*, 3 Blackf. (Ind.) 37; *Campbell v. St.*, 48 Ga. 353; *People v. Labadie* (Mich.), 33 N. W. 806; *Covington etc. Bridge Co. v. Smith*, 25 Ky. L. R. 207, 80 S. W. 440; *St. v. Love*, 106 La. 658, 31 South. 289; *St. v. Shepard*, 115 La. 942, 40 South. 363. As appointing an officer to select, instead of drawing names from the box. *Healey v. People*, 177 Ill. 306, 52 N. E. 426.

§ 16. **Publication of the Panel.**—The panel thus drawn is, under some statutory regulations, subject to public inspection;²⁵ under others, any person may have a copy of it by applying to the clerk or sheriff and paying the fee allowed by law.²⁶

§ 17. **Service of it upon the Accused.**—By statute in some jurisdictions persons held to answer for capital,²⁷ or other serious offenses, are entitled to a copy of the panel a designated number of days before their trial. These statutes vary in their terms, some providing for the service of the copy of the panel or array assembled to serve generally for the term, and others for a copy of the special panel assembled to serve in the particular case.²⁸ Some of them provide for the service of the list of those who have been actually summoned;²⁹ others for the service of a list of those who have been drawn. Under the former it is not sufficient to serve a list of those who have been drawn merely;³⁰ nor under the latter will the statutory right be accorded by the service of a long list of persons, most of whom, to the knowledge of the officer, have been excused.³¹ No such privilege existed at common law; it can only be claimed where

²⁵ R. S. La. 1904, p. 973, § 4. In Nevada by any officer or attorney of the court, Comp. L. Nev. 1900, § 3868. *St. v. Voorhees*, 115 La. 200, 38 South. 964. Such a provision is held to be merely directory. *Johnson v. St.*, 59 N. J. L. 35, 35 Atl. 987. And not applicable to other than regular panels drawn for service at regular terms. *St. v. Winters*, 109 La. 3, 33 South. 47.

²⁶ N. Y. Code Rem. Jus., § 1049. See, also, Cal. Code Civ. Proc., § 221; Comp. L. Mich. 1897, § 333; Comp. L. Kan. 1909, § 4609; Comp. L. Ariz., 1901, § 2805.

²⁷ Stat. 7 Will. III., ch. 3, § 7 (treason and misprision of treason); Stat. 7 Anne, ch. 21, § 11. See Code Ala. 1907, p. 715, art. 5; G. S. N. H. 1901, ch. 254, § 1; R. C. Miss. 1906, § 1481; R. S. Ohio, 1897, § 7273.

²⁸ R. S. Mo. 1909, § 5227. See, also, R. S. Me. 1903, ch. 135, § 14;

R. S. La. 1904, § 992. It is clear that the prisoner can have no right to a list of the jurors in any other case than that provided by statute. *Reg. v. Dowling*, 3 Cox. C. C. 509; *Driskill v. St.*, 45 Ala. 21. Compare R. S. Ill., ch. 38, § 421; R. S. Ohio 1897, § 7273; Rev. Code Miss. 1906, § 1481; Rev. Stat. W. Va. 1906, § 4566; Gen. Stat. N. H. 1901, ch. 254, § 1; Stat. Tenn. 1897, § 7181.

²⁹ Tex. Code Crim. Proc. 1896, art. 66; *Murray v. St. (Tex.)*, 3 S. W. 109. A merely technical error in doing this is immaterial. *Porter v. St.*, 146 Ala. 36, 41 South. 421.

³⁰ *Harrison v. St.*, 3 Tex. App. 558; *Drake v. St.*, 5 Tex. App. 649.

³¹ *St. v. Howell*, 3 La. Ann. 50, 52. Compare *St. v. Guidry*, 28 La. Ann. 631. And it is not permissible to draw names for this list before the case has been called and set for trial. *Adams v. St.*, 50 Tex. Cr. R. 586, 99 S. W. 1015.

there is a statute granting it, and in cases within such statute.³² The statutes are generally drawn upon the conception of extending a *privilege* to the accused, which he may *waive* by not demanding it,³³ though the right is a valuable one, of which he can not be deprived against his consent.³⁴

§ 18. [Continued.] Nature and Extent of this Right.—From this it follows that the prisoner, on the one hand, can require nothing *more* than the statute grants to him. He cannot, for instance, require that the list shall be *read* to him, if he is unable to read; nor that the trial shall be delayed in order that he may have, for the prescribed period of time, a list of the *talesmen* who may have been summoned to supply deficiencies in the regular panel.³⁵ He cannot, on the other hand, complain that *more* has been done for him than the statute accords,—as that the list was served upon him a *longer* period before the trial than therein prescribed;³⁶ or that there is a defect in the regular list of jurors summoned for the term (furnished to him as a matter of grace, merely), he being entitled only to a list of those summoned for his trial.³⁷ Nor can he insist that all named in the list shall attend,³⁸ nor that *talesmen* shall not be

³² Reg. v. Dowling, 3 Cox C. C. 509; Driskill v. St., 45 Ala. 21.

³³ St. v. Klinger, 46 Mo. 224, 227; St. v. Fisher, 2 Nott & McCord (S. C.), 261, 264; St. v. Cook, 20 La. Ann. 145; St. v. Jackson, 12 La. Ann. 679; St. v. Hernandez, 4 La. Ann. 379; Peterson v. St., 45 Wis. 535; Craft v. Com., 24 Gratt. (Va.) 602, 609; St. v. Waters, 1 Mo. App. 7, 62 Mo. 196. For stronger reasons, by going to trial without objection, he waives any *informality* or *inaccuracy* in the list known to him to exist. St. v. Shay, 30 La. Ann. 114; Bell v. St., 59 Ala. 55; Pressley v. St., 19 Ga. 192; Hannah v. St., 87 Miss. 375, 39 South. 855.

³⁴ St. v. Buckner, 25 Mo. 167. It is reversible error to refuse same whether prejudice is shown or not. St. v. Hunter, 181 Mo. 316, 80 S. W. 955.

³⁵ Gardenhire v. St., 6 Tex. App.

147; Harris v. St., 6 Tex. App. 97; Johnson v. St., 4 Tex. App. 268; Drake v. St., 5 Tex. App. 649; Sharp v. St., 6 Tex. App. 650; St. v. Buckner, 25 Mo. 167, 171; Green v. St., 17 Fla. 669; St. v. Price, 3 Mo. App. 586; St. v. Reeves, 11 La. Ann. 685; St. v. Bunger, 14 La. Ann. 461; St. v. Bennett, 14 La. Ann. 651; St. v. Henry, 15 La. Ann. 297; St. v. Gunter, 30 La. Ann. 539; Colt v. People, 1 Park. Cr. (N. Y.) R. 611. But, see, People v. Coyodo, 40 Cal. 586. Handing same to counsel suffices. St. v. Faulkner, 175 Mo. 546, 75 S. W. 116.

³⁶ St. v. Toby, 31 La. Ann. 736. Service on Saturday afternoon for trial on Monday morning fills the requirement of "one entire day" before trial. Wiggins v. St., 47 Tex. Cr. R. 538, 84 S. W. 821.

³⁷ Chaney v. St., 31 Ala. 342.

³⁸ Jackson v. St., 4 Tex. App. 292, 298; Walker v. St., 6 Tex. App. 576.

called to supply the place of absentees;³⁹ nor, in the case of unimportant errors in the list, that the trial shall be delayed until he shall have been supplied, for the statutory length of time, with a perfected list;⁴⁰ nor (in the absence of prejudice), that the *Christian names* are not given in full, but only by initials;⁴¹ nor that the name of a *township* from which a juror is drawn has been abbreviated, provided it is intelligible;⁴² nor that the *caption* contains neither the name of the county, the court, nor the case.⁴³ In short, technical objections to the caption of the list are not favored.⁴⁴ The sheriff's return on the *venire* may be *amended* after a motion to quash, so as to show a due service of a copy of it;⁴⁵ and the record need not affirmatively show the fact, in order to sustain a conviction on error or appeal.⁴⁶

§ 19. **Summoning the Jurors.**—Under the common law and early English statutes the writ of *venire facias*, under which the sheriff, at his own discretion, selected and summoned the panel, assumed great importance, and technical accuracy was required in respect of it.⁴⁷ But, since in nearly all the American States,⁴⁸ the drawing

³⁹ Stewart v. St., 13 Ark. 720, 735; Bates v. St., 19 Tex. 122; St. v. White, 7 La. Ann. 531; St. v. Bennett, 14 La. Ann. 651; St. v. Ferray, 22 La. Ann. 423; Green v. St. (Tex. Cr. R.), 65 S. W. 1075 (not reported in state reports).

⁴⁰ Goodhue v. People, 94 Ill. 37; St. v. Turner, 25 La. Ann. 573; McCarty v. St., 26 Miss. 299; St. v. Kane, 32 La. Ann. 999; St. v. Dubord, 2 La. Ann. 732; Swofford v. St., 3 Tex. App. 76. In Alabama such defects are cured by statute. Hall v. St., 51 Ala. 9.

⁴¹ Aikin v. St., 35 Ala. 399; Bill v. St., 29 Ala. 34; Hammond v. St., 147 Ala. 79, 41 South. 761. Or slight misspelling of surname. Skipper v. St., 144 Ala. 100, 42 South. 43. See, also, Stewart v. St., 131 Ala. 33, 34 South. 818; Kimbrell v. St., 130 Ala. 40, 30 South. 454.

⁴² St. v. Brooks, 30 N. J. L. 356.

⁴³ Ibid.

⁴⁴ St. v. Ward, 14 La. Ann. 673; Aikin v. St., 35 Ala. 399.

⁴⁵ Gray v. St., 55 Ala. 86; Washington v. St., 8 Tex. App. 377. In Woodsides v. St., 2 How. (Miss.) 665, it was held that the return of the sheriff that he had served the prisoner with a correct list of the jury could not be collaterally questioned. Rice v. St., 49 Tex. Cr. R. 569, 94 S. W. 1024.

⁴⁶ Benton v. St., 30 Ark. 328, 344; Freel v. St., 21 Ark. 212; Dawson v. St., 29 Ark. 116; Durrah v. St., 44 Miss. 789; Logan v. St., 50 Miss. 269; Lewis v. St., 51 Ala. 1; Mitchell v. St., 58 Ala. 417; Paris v. St., 36 Ala. 232; Rash v. St., 61 Ala. 89. As to the *computation of the time* during which the accused is entitled to have the list before the trial, see 1 East P. C. 112; St. v. McLendon, 1 Stew. (Ala.) 195; Robertson v. St., 43 Ala. 325; Craft v. Com., 24 Gratt. (Va.) 602.

⁴⁷ See Rogers v. Smith, 1 Ad. & El. 772, and many cases there cited. People v. McKay, 18 Johns. (N. Y.) 212, 217; St. v. Dozier, 2 Speers L.

of the panel precedes the issuing of the process, by whatever name called,⁴⁹ by virtue of which the jurors are summoned, irregularities in this process,⁵⁰ or in the mode of its execution⁵¹ or return⁵² lose

(S. C.) 211; *St. v. Williams*, 1 Rich. L. (S. C.) 188; 2 Hale P. C. 260; 2 Hawk. P. C., ch. 41, § 1.

⁴⁸ The States of Maine, New Hampshire, Vermont, Massachusetts, Pennsylvania and West Virginia seem to form exceptions: in these a writ of venire facias issues before each drawing, and this is the only process. R. S. Me. 1903, ch. 108, § 9; G. S. N. H. 1901, ch. 209, § 1; G. S. Vt. 1906, § 1469; G. S. Mass. 1902, p. 1588; 2 Purd. Dig. p. 2070; 2 R. S. Va. 1904, § 3145. In Connecticut a "warrant" is issued to the town constable directing the drawing. G. S. Conn. 1902, § 660.

⁴⁹ R. C. Miss. 1906, § 2688; R. S. Ohio 1897, § 5167; R. C. Md. 1904, p. 1361, § 8; Comp. L. Nev. 1900, § 3868; Bush Dig. Fla. 1906, § 1575; R. S. Wis. 1898, § 2533; G. L. Colo. 1905, § 179; R. S. La. 1904, p. 973, § 4; Code Va. 1904, § 3143; G. S. Neb. 1907, § 1692; Code Ala. 1907, § 7248; Battle Rev. N. C. 1908, § 1959; R. C. Iowa, 1897, § 3676; R. S. Ill. 1909, ch. 79, § 29; R. S. Mo. 1909, § 7300; Ind. Rev. Laws, 1908, § 1668; Comp. L. Ariz. 1901, § 2800; G. S. Ky. 1909, § 3066; Ark. Dig. Stat. 1904, § 4515; Gen. Laws Ore. 1902, § 975; Comp. L. Mich. 1897, § 326; Comp. L. Kan. 1909, § 4602; Cal. Code Civ. Proc., § 225; Rev. N. J. 1896; p. 1850; R. S. Del. 1893, ch. 109, § 5; Stat. Tenn. 1896, § 5793. In Texas this list must be under the seal of the court. R. S. Tex. 1897, § 3170.

⁵⁰ *Peri v. People*, 65 Ill. 17; *St. v. Cole*, 9 Humph. (Tenn.) 626; *White v. St.*, 16 Tex. 206; *Murray v. St.* (Tex.), 3 S. W. 104, 1 S. W. 522. *White v. Com.*, 6 Binn. (Pa.) 179;

St. v. Phillips, 2 Ala. 297; *Louw v. Davis*, 13 Johns. (N. Y.) 227. Compare *St. v. Stedman*, 7 Port. (Ala.) 495; *St. v. Cole*, 9 Humph. (Tenn.) 627; *Bartow v. Murry*, 2 N. J. L. 97, *Kirkpatrick*, C. J. diss. (overruling also the opinion of the latter in *Sayres v. Scudder*, and *Veal v. Brown*, *Ibid.* pp. 53, 72); *Sharp v. Hendrickson*, 2 N. J. L. 686; *Cox v. Haines*, *Ibid.* 687; *St. v. Alderson*, 10 Yerg. (Tenn.) 523; *Bill v. St.*, 29 Ala. 34; *Hall v. St.*, 51 Ala. 9; *Fields v. St.*, 52 Ala. 348; *Alkin v. St.*, 35 Ala. 399; *St. v. Simmons*, 6 Jones L. (N. C.) 309; *Cordova v. St.*, 6 Tex. App. 207, 222; *Haight v. Holley*, 3 Wend. (N. Y.) 258, 262. Contra, a few old cases which blindly adhere to the ancient strictness: *People v. McKay*, 18 Johns. (N. Y.) 212, 217; *St. v. Dozier*, 2 Speers L. (S. C.) 211; *St. v. Williams*, 1 Rich. L. (S. C.) 188; *Stamey v. Barkley*, 211 Pa. 313, 60 Atl. 991; *Ullman v. St.*, 124 Wis. 602, 103 N. W. 6. The same principle applies to special venires, if the jury is impartial. *Buchanan v. St.*, 84 Miss. 332, 36 South. 388.

⁵¹ *People v. Williams*, 24 Mich. 156, 161. See, also, *Kennedy v. Com.*, 14 Bush (Ky.), 340; *Com. v. Zillaflow*, 207 Pa. 274, 56 Atl. 539; *Lucas v. Johnson* (Tex. Civ. App.), 64 S. W. 823 (not reported in state reports); *Wheeler v. Bowles*, 163 Mo. 398, 63 N. W. 675. If a juror appear on a summons served on Sunday, all objection is obviated. *St. v. Kornstett*, 62 Kan. 221, 61 Pac. 805. And so if no fraud or wrong has been practiced. *St. v. Stewart*, 117 La. 476, 41 South. 798. Even a notification by mail and the juror appearing has been held

their importance; nor, in general, is it necessary that it issue at all;⁵³ since, if the designated jurors assemble, it is wholly immaterial how they were brought in. The *number* to be summoned,

sufficient. *West v. St.*, 80 Miss. 710, 32 South. 298.

⁵² *People v. Jones*, 24 Mich. 215; *St. v. Stokely*, 16 Minn. 282; *Maples v. Park*, 17 Conn. 338; *Fellow's Case*, 5 Me. 333; *Davis v. St.*, 25 Ohio, St. 369; *Anon.*, 1 Pick. (Mass.) 196. Although a return is necessary for the purpose of identifying the juror's drawn, with those present in court or failing to attend (*People v. Jones*, 24 Mich. 215), yet even the omission of a return does not vitiate the array (*Rolland v. Com.*, 82 Pa. St. 306, 322), or prevent a juror from taking his seat upon showing that he was in fact summoned. *Patterson's Case*, 6 Mass. 486. A neglect to sign the return will not vitiate the array, but the court may order it to be indorsed on the writ and signed. *Duwar v. Spence*, 2 Whart. (U. S.) 211; *Com. v. Miller*, 4 Phila. 210; *Com. v. Green*, 1 Ashm. (Pa.) 289, 291; *Com. v. Chauncey*, 2 Ashm. (Pa.) 90; *Com. v. Parker*, 2 Pick. (Mass.) 549. If it omit to name the day of summoning, the jurors being in attendance, may testify that they have been duly summoned and thereafter be sworn. *Anon.*, 1 Pick. (Mass.) 196. Where the issue of the venire precedes the drawing, it has been held unnecessary to recite in the return that the panel was drawn *according to law*, for this will be presumed. *Com. v. Green*, 1 Ashm. (Pa.) 289. *Contra*, *Eaton v. Com.*, 6 Binn. (Pa.) 447. The statutory provision as to the *time* within which the return shall be made has been regarded as *directory*, so that it is made in time to afford

an opportunity for inspecting the panel. *Mowry v. Starbuck*, 4 Cal. 274; *St. v. Squaires*, 2 Nev. 226. *Contra*, *St. v. Vegas*, 19 La. Ann. 105. Not error to permit sheriff to *amend* return: *Murray v. St.* (Tex.), 3 S. W. 104, 1 S. W. 522; *Mullin's Appeal* (Pa.), 5 Atl. 738.

⁵³ *Bird v. St.*, 14 Ga. 43. To the same effect see *St. v. Crosby*, *Harper Const. Rep.* (S. C.) 90; *Maher v. St.*, 1 Port. 265; *Johnson v. Cole*, 2 N. J. L. 266; (*contra*, *Howell v. Robertson*, 6 N. J. L. 142); *St. v. Williams*, 3 Stew. (Ala.) 454; *Lyon v. Commercial Ins. Co.*, 2 Rob. (La.) 267; *State v. Folke*, 2 La. Ann. 744; *Tremblay v. St.*, 20 Kan. 116, 120; *St. v. Harris*, 30 La. Ann. 90; *McDermott v. Hoffman*, 70 Pa. St. 31; *St. v. Perry*, *Busbee* (N. C.) 330; *Bennett v. St.*, *Mart. & Yerg.* (Tenn.) 133; *Mackey v. People*, 2 Colo. 13, 17; *United States v. Reed*, 2 Blatchf. (U. S.) 435, 452; *Samuels v. St.*, 3 Mo. 68; *St. v. Marshall*, 36 Mo. 406; *St. v. Jones*, 61 Mo. 232; *People v. McCann*, 3 Parker, Cr. R. (N. Y.) 272; *People v. Cummings*, 3 Park. Cr. R. (N. Y.) 343; *People v. Robinson*, 2 Park. Cr. R. (N. Y.) 235 (overruling *McGuire v. People*, 2 Park. Cr. R. (N. Y.) 148); *St. v. Cavanaugh*, 76 Mo. 54. In New York it was ruled where jurors drawn and summoned under a statute held to be unconstitutional, that fact was unimportant where they were taken from the body of the county and all were qualified and satisfaction as to each juror was expressed. *People v. Ebelt*, 180 N. Y. 470, 73 N. E. 235.

when not fixed by statute,⁵⁴ rests in the *discretion* of the court;⁵⁵ and, where fixed by statute, a want of literal compliance with its terms will not vitiate the array.⁵⁶ Parties cannot insist upon the attendance at one time of the full panel, so that enough attend for the selection of a jury in the particular case.⁵⁷

§ 20. **Special Venire in Default of Jurors.**—If the regular panel is not drawn, or is quashed or exhausted, the business of the court is not therefore to stop, but the court may, under most statutory systems, award a special *venire facias*, returnable forthwith, under which a sufficient number of jurors are summoned to proceed with the public business.⁵⁸ A new jury may, it has been held, be thus

⁵⁴ It was limited by Stat. Will. II., ch. 38, 225, but this was held not to apply to crown cases.

⁵⁵ U. S. v. Insurgents, 2 Dall. (U. S.) 335. See, also, U. S. v. Fries, 3 Dall. (U. S.) 515.

⁵⁶ Anderson v. St., 5 Ark. 444, 453; Ramos v. Bringier, 2 Mart. (N. S.) La. 192; Debuys v. Mollere, 2 Mart. (N. S.) La. 625; Prall v. Peet, 3 La. 274, 280. But contra see Harrison v. St., 3 Tex. App. 558; Burfey v. St., 3 Tex. App. 519; Jones v. St., 3 Tex. App. 575; Calthorp v. Newton, Cro. Jac. 647. In Louisiana it is provided by statute that it shall not be deemed a good cause of challenge to the array, that the number of jurors actually drawn at any time is not the exact number required by law. R. S. La. 1876, § 2130.

⁵⁷ Odom v. Gill, 59 Ga. 180; St. v. Lovenstein, 9 La. Ann. 313; Rolland v. Com., 82 Pa. St. 306, 321; Stands v. Com., 21 Gratt. (Va.) 871; St. v. Brown, 12 Minn. 538; St. v. Stephens, 13 S. C. 285; St. v. Klinger, 46 Mo. 224. But see Flower v. Livingston, 12 Mart. (La.) 681. In Anon., 1 Bro. (Penn.) 200, it is stated that "all the persons who may be indicted will be entitled to their challenges out of the whole panel; if one single juror

neglects to attend, in consequence of being illegally summoned, the right of challenge is infringed." This, however, is now contradicted by the settled rule that the right of challenge is a right to reject, and not a right to select. U. S. v. Marchant, 4 Mason, (U. S.) 158, 12 Wheat. (U. S.) 482. Persons jointly indicted, who elect to be jointly tried, cannot demand a more numerous panel than would be awarded in the case of a single defendant. St. v. Phillips, 24 Mo. 475.

⁵⁸ Russell v. St., 53 Miss. 367; Trembley v. St., 20 Kan. 116; People v. Stuart, 4 Cal. 225; People v. Vance, 21 Cal. 400; People v. Williams, 43 Cal. 344; People v. Divine, 46 Cal. 46; People v. Davis, 47 Cal. 93. What is "an entire absence of the regular panel," so as to authorize a special *venire*; St. v. McCartey, 17 Minn. 76; Blemer v. People, 76 Ill. 265; Reed v. St., 15 Ohio, 217; Jacobs v. St., 146 Ala. 103, 42 South. 70; St. v. Anderson, 49 La. Ann. 1576, 22 South. 817; Dinsmore v. St., 61 Neb. 418, 85 N. W. 445. This may be done by a special, as well as the regular, judge. Com. v. Eames, 30

impaneled while the regular jury is out deliberating upon a verdict,⁵⁹ or for immediate retrial of a criminal case where a jury have failed to agree.⁶⁰ As in the case of the regular *venire*,⁶¹ irregularities in the special *venire*,⁶² or in its execution,⁶³ are in general disregarded; though matters of *substance* are insisted upon,—as, where the statute prescribes that the jurors be drawn by the clerk and this is omitted, a *venire* is issued directing the sheriff to summon a certain number.⁶⁴

Ky. Law Rep. 506, 98 S. W. 1045. The like course may be taken, where the panel of a special jury has been exhausted, for the purpose of completing same. *St. v. May*, 172 Mo. 630, 72 S. W. 918. And it is within the discretion of the court to direct the sheriff to confine the summoning to a particular part of the county so as to prevent unnecessary delay. *People v. Wheeler*, 142 Mich. 212, 105 N. W. 607. Where there was a custom by the court to divide its panel between its civil and criminal divisions, it may on exhaustion of either issue such *venire*, if it so elects. *Beals v. Cove*, 27 Colo. 473, 62 Pac. 978. Setting down a case by consent at a time when both parties know the regular panel will not be in attendance, is taken as consent to such a *venire*. *International & G. N. R. Co. v. Foster*, 26 Tex. Civ. App. 497, 63 S. W. 952.

⁵⁹ *Evarts v. St.*, 48 Ind. 422; *Winsett v. St.*, 57 Ind. 26; *Merrick v. St.*, 63 Ind. 327. If the regular jury come in after the impanelling has begun, their names may be placed in the box that is being drawn from. *Thomas v. St.*, 134 Ala. 126, 33 South. 130. Or the court may continue on as it began. *Stagg's Heirs v. Pilaud*, 31 Tex. Civ. App. 245, 71 S. W. 762. Or merely further draw from the list of the returning jury. *St. v. Houghton*, 45 Or. 110, 75 Pac. 887.

⁶⁰ *Pierce v. St.*, 67 Ind. 354; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *Baker v. St.*, 122 Ala. 1, 26 South. 194. And so for a civil case. *Tex. & M. R. Co. v. Crowder*, 25 Tex. Civ. App. 536; 64 S. W. 90.

⁶¹ See preceding section.

⁶² *St. v. Coleman*, 8 S. C. 237; *People v. Jones*, 24 Mich. 215; *Com. v. Cressinger*, 193 Pa. 326, 44 Atl. 433. The Virginia practice allows a special *venire* drawn for a particular case to be used for all cases at that term. *Bennett v. Com.*, 106 Va. 834, 55 S. E. 698.

⁶³ *St. v. Arthur*, 39 Iowa, 631 (summoning "from the body of the county"); *Cavanah v. St.*, 56 Miss. 299 (summoning from the assessment roll). See, also, *People v. Colt*, 3 Hill (N. Y.) 432; *Deon v. St.*, 37 Tex. Cr. R. 506, 40 S. W. 266.

⁶⁴ *Gladden v. St.*, 13 Fla. 623; *Gropp v. People*, 67 Ill. 154; *Lincoln v. Stowell*, 73 Ill. 246; *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Wright v. Stuart*, 5 Blackf. (Ind.) 120; *Hight v. Langdon*, 53 Ind. 81. But where the statute requires the drawing of a certain number in excess of the panel, for purging purposes, this does not prevent the court from drawing and summoning an even larger number. *Hethcock v. McGouirk*, 119 Ga. 873, 47 S. E. 563; *Healy v. People*, 177 Ill. 306, 52 N. E. 426. If the order is for a certain number, the writ for

§ 21. **Special Venire in Capital Cases.**—In many of the States the issuing of a special *venire* in capital cases is provided for by statute. This is in the nature of a *privilege* to the accused, and under some statutes the *venire* is issued only upon the demand of the accused. This right cannot be demanded where, from some cause, the offense has ceased to be capital.⁶⁵ It is *waived* by going to trial without objection, with a jury selected from the regular panel.⁶⁶ It is proper that the accused should be present when the names of the jurors who are thus to be summoned are drawn, where the statute provides for a drawing,⁶⁷ though it has been held that he cannot demand this as a right.⁶⁸ Although the statute provides that the clerk of the court shall make the drawing, this, it has been held, may be done by a deputy sheriff in open court.⁶⁹ As in the case of the

a greater number is invalid. *Jones v. Com.*, 100 Va. 842, 41 S. E. 951. This means from the body of the county, but where sheriff directed his deputy to avoid summoning those who might be disqualified, *propter defectum*, selected a certain number from each district, there was no prejudicial error. *West v. St.*, 80 Miss. 710, 32 South. 298.

⁶⁵ *St. v. Bullock*, 63 N. C. 570; *Brown v. St.* (Tex. Cr. R.), 65 S. W. 912 (not reported in state reports). If indictment is quashed, a new venire must be summoned under new indictment. *Garwile v. St.*, 148 Ala. 576, 39 South. 220. And a separate venire must issue for each case, though several are for trial at same term. *Hunt v. St.*, 135 Ala. 1, 33 South. 129: Where the special venire is demanded and becomes exhausted, it must be filled as the statute directs. *St. v. Simons*, 61 Kan. 752, 60 Pac. 1052; *Bates v. St.*, 43 Tex. Cr. R. 589, 67 S. W. 504. A special venire cannot be filled from the regular panel under Texas practice. *Riley v. St.* (Tex. Cr. R.), 81 S. W. 711 (not reported in state reports).

⁶⁶ *Jefferson v. St.*, 52 Miss. 767; *St. v. Perry*, *Busbee* (N. C.), 330.

Or failing to object to additional veniremen not being summoned in the statutory mode. *Newman v. St.* (Tex. Cr. R.), 70 S. W. 951 (not reported in state reports). An overruled motion for continuance does not waive demand. *Farrar v. St.*, 44 Tex. Cr. R. 236, 70 S. W. 209. Where special venire is not supplementary to the regular panels, it is not necessary that they be in attendance. *Henry v. People*, 198 Ill. 162, 65 N. E. 120.

⁶⁷ *Henry v. St.*, 33 Ala. 389; *Hall v. St.*, 40 Ala. 698. Where the judge draws the names, handing the slips as drawn to the clerk to be recorded and defendant's counsel is allowed to see the slips as entered and a list is at once made for defendant, this satisfies the statute. *Parnell v. St.*, 129 Ala. 6, 29 South. 860.

⁶⁸ *Pocket v. St.*, 5 Tex. App. 552; *Cordova v. St.*, 6 Tex. App. 207; *Handline v. St.*, 6 Tex. App. 347, 358. It is not necessary he should be present when the sheriff makes his return on the venire. *Thomas v. St.*, 47 Fla. 99, 36 South. 161.

⁶⁹ *Pocket v. St.*, 5 Tex. App. 552. Later it was held, that, statute providing for manual act by judge, he

regular panel,⁷⁰ the disqualification of one or more jurors is no ground for quashing the *venire*, but is a ground of individual challenge merely.⁷¹ While the accused cannot insist that all persons named in the special *venire* shall be brought in,⁷² yet the neglect to summon a large number of them ought, it should seem, to vitiate the panel;⁷³ since in this way the sheriff might omit to summon persons supposed to be favorable to the accused, while summoning others unfavorable to him.⁷⁴

§ 22. **Venire, by Whom Executed and Returned.**—As the summoning officer at common law possessed the entire power of selecting the *venire-men* who were to be brought in, the impartiality of this officer was a matter of great importance, and his disqualification constituted in general the only ground for challenging the array.⁷⁵ Under American statutes, where the panel is selected and drawn and a list of the names to be summoned is furnished to the officer, it can be of little importance whether he is the proper officer, or whether he is for any reason disqualified, where he summons all the persons named in the list.⁷⁶ But a *fraudulent omission* to summon

could not authorize another to perform it. *Scott v. St.*, 141 Ala. 39, 37 South. 366.

⁷⁰ Post, § 31.

⁷¹ *Durrah v. St.*, 44 Miss. 789; *Skipper v. St.*, 144 Ala. 100, 42 South. 43; *People v. Durant*, 116 Cal. 179, 48 Pac. 75.

⁷² *Stewart v. St.*, 13 Ark. 720, 735; *Bates v. St.*, 19 Tex. 122; *Jackson v. St.*, 4 Tex. App. 292, 298; *Taylor v. St.* (Miss.), 30 South. 657 (not reported in state reports); *Oates v. St.*, 48 Tex. Cr. R. 111, 86 S. W. 760. Return of "not found" is good against motion to quash. *Barnes v. St.*, 134 Ala. 36, 32 South. 670. Such motion is premature if made before a motion for fuller return regarding diligence. *Furlow v. St.*, 41 Tex. Cr. R. 12, 51 S. W. 938. Names of persons known to have removed or to be incompetent need not be placed on the *venire*. *Marlow v. St.*, 49 Fla. 7, 38 South.

653. Defendant may require names drawn for other cases be returned, first, to the wheel. *Oates v. St.*, supra. The presumption of proper discretion allows excusing a juror without defendant's knowledge. *Plant v. St.*, 140 Ala. 52, 37 South. 159; *Contra*, *Clay v. St.* (Tex. Cr. R.), 51 S. W. 370; not, however, as to an excuse through inadvertency. *Hughes v. St.*, 50 Tex. Cr. R. 32, 95 S. W. 1034.

⁷³ *Logan v. St.*, 53 Miss. 431.

⁷⁴ In a case of murder it is not error for the court to refuse to cause a *venire* to be summoned from another county because of prejudice against the accused, until an effort has been made to obtain a jury, free from exception, from the *venire* already summoned. *Puryear v. Com.* (Va.), 1 S. E. 513.

⁷⁵ Post, § 32.

⁷⁶ See *Forman v. Com.* (Ky.), 6 S. W. 579. And even if he be di-

a portion of those whose names are on the list may create a necessity for the issuing of a special venire, or for the summoning of talesmen, which may throw into the hands of the officer the power of selecting, or otherwise prejudice the accused. In such a case, it is still a matter of moment, as it was at common law, that the summoning officer be the lawful officer, and not for any reason disqualified for the performance of the duty. We accordingly find a good many modern holdings which still emphasize the importance of the *venire facias*, or other process by which jurors are brought in, being executed by the proper officer; though some of them proceed in deference to the ancient rule of the common law after the reason of it has ceased, and do not put their conclusions upon the correct ground. By that law, when the sheriff was for any reason incompetent, the *coroner* acted in his place;⁷⁷ though the coroner could not act where the sheriff was merely *sick*⁷⁸ or *dead*.⁷⁹ His absolute disqualification was necessary to qualify the coroner.⁸⁰ In case of the *gross ignorance* of the sheriff, it has been held that the court may direct his *deputy* to summon *tales* jurors;⁸¹ and, where the sheriff can act, the deputy usually can.⁸² If there be *two sheriffs* and one a party, the other may act.⁸³ Statutes are found authorizing the court, when the sheriff or his deputies are disqualified, to direct the coroner or any *disinterested person* to summon the jurors,⁸⁴ and this may be shown

rected to summon a certain number, it is no abuse of discretion for the court to refuse a second drawn jury, where the first had been dismissed, the prosecution being for the murder of a brother sheriff. *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093.

⁷⁷ Co. Litt. 158a; *Rex v. Smith*, 2 Shower, 288; *Rex v. Dolby*, 1 Dow. & Ry. 145, 2 Barn. & Cress. 104. Where statute provided for process to run to coroner, upon a party filing affidavit of prejudice, this is mandatory and counter-affidavits cannot be received. *Fitch v. People*, 19 Colo. App. 433, 75 Pac. 1083.

⁷⁸ *State v. Monk*, 3 Ala. 415.

⁷⁹ *Rex v. Warrington*, 1 Salk, 152.

⁸⁰ *Reg. v. Delme*, 10 Mod. 198.

⁸¹ *Kelly v. St.*, 3 Smed. & M. (Miss.) 518.

⁸² *Com. v. Carson*, 3 Phila. 219, 223; *Conner v. St.*, 25 Ga. 515.

⁸³ *Rex v. Warrington*, 1 Salk. 152; *Rich v. Player*, 2 Shower, 286.

⁸⁴ *Crim. Code Ky.*, § 193; *Johns v. Com. (Ky.)*, 3 S. W. 369; *Forman v. Com. (Ky.)*, 6 S. W. 579. *Phillips v. St.*, 29 Ga. 105; *Hanna v. People*, 86 Ill. 243; *St. v. Hardin*, 46 Iowa, 623. A statute providing that "if the case requires it," the court may appoint two citizens for the summons of jurors, was liberally interpreted. "If from any cause," said the court, "bias or partiality, sickness, absence, death, removal or resignation from office, refusal to obey the order to summon special jurors, or if for any other sufficient cause the court determine that the circumstances of the case require it, they may ap-

by *affidavit* merely.⁸⁵ Where the sheriff and the coroner were both incompetent, under the English practice, the court might, on application, appoint officers called *elisors* to perform the duty; ⁸⁶ but this practice seems not to have gained a footing in this country.⁸⁷

§ 23. Of Talesmen.—Where the requisite number of *venire-men* did not attend, or the panel became reduced by claims of exemption or by challenges, or where otherwise an emergency arose for the summoning of additional jurors, the practice sprang up and was sanctioned by early statutes,⁸⁸ of summoning talesmen,⁸⁹ or bystanders. In this country the power of summoning such persons seems to be regarded as possessed by courts of record, where not prohibited by statute.⁹⁰ The abuses which may spring from the exercise of such a power are too obvious to be pointed out; and we accordingly find that statutes exist prohibiting the summoning of talesmen from the bystanders.⁹¹ There seems to be a disposition on the part of the courts to retain this power, evidently regarding it as advantageous to the dispatch of the public business.⁹² Accordingly,

point two citizens to perform the duty mentioned in the act." Com. v. Carson, 3 Phila. 219.

⁸⁵ Harriman v. St., 2 G. Greene, 271; St. v. Hardin, 46 Iowa, 623. Compare People v. Welch, 49 Cal. 174.

⁸⁶ Co. Litt. 158a; Rex v. Edmunds, 4 Barn. & Ald. 471, 480.

⁸⁷ Statutory provisions against *fraud* in procuring jurors: Thomp. & Mer. Jur., § 84. Punishment by *fine* of non-attending jurors: Ibid., § 83. Though it is sometimes resorted to. People v. Young, 108 Cal. 8, 41 Pac. 281.

⁸⁸ St. Hen. VIII., c. 6; 4 & 5 Phil. & M., c. 7.

⁸⁹ *Tales de circumstantibus*,—that is, *such of those standing around as were probi et legales homines*; Driver v. St., 112 Ga. 229, 37 S. E. 400. Whether they be taken from the body of county or drawn from the talesmen box is within discretion. St. v. John, 124 Iowa, 230, 100 N. W. 193.

⁹⁰ R. S. Ill. 1880, ch. 78, § 13; Comp. L. Kan. 1879, § 2991; 2 Ind. Rev. 1876, p. 392, § 80; Keith v. St., 50 Tex. Cr. R. 63, 94 S. W. 1044.

⁹¹ Cal. Code Civ. Proc., § 227; Comp. L. Nev. 1873, § 1222; Comp. L. Utah, 1876, § 1385; Comp. L. Ariz., ch. 47, § 30; R. S. Ohio, 1880, § 5173; Miller's R. C. Iowa, 1880, § 2775. As to penalty for seeking jury service, see ante, § 84, subsec. 2. Construction of a statute prohibiting *tales* jurors from being summoned from persons found in the court-house or yard if procurable elsewhere: Baker v. St., 4 Tex. App. 223; Matthews v. St., 6 Tex. App. 23; Johnson v. St., 4 Tex. App. 268. See also, Frye v. St., 7 Tex. App. 94; Hicks v. St., 5 Tex. App. 488; Samschen v. St., 8 Tex. App. 45; St. v. Simons, 61 Kan. 752, 60 Pac. 1052.

⁹² Matthews v. St., supra; Frye v. St., supra; St. v. Monica (La.), 2 South. 814; Mullin's Appeal (Pa.), 5 Atl. 738; St. v. Riggs, 110 La.

it has been held unaffected in the Federal courts by act of Congress⁹³ already referred to. Unless otherwise provided by statute, it exists in the case of *special juries*, as well as in that of common juries.⁹⁴

§ 24. [Continued.] Under what Circumstances Summoned.—

The true theory of summoning talesmen is that such persons are to be summoned only where it is necessary to supplement or fill up a jury which remains incomplete after the exhaustion of the regular panel by excuses, challenges or otherwise. They ought not to be summoned on the one hand, until the regular panel has been exhausted,⁹⁵ though the court may summon them without awaiting the return of attachments issued to bring in members of the regular panel.⁹⁶ And where separate panels are summoned and in attendance for separate weeks of the term, it is better, and hence proper, where the first panel is exhausted without procuring a jury, to resort to the panel for the second week, rather than summon talesmen.⁹⁷ So, where the sheriff is ordered by the court to summon

509, 34 South. 655. And it is in the discretion of the court to direct that they be taken from within a designated distance from the court house. *Sanford v. St.*, 143 Ala. 78, 39 South. 370. Where the North Carolina statute prescribed "by-standers" it was held that it was not error when no jury was obtainable from by-standers for those to be so considered who appeared at court afterwards upon an order of court for them to attend. *St. v. McDowell*, 123 N. C. 764, 31 S. E. 839.

⁹³ Ante, § 14; *United States v. Rose*, 6 Fed. 136. The power is given by § 804, Rev. Stat. U. S.

⁹⁴ *Rex v. Hunt*, 4 Barn. & Ald. 430; *Snook v. Southwood*, *Ryan & Moo.* 429; *Gatliff v. Bourne*, 2 *Moo. & Rob.* 100; *Atty. Gen. v. Parsons*, 2 *Mee. & W.* 23; *Rex v. Hill*, 1 *Car. & P.* 667; *Rex v. Tipping*, 1 *Car. & P.* 668; *Buron v. Denman*, 1 *Exch.* 769; *People v. Tweed*, 50 *How. Pr.* (N. Y.) 286; *Anon.*, 2 *Dall. (U. S.)* 382; *Rankin v. Goddard*, 4 *Allen*

(N. B.) 155; *Atlee v. Shaw*, 4 *Yeates (Pa.)*, 236; *Rex v. Perry*, 5 *Term Rep.* 453; *Sparrow v. Turner*, 2 *Wils.* 366; *Denn v. Evaul*, 1 *N. J. L.* 283; *Hubley v. White*, 2 *Yeates (Pa.)* 133; *Mays v. St.*, 50 *Tex. Cr. R.* 165, 96 *S. W.* 329.

⁹⁵ *Barker v. Bell*, 49 *Ala.* 281. Compare *St. v. Benton*, 2 *Dev. & B.* 196; *St. v. Nash*, 8 *Ired. L. (N. C.)* 35; *St. v. Lytle*, 5 *Ired. L. (N. C.)* 58. Compare *Bayoujon v. Criswell*, 5 *Martin (N. s.) (La.)* 232; *St. v. Wright*, 15 *S. D.* 628, 91 *N. W.* 311. In Georgia the summoning may be for enough above number as may provide for exercise of peremptory challenges (*Driver v. St.*, 112 *Ga.* 229, 37 *S. E.* 400), while in Alabama it may be postponed until those in the box have been passed both for cause and peremptory challenge. *Schieffelin v. Schieffelin*, 127 *Ala.* 14, 28 *South.* 687.

⁹⁶ *Barthet v. Estebene*, 5 *La. Ann.* 315.

⁹⁷ *Lambertson v. People*, 5 *Park. C. R. (N. Y.)* 200. See, also, *Smith*

duly qualified jurors "from the county at large," he complies with the first order by summoning them from the first names remaining on the jury list of the county.⁹⁸ Nor is it improper, although not authorized by statute, for the court to direct such additional jurors to be drawn by the clerk in the usual way.⁹⁹

§ 25. [Continued.] **Conflicting Rulings on this Subject.**—It is to be regretted, however, that no general rule on this subject, applicable in all jurisdictions, can be stated. It has been held, on the one hand, in a court of the United States, that it is ground of new trial to order a *tales* where there is no deficiency of regular jurors.¹ On the other hand, a territorial court has held that whether a proper emergency exists for summoning talesmen is for the court to decide according to the nature and amount of the business pending.² Coming to the State courts, we find the same difference of opinion. It has been denied by some,³ and allowed by others,⁴ that talesmen may be summoned to supply a *total default* of regular jurors. On the one hand, it has been ruled that, where the regular panel is absent in the jury room making up their verdict in a case, the court cannot call another cause for trial and proceed to impanel a jury composed entirely of bystanders.⁵ On the other hand, if a *portion* only of the regular jurors are so absent, talesmen may be summoned to form a jury for the remainder of the panel.⁶ If but a *single member* of the

v. St., 55 Ala. 1; St. v. Edwards, 64 Kan. 455, 67 Pac. 834. If the statute says talesmen this is mandatory. Cribb v. St., 118 Ga. 316, 45 S. E. 396.

⁹⁸ People v. Colt, 3 Hill (N. Y.) 432. See, also, Cavanah v. St., 56 Miss. 299. The court may direct, however, that they be summoned from other parts of the county, than where the crime was committed. St. v. Thompson, 116 La. 829, 41 South. 107; St. v. Kellogg, 104 La. 580, 29 South. 285.

⁹⁹ People v. Cummings, 3 Park. C. R. (N. Y.) 343, 354.

¹ U. S. v. Watkins, 3 Cranch C. C. (U. S.) 508.

² Territory v. Doty, 1 Pinney (Wis.), 396.

³ Rogers v. St., 33 Ind. 543; Williams v. Com., 91 Pa. St. 493.

⁴ Suttle v. Batie, 1 Iowa, 141; Hunt v. Scobie, 6 B. Mon. (Ky.) 469. In Louisiana it is ruled that there can be no objection to summoning talesmen where the regular panel has been exhausted without procuring a single juror. St. v. Reeves, 11 La. Ann. 686; St. v. Desmouchet, 32 La. Ann. 1241.

⁵ Rogers v. St., 33 La. Ann. 543.

⁶ Bradley v. Bradley, 45 Ind. 67; Rondeau v. New Orleans Imp. Co., 15 La. Ann. 160; Gulf C. & S. F. R. Co. v. Gilvin (Tex. Civ. App.), 55 S. W. 985 (not reported in state reports). And may be called into the box as they appear in the court room. St. v. Wolf, 112 Iowa, 458, 84 N. W. 536.

regular panel remains, talesmen may be summoned to form a jury with him alone;⁷ and if he be challenged off, a jury may nevertheless be formed entirely from the talesmen.⁸

§ 26. [Continued.] **Further on this Subject.**—The *number* of talesmen to be summoned to supply a deficiency is generally regarded as a matter resting in the sound *discretion* of the trial court;⁹ and the court may even direct the sheriff, in anticipation of emergency, to bring in a sufficient number of qualified persons to act as talesmen whenever a deficiency may occur;¹⁰ and these are not summoned for a particular case, but for the business of the court generally.¹¹ While talesmen are ordinarily summoned for a particular case,¹² yet if they sit in a subsequent case, it is an irregularity which is *waived* by not objecting before verdict.¹³

§ 27. [Continued.] **By whom and how Summoned.**—By the common law, the selection of talesmen was confided entirely to the *discretion* of the *sheriff*, as was the selection of regular jurors; and this is still the law where not changed by statute;¹⁴ though an order

⁷ Fuller v. St., 1 Blackf. (Ind.) 63; Emerich v. Sloan, 18 Iowa, 139.

⁸ Fuller v. St., *supra*.

⁹ People v. Colt, 3 Hill (N. Y.), 432; McGuffee v. St., 17 Ga. 497; St. v. Lamon, 3 Hawks (N. C.) 175; St. v. Buckner, 25 Mo. 167, 171; Burk v. St., 2 Har. & J. (Md.) 426; Dayton v. St., 19 Ohio St. 584; Colt v. People, 1 Park. Cr. R. (N. Y.) 611; Com. v. Eaton, 8 Phila. 428; Com. v. Twitchell, 1 Brewst. (Pa.) 551; Robinson v. St., 109 Ga. 506, 34 S. E. 1017; People v. Durant, 116 Cal. 179, 48 Pac. 75.

¹⁰ Bac. Abr., Juries D. 337; St. v. Lamon, 3 Hawks (N. C.), 175; U. S. v. Loughery, 13 Blatch. (U. S.) 267; St. v. Kane, 32 La. Ann. 999; St. v. Allen, 47 Conn. 121. The sheriff, or coroner, when discharging the duties of that officer, may of his own motion specially request the attendance of persons to serve as talesmen if necessary. Rex v. Dolby, 2 Barn. & Cress. 104. The

statutes of a large number of the States now provide that talesmen may be taken from the bystanders or from the body of the county. St. v. Watkins, 106 La. 380, 31 South. 10.

¹¹ Bird v. St., 14 Ga. 43. See, also, St. v. Dale, 8 Ore. 229; U. S. v. Loughery, 13 Blatch. (U. S.) 267; O'Connor v. St., 9 Fla. 215; Davis v. St., 51 Neb. 301, 70 N. W. 984.

¹² Wallace v. Columbia, 48 Me. 436; Shields v. Niagara Sav. Bank, 3 Hun (N. Y.), 477, 5 Th. & C. (N. Y.) 585.

¹³ Howland v. Gifford, 1 Pick. (Mass.) 42, note; Wallace v. Columbia, 48 Me. 436.

¹⁴ People v. Cummings, 3 Park. C. R. (N. Y.) 343, 353. That he is a witness does not disqualify him from acting as one of a commission in the drawing of talesmen. People v. Summers, 115 Mich. 537, 73 N. W. 818.

of court controlling his discretion in this matter is no ground for new trial unless prejudice appears.¹⁵ Therefore, the sheriff and his deputies who perform this duty ought to be *properly* qualified; and where there is a statute prescribing the *oath* which they shall take,¹⁶ the omission to administer it will be error for which a conviction will be set aside.¹⁷ Talesmen should possess the qualifications of regular jurors, which will be presumed until the contrary is shown;¹⁸ and while the summoning officer must, of course, judge of their qualifications in the first instance, yet he ought not to *interrogate* them as to their opinions or bias.¹⁹

¹⁵ Capehart v. Stewart, 90 N. C. 101. City v. Kirkham, 9 Kan. App. 236, 59 Pac. 675.

¹⁶ Rev. St. Tex. art. 3056.

¹⁷ Wyers v. St. (Tex.), 2 S. W. 722.

¹⁸ Yelm Jim v. Territory, 1 Wash. Terr. 76; O'Connor v. St., 9 Fla. 215; Lee v. Lee, 71 N. C. 139; McGuffie v. St., 17 Ga. 497; St. v. Latin, 19 Wash. 57, 52 Pac. 314; Kansas

¹⁹ 1 Burr's Trial, p. 421; St. v. McCarty, 17 Minn. 76; Joy v. St., 14 Ind. 139. Right of exemption or that one is sick is no reason for failure to summon one as a venireman. Gay v. St., 92 Tex. 346, 49 S. W. 367.

CHAPTER III.

OF CHALLENGES

ARTICLE I.—CHALLENGES TO THE ARRAY.

ARTICLE II.—PEREMPTORY CHALLENGES.

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THE PARTICULAR CASE.

Subdivision 1—CHALLENGES GROUNDED ON CONSANGUINITY,
AFFINITY, INTEREST, AFFECTION.

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ARTICLE I.—CHALLENGES TO THE ARRAY.

SECTION

31. Of the Various kinds of Challenges.
32. Partiality of the Summoning Officer.
33. Irregularities or Frauds in Selecting the General List.
34. Irregularities in Drawing the Panel.
35. Objection to the Officer who Conducts the Drawing.
36. In the Case of Special or Struck Juries.
37. Time of Conducting the Drawing.
38. Irregularities in Summoning the Panel.
39. Resummoning Members of Quashed Panel.
40. Kinds of Challenges to the Polls.

§ 31. **Of the Various kinds of Challenges.**—There are two general divisions of challenges: 1. Challenges to the *array*. 2. Challenges to the *polls*. In the broadest sense, challenges to the *array* are grounded upon some objection which, if well taken, vitiates the whole panel or venire, and requires its discharge; while challenges to the *polls* are grounded upon objections to particular jurors. As the entire office of selecting the panel was, at common law, committed to the sheriff or other summoning officer, the usual ground of challenging the *array* under that system related to the partiality, “unindifferency,” as it was called, or other disqualification of this officer. This ground of challenging the *array* still subsists in some

American jurisdictions; but the more important and frequent ground is a non-compliance with the law in some substantial particular in the selection of the general jury list or in the drawing of the panel therefrom.

§ 32. **Partiality of the Summoning Officer.**—The partiality of the summoning officer, grounded upon his sustaining such relations to a party as subjected him to the influence of the latter,¹ or upon his being related to the adverse party by consanguinity or affinity,² at least within the *ninth degree*,³ or himself the adverse party to the suit,⁴ or interested therein,⁵ or the prosecutor in a criminal case,⁶ or the advocate of the opposing party is, at common law, a good ground of quashing the array;⁷ though the mere fact that he has expressed an opinion adverse to the case of the challenging party, will not be.⁸

¹ Bac. Abr. Juries E.; Co. Litt. 156a; Trials per Pais (ed. of 1725), p. 123. The prime inquiry in the American courts is, whether admitting partiality, yet has nothing to do with selecting those to be summoned and tried in no way to influence, there could be any prejudice arising out of that partiality. *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675. Practitioners will consult local statutes on subject of this chapter.

² Co. Litt. 156a; Bac. Abr. Jur. E.

³ 3 Bla. Com. 363; *Vernon v. Manners*, 3 Dyer, 319. a. (13); *Oulton v. Morse*, 2 Kerr (N. B.), 77; *Vanauken v. Beemer*, 4 N. J. L. 364; *Rector v. Hudson*, 20 Tex. 234; *Munshower v. Patton*, 10 Serg. & R. (Pa.) 334; *Mounsens v. West*, 1 Leon. 88; *Markham v. Lee*, cited *Ibid.* See, also, *Foot v. Morgan*, 1 Hill (N. Y.) 654. But not that he was a son of the prosecuting attorney (*St. v. Cameron*, 2 Chand. (Wis.) 172), or married to the sister of one who was surety for costs and who had supported the plaintiff's action with his money (*Murchison v. Marsh*, 2 Kerr, N. B. 608), or cousin of the lessor of the plaintiff in ejectment, the lessor not be-

ing a party in interest. *Anon.*, 3 Dyer, 300. b. (35); *Goodtitle v. Thrustout*, 2 Stra. 1023.

⁴ *Cowgill v. Wooden*, 2 Blackf. (Ind.) 332; *Cranmer v. Crawley*, 1 N. J. L. 43; *Woods v. Rowan*, 5 Johns. (N. Y.) 133; *Munshower v. Patton*, 10 Serg. & R. (Pa.) 334. But see *St. v. Judge*, 11 La. Ann. 79; *Prince v. St.*, 3 Stew. & Port. (Ala.) 253.

⁵ *People v. Tweed*, 50 How. Pr. (N. Y.) 286. See also *Rex v. Johnson*, 2 Stra. 1000.

⁶ *Rex v. Shepherd*, 1 Leach, C. C. 119.

⁷ Co. Litt. 156. b.; *Baylis v. Lucas*, Cowp. 112; *Watkins v. Weaver*, 10 Johns. (N. Y.) 107; *Tallman v. Woodworth*, 2 Johns. (N. Y.) 385; *Stubber v. Wall*, 1 Craw. & Dix (Irish) Cir. 54; *Chapman v. Macutchin*, 1 Craw. & Dix (Irish) Cir. 121.

⁸ *Friery v. People*, 2 Keyes (N. Y.), 424, 2 Abb. App. Dec. (N. Y.) 215; 54 Barb. (N. Y.) 319; *Ferris v. People*, 35 N. Y. 125, 31 How. Pr. (N. Y.) 140, 48 Barb. (N. Y.) 17, 1 Abb. Pr. (N. s.) (N. Y.) 193. In Texas the only ground of challenging the array in criminal cases is that "the officer summon-

Attempts by a party to influence the summoning officer in the performance of his duties will have this effect, without discriminating nicely as to whether prejudice has resulted or not;⁹ though where the party is a *corporation*, the mere fact of giving to the sheriff at his request information as to who the *stockholders* are, so that he may avoid summoning them, will not have this effect.¹⁰

§ 33. Irregularities or Frauds in Selecting the General List.—

As already seen, statutes which prescribe the manner of selecting, by county, town, or other officers, the general list of persons liable to jury duty from which the panel is drawn, are generally treated as directory merely.¹¹ It is hence a general rule that irregularities in the discharge of this duty constitute no ground for challenging an array.¹² If the jurors who have been selected and drawn are indi-

ing the jury has acted corruptly, and has willfully summoned persons upon the jury known to be prejudiced against the defendant, and with a view to cause him to be convicted." Pasc. Dig., art. 3034; R. S. Tex. 1879 (Code Cr. Proc.), art. 624. See Tuttle v. St., 6 Tex. App. 556; Coker v. St., 7 Tex. App. 83; Castaneda v. St., 7 Tex. App. 582. See, also, Harris v. St., 6 Tex. App. 97; Swofford v. St., 3 Tex. App. 88; Williams v. St., 44 Tex. 34; Bowman v. St., 41 Tex. 417. Being a witness does not disqualify. Com. v. Zillafrow, 207 Pa. 274, 56 Atl. 539; People v. Slater, 119 Cal. 620, 51 Pac. 957. Under a statute disqualifying summoning officer for the same reasons, which would disqualify a venireman, an officer, who had formed but not expressed an opinion as to defendant's guilt, from having heard the case tried before, was held qualified, where he said he could give defendant a fair trial and he did not discuss the case with any of the veniremen. St. v. Hall, 16 S. D. 6, 91 N. W. 325.

⁹ McDonald v. Shaw, 1 N. J. L. 6. See also St. v. Johnson, 1 N. J. L. 219.

¹⁰ Quinebaug Bank v. Tarbox, 20 Conn. 510.

¹¹ Ante, § 13; People v. Sowell, 145 Cal. 292, 78 Pac. 717; Rhodes v. Southern Ry. Co., 68 S. C. 494, 47 S. E. 689; Hutto v. Southern Ry. Co., 75 S. C. 295, 55 S. E. 445.

¹² People v. Tweed, 50 How. Pr. (N. Y.) 280; Maffett v. Tonkins, 6 N. J. L. 228; Dolan v. People, 64 N. Y. 485; Foust v. Com., 33 Pa. St. 338; Jewell v. Com., 22 Pa. St. 94; Com. v. Walsh, 124 Mass. 32; Woodsides v. St., 2 How. (Miss.) 655; Malone v. St., 49 Ga. 210; Brinkley v. St., 54 Ga. 371; Foster v. Speed, 32 La. Ann. 34; Sumrall v. St., 29 Miss. 202; St. v. Neagle, 65 Me. 468. But see Compton v. Legras, 24 La. Ann. 259. Irregularities in filling the jury wheel in Pennsylvania: Com. v. Lippard, 6 Serg. & R. (Pa.) 395; in the custody of the wheel: Curley v. Com., 84 Pa. St. 151; Roland v. Com., 82 Pa. St. 306. Unless they are the product of misconduct or fraud. White v. St., 45 Tex. Cr. R. 597, 78 S. W. 1066. Or great wrong or irreparable injury suffered: St. v. Thompson, 104 La. 167, 28 South. 882.

vidually qualified, that is generally deemed sufficient,¹³ and objections to particular jurors are made by challenge to the polls. It has been so held in case of a delay in returning the list to the clerk of the court,¹⁴ and of informalities of the certificate of selection;¹⁵ though a total failure to record the list, so as to allow the public inspection of it, has been held a ground of such challenge,¹⁶ and so has a total departure from the provisions of the law.¹⁷ That the selection was not made by the officer appointed by the statute,¹⁸ or that it was made by an officer who had never qualified,¹⁹ or by persons to whom the proper officers assumed to delegate their functions,²⁰ will support such a challenge; but the objection that it was made by an officer whose term had expired, will not, since he was still an officer *de facto*, and the court will not, on such challenge, try the title to a public office.²¹ That a great disproportion exists between the num-

¹³ *St. v. Massey*, and *St. v. Baldwin*, 2 Hill (S. C.), 379; *Rafe v. St.*, 20 Ga. 80; *Perry v. St.*; 9 Wis. 19; *Gettwerth v. Teutonia Ins. Co.*, 29 La. Ann. 30; *St. v. Petrie*, 25 La. Ann. 386; *Com. v. Walsh*, 124 Mass. 32; *St. v. Hascall*, 6 N. H. 352. Contra, that a selection under the provisions of a repealed law is void: *St. v. Da Rocha*, 20 La. Ann. 356; *St. v. Morgan*, 20 La. Ann. 442.

¹⁴ *St. v. Gut*, 13 Minn. 341.

¹⁵ *Carter v. St.*, 56 Ga. 463; *Brinkley v. St.*, 54 Ga. 371. See also *Gardiner v. People*, 6 Park. C. R. (N. Y.) 157, 198; *St. v. Clarkson*, 3 Ala. 378.

¹⁶ *Mitchell v. Likens*, 3 Blackf. (Ind.) 258; *Mitchell v. Denbo*, Ib. 259; *St. v. Dixon*, 131 N. C. 808, 42 S. E. 944. Even though it be not mentioned in the statutes as a cause of challenge. *White v. St.*, 45 Tex. Cr. R. 597, 78 S. W. 1066.

¹⁷ *St. v. Da Rocha*, 20 La. Ann. 356; *St. v. Morgan*, 20 La. Ann. 442. As a failure to select from the assessment roll. *St. v. Jenkins*, 32 Kan. 477; *Ray v. St.*, 46 Tex. Cr. R. 176, 79 S. W. 535. Thus that the lists were selected from certain beats, instead of the entire county.

Hanners v. St., 147 Ala. 27, 41 South. 973. If the commissioners from wrong interpretation of law omit a great number of qualified persons, this presents ground for such challenge. *St. v. Bolen*, 10 Wyo. 439, 70 Pac. 1.

¹⁸ *Elkins v. St.*, 1 Tex. App. 539. See also *Shakleford v. St.*, 2 Tex. App. 385. A general provision authorizing the judge to appoint the sheriff to select a jury, where from any cause commissioners fail to provide one, does not cover the case of a judge wilfully failing to appoint the commissioners, whether he acts corruptly in so failing or not. *White v. St.*, 45 Tex. Cr. R. 597, 79 S. W. 535.

¹⁹ *St. v. Vance*, 31 La. Ann. 398; contra, *Sims v. St.*, 146 Ala. 109, 41 South. 413.

²⁰ *St. v. Newhouse*, 29 La. Ann. 821.

²¹ *St. v. McJunkin*, 7 S. C. 21; *Vance v. Com.*, 2 Va. Cas. 162; *Carpenter v. People*, 64 N. Y. 483; *Dolan v. People*, Ib. 485; *St. v. Ferray*, 22 La. Ann. 423. So, under the old law, it was no ground of challenge that the array was made by a person two days after he had received

ber of persons of different *religious beliefs* on the panel,²² or that, a *rich* man being defendant, there are many *poor* men on the panel,²³ are not, *per se*, grounds of such challenge. Decisions are found to the effect that a *list*, valid on its face, is *conclusive* upon a prisoner as to its regularity;²⁴ and a monstrous political case resulted in establishing the doctrine in England that it will be no ground of challenge to the array that the list is incomplete through *fraud*.²⁵ But it is confidently believed that the doctrine in this country is otherwise.²⁶

§ 34. **Irregularities in Drawing the Panel.**—In like manner, statutory provisions respecting the drawing of the panel are generally regarded as directory merely,²⁷ so that irregularities therein, unless plainly operating to the prejudice of the challenging party, form no ground for challenging the array.²⁸ Cases are found, however, where a palpable disregard of the statutory provisions have

his discharge as sheriff. *Hoare v. Broom*, Cro. Eliz. 369. But compare *Anon.*, Dyer, 177 b. pl. (34); *Com. v. Clemmer*, 190 Pa. 202, 42 Atl. 675; *St. v. Sutherland*, 165 Ind. 339, 75 N. E. 642. Or that he was ineligible to election. *Wright v. St.*, 124 Ga. 84, 52 S. E. 146. Or where the elected officer had not yet received his commission. *Spragins v. St.*, 139 Ala. 93, 35 South. 1000. Or did not take oath of office. *Linnehan v. St.*, 116 Ala. 471, 22 South. 662.

²² *Reg. v. Mitchel*, 3 Cox, C. C. 1. Excluding those engaged in certain avocations, lawyers, doctors, ministers, etc. is not violative of the Federal constitution. *Rawlins v. Georgia*, 201 U. S. 638.

²³ *Ibid.*, p. 30, per Lefroy, B. Or that the jury has no colored men on the panel, the defendant being a negro. *Montgomery v. St.*, 55 Fla. 97, 42 South. 894. Or that one of the parties has many friends and acquaintances on the jury. *Soper v. Crutcher*, 29 Ky. Law Rep. 1080, 96 S. W. 907.

²⁴ *Gardiner v. People*, 6 Park. C.

R. (N. Y.) 157, 198; *St. v. Allen*, 1 Ala. 442; *St. v. Clarkson*, 3 Ala. 378; *St. v. Brooks*, 9 Ala. 9. If the question be sufficiently raised and the fact proven, it is a constitutional right to challenge a list made up by discriminating against citizens because of their color. *St. v. Baptiste*, 105 La. 661, 30 South. 147.

²⁵ *Reg. v. O'Connell*, 11 Cl. & Fin. 155, 1 Cox, C. C. 394. See also *Reg. v. Fitzpatrick, Craw. & Dix* (Irish), 513; *Reg. v. Conrahy*, 1 *Craw. & Dix* (Irish) Cir. 56. Compare *People v. Jewett*, 3 Wend. (N. Y.) 314, 320.

²⁶ *People v. Tweed*, 50 How. Pr. (N. Y.) 264; *People v. Dolan*, 64 N. Y. 485; *Maffett v. Tonkins*, 6 N. J. L. 228.

²⁷ *Ante*, § 15.

²⁸ *Rafe v. St.*, 20 Ga. 64; *St. v. Williams*, 3 Stew. (Ala.) 454; *Friery v. People*, 2 Abb. App. (N. Y.) Dec. 215, 2 Keyes (N. Y.) 424; 54 Barb. (N. Y.) 319; *Ferris v. People*, 35 N. Y. 125, 31 How. Pr. (N. Y.) 140; 48 Barb. (N. Y.) 17; 1 Abb. Pr. (N. s.) (N. Y.) 193; *St. v. Guidry*, 28 La. Ann. 630; *Pratt v. Grappe*, 12

been held sufficient ground for such challenge.²⁹ Thus, if the clerk put upon the panel the names of persons, at their own request, who have not been regularly drawn, the presence of these interlopers, called *non-jurors*, they not being subject to challenge personally, vitiates the whole panel.³⁰ Statutes are found which enact that only a material departure from the forms prescribed for the drawing,^{30a} or the intentional omission of the sheriff to summon one or more of the jurors drawn, shall afford ground of challenge;³¹ and

La. 451; *St. v. Miller*, 26 La. Ann. 579; *Mapes v. People*, 69 Ill. 523; *Wilhelm v. People*, 72 Ill. 468; *Dotson v. St.*, 62 Ala. 141. See also *Crane v. Dygert*, 4 Wend. (N. Y.) 675; *Rolland v. Com.*, 82 Pa. St. 306, 321. *Contra*, *Jones v. St.* (Sup. Ct. Ohio 1851), 8 West. L. J. 508; *Lindley v. Kindall*, 4 Blackf. (Ind.) 189; *Friery v. People*, Abb. App. (N. Y.) Dec. 215, 2 Keyes (N. Y.), 424; 54 Barb. (N. Y.) 319; *Gardiner v. People*, 6 Park. C. R. (N. Y.) 155; *People v. Rogers*, 13 Abb. Pr. (N. s.) (N. Y.) 370; *St. v. Squaires*, 2 Nev. 227; *People v. Ah Chung*, 54 Cal. 398; *Pierson v. People*, 18 Hun (N. Y.), 239; *Cox v. People*, 19 Hun (N. Y.), 430; *Dolan v. People*, 24 N. Y. 485; *Claussen v. La Franz*, 1 Iowa, 226, 241; *St. v. Seaborn*, 4 Dev. L. (N. C.) 305; *Stone v. St.*, 137 Ala. 1, 34 South. 629; *Chesley v. St.*, 121 Ga. 340, 49 S. E. 258; *St. v. Batson*, 108 La. 479, 32 South. 478. Thus destroying the names of those known to be non-residents and drawing others in their stead creates no prejudice. *Hannan v. Territory*, 9 Okl. 313, 60 Pac. 115.

²⁹ *Jones v. St.*, 3 Blackf. (Ind.) 37; *Anon.*, 1 Brown (Penn.) 121; *Baker v. Steamer Milwaukee*, 14 Iowa, 214; *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *McCloskey v. People*, 5 Park. C. R. (N. Y.) 308. Such persons are termed *non-jurors*; they are mere interlopers, and not being subject to challenge personally, their

presence vitiates the whole panel. *Norman v. Beaumont*, Willes, 484; *Abbott, C. J.*, in *Rex v. Tremaine*, 7 Dowl. & Ry. 684, 687, 16 Eng. C. L. 318, sub nom. *Rex v. Tremearne*, 5 Barn. & Cress. 254; 11 Eng. C. L. 218; *Carley v. St.*, 133 Ala. 128, 32 South. 227; *Borrelli v. People*, 164 Ill. 549, 45 S. E. 1024; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

³⁰ *McCloskey v. People*, 5 Park. C. R. (N. Y.) 308; *Norman v. Beaumont*, Willes, 484; *Rex v. Tremaine*, 7 Dowl. & Ry. 684, 687, 16 Eng. C. L. 318, sub nom. *Rex v. Tremearne*, 5 Barn. & Cress. 254; 11 Eng. C. L. 218. Merely retaining jurors for a longer period than that for which they are summoned only gives challenge to the polls. *Cochran v. St.*, 113 Ga. 726, 29 S. E. 332. Drawing a jury behind closed doors on which is posted a notice of no admission, when statute prescribes the drawing must be public, presumes fraud that will vitiate the panel. *St. v. Turner*, 63 S. C. 548, 41 S. E. 778.

^{30a} If there is no fraud in the drawing or summoning. *Stewart v. St.*, 137 Ala. 33, 34 South. 403.

³¹ Cal. Penal Code, § 1059; Comp. L. Nev. 1900, § 3259; Laws Utah, 1907, § 3144; R. C. Iowa, 1897 § 3679; Stat. at Large, Minn. 1905, § 5383; Ark. Dig. Stat. 1904, § 4534; Bullett's Ky. Codes (Crim.), p. 40, § 199. The grounds of challenge stated in such statutes are exclu-

still other statutes, in various terms, uphold the conclusion that irregularities or informalities in the discharge of this duty will not afford ground for challenging the array.³²

§ 35. Objections to the Officer who Conducts the Drawing.—

Although the officer who conducts the drawing is regarded for many purposes as the substitute of the sheriff at common law,³³ yet he has not the same power which was possessed by that officer corruptly to influence the selection of the jury; and therefore challenges to the array, grounded on an objection that the drawing was conducted by a different officer from the one appointed by law, have not the same force as such a challenge under the old system. Plainly, it will be no objection that the drawing took place by a *deputy* of the statutory officer, if the latter was duly appointed;³⁴ nor that an officer other than the statutory officers attended and participated in it,³⁵ nor that one of the statutory officers was temporarily absent, provided no names were drawn during his absence.³⁶ Objections to the *partiality* of the officer conducting the drawing, such as prevailed on a challenge to the array at common law, have been abrogated by statute in some of the States;³⁷ and in one State there are holdings to the effect that the fact that the officer who served the jury process, or drew and arrayed the panel, was the *attorney* of the party, did not disqualify him for the duty.³⁸ But in another State it is enacted that a person *interested* in a suit cannot participate in

sive. *St. v. Arnold*, 12 Iowa, 479; *St. v. Raymond*, 11 Nev. 98; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293; *St. v. Bates*, 25 Utah, 1, 69 Pac. 70.

³² 2 Ind. Stat. 1876, p. 30, § 6; Rev. Code Miss. 1906, § 2716. See *Hare v. St.*, 4 How. (Miss.) 189; *Thomas v. St.*, 5 Id. 20; *King v. St.*, 5 Id. 730; *Laws N. Y.* 1881, ch. 442, § 362; *Tex. Code Crim. Proc.*, art. 624; *Kerr v. St.*, 63 Neb. 115, 88 N. W. 240.

³³ *Gardner v. Turner*, 9 Johns. (N. Y.) 260; *Jones v. St.*, 3 Blackf. (Ind.) 37; *Mitchell v. Likens*, Id. 258; *Mitchell v. Denbo*, Id. 259.

³⁴ *St. v. Gay*, 25 La. Ann. 472; *People v. Fuller*, 2 Park. C. R. (N.

Y.) 16; *St. v. Aspara*, 113 La. 940, 37 South. 883.

³⁵ *Hunt v. Mayo*, 27 La. Ann. 197; *St. v. Bohan*, 19 Kan. 28.

³⁶ *St. v. Arata*, 32 La. Ann. 193.

³⁷ *N. Y. Code Rem. Jus.*, §§ 1177, 1178. See also *Comp. L. Mich.* 1871, §§ 6013, 6014.

³⁸ *Miles v. Pulver*, 3 Den. (N. Y.) 84; *Wakeman v. Sprague*, 7 Cow. (N. Y.) 720. The sole inquiry is whether or not there was any attempt to influence any of those served. *Lucas v. Johnson* (Tex. Civ. App.), 64 S. W. 823 (not reported in state reports); *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675. See also *Arnold v. St.*, 38 Tex. Cr. R. 1, 40 S. W. 734.

the drawing of the panel by which it is to be tried;³⁹ and in still another State such a challenge has been upheld on the ground that the jury commissioner who assisted in the drawing was a *first cousin* to the challenging party.⁴⁰

§ 36. **In the Case of Special or Struck Juries.**—It seems that “*unindifferency*” in the officer by whom a special or struck jury has been nominated is no ground for challenging the array,⁴¹ though *fraud* in the preparation of the list from which such a jury is struck will be.⁴²

§ 37. **Time of Conducting the Drawing.**—Statutory provisions prescribing the time of conducting the drawing are generally treated as directory,⁴³ and it has been held no ground of challenging the array that the drawing took place a *greater* length of time⁴⁴ prior to the session of the court than that prescribed; but otherwise where it took place within a *shorter* period of time,⁴⁵ the object of the statute being to afford parties an opportunity for the inspection of the list.⁴⁶

³⁹ 2 Ind. Stat. 1876, p. 29, § 1.

⁴⁰ St. v. McQuaige, 5 S. C. 429.

⁴¹ Rex v. Edmunds, 4 Barn. & Ald. 471. See also Rex v. Despard, 2 Man. & Ryl. 406; Webb v. St., 29 Ohio St. 351; Rex v. Johnson, 2 Str. 1000; Rex v. Burridge, 1 Str. 593, 2 Ld. Raym. 125. See Thomp. & Mer. Jur., § 144, subsec. 2. The discretion to grant, on motion, a struck jury implies the discretion to revoke the order therefor. Bullock v. St., 65 N. J. L. 557, 47 Atl. 62. That all were not served is no ground of challenge, if enough attend to try the cause. St. v. Woods, 66 N. J. L. 458, 49 Atl. 716. It has been held that the bias disqualifying one as a juror is sufficient to disqualify in the summoning of such a jury. People v. Ryan, 108 Cal. 8, 41 Pac. 451.

⁴² Maffett v. Tonkins, 6 N. J. L. 224. In *New Jersey*, where the sheriff exercises powers in respect of juries analogous to those pos-

sessed at common law, it has been held a good ground for challenging the array of a special jury, that it was returned by the sheriff's deputy, who had not taken the oath of office. Denn v. Evall, 1 N. J. L. 283. In *New York* it has been held that the statutory mode of obtaining a special jury must be strictly pursued. People v. Tweed, 50 How. Pr. (N. Y.) 262, 263.

⁴³ Wilson v. St. Bank, 3 La. Ann. 196, 198; St. v. Pitts, 58 Mo. 556; St. v. Knight, 61 Mo. 373; St. v. Teachey, 138 N. C. 287, 50 S. E. 232; White v. Com., 27 Ky. Law Rep. 561, 85 S. W. 753.

⁴⁴ Crane v. Dygert, 4 Wend. (N. Y.) 675. But see St. v. Hascall, 6 N. H. 352, 360; Stamey v. Barkley, 211 Pa. 313, 60 Atl. 991.

⁴⁵ Powell v. People, 5 Hun (N. Y.), 69. Contra, White v. Com., 27 Ky. Law Rep. 561, 85 S. W. 753.

⁴⁶ Ante, § 16. In a capital case the record must show it was drawn

§ 38. **Irregularities in Summoning the Panel.**—From what has preceded,⁴⁷ the conclusion follows that irregularities in the procedure by which the panel, selected and drawn, are brought into court, afford no ground for challenging the array;⁴⁸ and objections to particular persons summoned are not properly taken by challenge to the *array*, but by challenge to the *polls*.⁴⁹

§ 39. **Resummoning Members of Quashed Panel.**—The inutility of challenging the array on the ground of *irregularities* merely, is illustrated by a class of cases which hold that, where such a challenge is sustained and a special *venire facias* issues for want of jurors, the sheriff may resubmit the members of the quashed panel,⁵⁰ unless it has been quashed by reason of *fraud*.⁵¹

§ 40. **Kinds of Challenges to the Polls.**—It will serve no use to refer to the confusing divisions and subdivisions of challenges to

in due time. *Davis v. St.*, 132 Ala. 8, 31 South. 567.

⁴⁷ Ante, § 19.

⁴⁸ *Hart v. Tallmadge*, 3 Day (S. C.), 381; *Rex v. Edmunds*, 4 Barn. & Ald. 471, 489. See also *Rex v. Hunt*, 4 Barn. & Ald. 430; *People v. McGeery*, 6 Park. Cr. (N. Y.) 653. As a misdescription in the *venire facias* by which the act is called "civil" instead of "criminal:" *St. v. Nerbovig*, 33 Minn. 480. Compare under the statute of *California*: *People v. Coyodo*, 40 Cal. 586; *People v. Welch*, 49 Cal. 174; *People v. Rodriguez*, 10 Cal. 50; *Carroll County v. Durham*, 219 Ill. 64, 76 N. E. 78. If the manner of selection, i. e., from a part instead of the entire county, is directly opposed to the statute, it then is ground for such challenge. *People v. Enwright*, 134 Cal. 527, 66 Pac. 726.

⁴⁹ *Mitchell v. St.*, 43 Tex. 517; *Gray v. St.*, 55 Ala. 86; *Hall v. St.*, 40 Ala. 698. See also *Hayes v. Reg.*, 10 Irish L. 53; *Commander v. St.*, 60 Ala. 1; *Baker v. Harris*, 1 Winst. (N. C.) 277; *Bryan v. St.*, 124 Ga.

79, 52 S. E. 288; *St. v. Hogan*, 67 Conn. 581, 35 Atl. 508. The same rule obtains with respect to a special *venire* in a murder case. *Collins v. St.*, 137 Ala. 50, 34 South. 403. Where talesmen are included in the special *venire* process, such irregularity merely goes to them. *Locklin v. St.* (Tex. Cr. R.), 75 S. W. 305 (not reported in state reports).

⁵⁰ *Caperton v. Nickel*, 4 W. Va. 137; *St. v. Degonia*, 69 Mo. 485; *St. v. Owen*, Phill. L. 425; *St. v. McCurry*, 63 N. C. 33; *Smith v. St.*, 4 Neb. 277. But see *Combs v. Slaughter*, Hard. (Ky.) 62. It has been held that, upon process directed to the coroner, that officer can summon the same panel. *Payne v. McLean*, 1 Up. Can. K. B. (o. s.) 444. Compare *Norbury v. Kennedy*, 3 Crawf. & Dix (Ir.), Cir. 124; *Arnold v. St.*, 38 Tex. Cr. 1, 40 S. W. 734. Statutes disqualifying for prior service do not include members summoned for a panel that was quashed. *Randolph v. St.*, 65 Neb. 520, 91 N. W. 356.

⁵¹ *Kell v. Brillinger*, 84 Pa. St. 276.

the polls at common law.⁵² All such challenges fall into two classes: 1. Peremptory challenges,—that is, challenges for which no reason need be given. 2. Challenges for disqualification,—that is, challenges for which a legal reason must be given. The latter obviously again falls into two subdivisions: 1. Challenges grounded upon general disqualification. 2. Challenges grounded upon disqualification in respect of the particular case. By a common-law classification, challenges for cause were divided into challenges for *principal cause*, and challenges *to the favor*. The chief importance of this distinction lay in the fact that the former were tried by the *court*, whose decision was *reviewable* on error, while the latter were tried by *triors*, whose decision was *conclusive*.⁵³ With the abolition of *triors*, the distinction has become unimportant, though still to some extent kept up.

ARTICLE II.—PEREMPTORY CHALLENGES.

SECTION

42. In what Cases Allowed.

43. Nature of this Right.

44. Number of such Challenges.

45. Number in Cases of Persons Jointly Indicted.

46. [Continued.] In Case of Several Parties Plaintiffs or Defendants in a Civil Action.

47. Power of Legislature to Increase or Diminish Number.

48. Canons of Construction Touching the Number of Challenges.

49. Right of Prosecution to Stand Jurors Aside.

§ 42. In what Cases Allowed.—According to early writers, peremptory challenges were allowed in capital felonies only, *in favorem vite*.⁵⁴ This statement was not far out of the way, in early times; since all felonies, though strictly punishable by *forfeiture*, were generally also punished by *death*.⁵⁵ But, as non-capital felonies were created and multiplied, the statements of these writers became misleading, and they in fact misled many American courts into the conclusion that the right of peremptory challenge existed only in

⁵² See Thomp. & Mer. Jur., §§ 152, 153.

⁵³ Post, § 99.

⁵⁴ Co. Litt. 156. b.; 2 Hawk. P. C. 570, B. 2, c. 43, § 5; 2 Hale P. C. 267; 4 Bl. Com. 353; 1 Chit. Cr. L. 535; Trials per Pals (1725), 455; Bac. Abr. Juries E. 2; Ibid., 9; Doctor & Student, 29. See com-

ments upon the foregoing by Lord Chief Baron Pollock in Reg. v. Gray, 11 Cl. & Fin. 427, 479; Reading's Case, 7 How. St. Tr. 264. See also Com. Dig. Challenge, c. 1; Ibid., Indictment M.; Ibid., Justices W. 2; Finch Law, Bk. 4, c. 36, p. 414.

⁵⁵ 4 Bla. Com. 98.

the case of capital felonies.⁵⁶ It was long the practice in England, though not in Ireland,⁵⁷ to admit this right in trials for felonies which were not capital; but finally it was settled in 1843 by the House of Lords, in a case arising in Ireland, that it was a right incidental to all felonies, whether capital or not, both in England and in Ireland.⁵⁸ Such challenges are now allowed by statute in all American jurisdictions in all cases of felony, whether capital or not; and in most American jurisdictions in cases of misdemeanor, and in some in civil cases.⁵⁹

§ 43. **Nature of this Right.**—It is a fundamental principle that the right of peremptory challenge is a right to *reject* and not a right to *select*.⁶⁰ Therefore, a party cannot, in general, complain that the court has *excused* jurors without cause,⁶¹ or sustained un-

⁵⁶ See *U. S. v. Hand*, 3 Phila. 403; *U. S. v. Cottingham*, 2 Blatch. (U. S.) 470; *U. S. v. Carrigo*, 1 Cranch C. C. (U. S.) 49; *U. S. v. McPherson*, 1 Cranch C. C. (U. S.) 517; *U. S. v. Toms*, 1 Cranch C. C. (U. S.) 607; *U. S. v. Smithers*, 2 Cranch C. C. (U. S.) 38; *U. S. v. Johns*, 4 Dall. (U. S.) 412; *U. S. v. Black*, 2 Cranch C. C. (U. S.) 195; *U. S. v. Krouse*, 2 Cranch C. C. (U. S.) 252; *U. S. v. White*, 5 Cranch C. C. (U. S.) 73; *U. S. v. Randall*, 1 Deady (U. S.), 524; *Shuster v. Com.*, 38 Pa. St. 206.

⁵⁷ *Rex v. Phelan*, and *Rex v. Whelan*, 1 Craw. & Dix C. C. 189, and note; *Rex v. Adams*, *Jebb C. C.* 135, and other unreported cases cited in 6 Irish C. L. 281, 288.

⁵⁸ *Gray v. Reg.*, 11 Cl. & Fin. 427; *reversing Reg. v. Gray*, 6 Ir. C. L. 482.

⁵⁹ In recent times they have been allowed in cases of misdemeanor and in civil cases in England, though as a matter of *grace* merely. *Creed v. Fisher*, 9 Exch. 472. The plaintiff in a civil action cannot peremptorily challenge a juror drawn to fill the place of one removed for cause. *Huff v. Walkins*, 15 S. C. 82; *Gunter v. Graniteville Man Co.*,

Id. 443. Including courts not of record, and in special proceedings. *Lasher v. Curry*, 68 N. Y. S. 845.

⁶⁰ *U. S. v. Marchant*, 4 Mason (U. S.), 158, 12 Wheat. (U. S.) 480; *St. v. Wise*, 7 Rich. L. 412; *St. v. Cazeau*, 8 La. Ann. 109; *St. v. Cardoza*, 11 S. C. 195, 249; *Maton v. People*, 15 Ill. 536, 539; *Cruce v. St.*, 59 Ga. 83, 90; *St. v. Smith*, 2 Ired. L. 402; *St. v. Arthur*, 2 Dev. 217; *Turpin v. St.* (Sup. Ct. Md., Oct. 1880), 2 Crim. L. Mag. 532; *Heskew v. St.*, 17 Tex. App. 161. Thus the number is of the date of the trial, not of the offense. *Edmonson v. St.* (Tex. Cr. R.), 44 S. W. 154 (not reported in state reports). Its exercise is not to be taken as waiving any defect vitiating the panel. *St. v. Barber*, 13 Idaho, 65, 88 Pac. 418. In Missouri where in certain cities the number differed from the general law, the place of trial governed in change of venue cases. *St. v. May*, 168 Mo. 122, 67 S. W. 566.

⁶¹ *Ante*, § 10; *post*, § 120; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969; *Glasgow v. Metropolitan St. Ry. Co.*, 191 Mo. 347, 89 S. W. 915; *St. v. Kellogg*, 104 La. 580, 29 South. 585. Kentucky statute making rulings

tenable challenges of the other party, thus driving the objecting party to exhaust his peremptory challenges upon *other members* of the panel, or upon special venire-men or talesmen. The practice of allowing the crown to *stand jurors aside*⁶² was supported by the same conception,—the idea being that, so long as the prisoner enjoyed the full number of peremptory challenges allowed him by law, he was not prejudiced. This was illusory; since the sheriff had the power of arraying the panel in such order as suited his discretion, so that, by placing at its head thirty-five persons publicly known to be obnoxious to the accused he could drive him to exhaust his peremptory challenges against these, after which he would be completely at the mercy of the crown. Moreover, this right of peremptory challenge is confined to the *main issue*,⁶³ and

on challenge for cause by lower court conclusive has been held constitutional. *Howard v. Com.*, 25 Ky. Law. 2213, 80 S. W. 211. Federal Supreme Court affirmed such ruling with the proviso, that it do not work discrimination as forbidden by 14th Amendment *Howard v. Com.*, 200 U. S. 164. An allegation that in former trials of a defendant the trial court finds such discrimination has been practiced and will be again presents no reason under federal statute for removal of his cause from the state to the federal court, but there must be legislative denial of right to an impartial jury, and if in a future trial there be administrative denial the appropriate remedy would be by writ of error from the federal supreme court after the party prejudiced thereby has exhausted his remedy in the state courts. This holding was made in the case of *Caleb Powers*, which the federal Circuit Court ordered removed from the state court and upon petition by the State of Kentucky to the federal Supreme Court for mandamus to the Circuit Court, the case was directed to be remanded. In this case all prior cases are reviewed in the opinion deliv-

ered by the federal Supreme Court enforcing the distinction between legislative and administrative denial of rights guaranteed by the federal constitution and the federal removal statute was confined to the former. Any other conclusion would subject, a state's enforcement of its criminal statutes to a practically limitless interference on the part of the federal circuit courts, whose justification for the removal of any cause would be that the state courts did not intend, in advance of its trial, to administer justice therein. *Ex parte Kentucky* (U. S.), 50 L. Ed.; *Kentucky v. Powers*, 139 Fed. 453.

⁶² Post, § 49. It has been held no invasion of the right of a common-law jury that peremptory challenges take the place of standing jurors aside. *St. v. Noakes*, 70 Vt. 247, 40 Atl. 249.

⁶³ 2 Hale, P. C. 267; Bac. Abr. Juries E. 9; Foster Cr. L. 42; 4 Bl. Com. 353, 396; Co. Litt. 156. b.; *Rex v. Ratcliffe*, 1 W. Bl. 3, 6, 18 How. St. Tr. 429; *Rex v. Oakey*, 1 Levinz, 61, Sid. 72; Sir J. Kelyng, 13; 1 Keble, 244; *Reg. v. Key, Temple & Mew*, 623.

does not extend to the trial of collateral issues, such as the issue of *identity*,⁶⁴ or *insanity*;⁶⁵ though, where it exists in civil cases by statute, the defendant may exercise it upon jurors impaneled to execute a *writ of inquiry*.⁶⁶ Finally, this right does not exist in the case of *special* or *struck juries*, for the right of striking takes the place of it.⁶⁷

§ 44. **Number of such Challenges.**—At common law, the number of such challenges allowed to the accused was *thirty-five*, that is, one short of three complete juries.⁶⁸ If he challenged a greater number than that allowed, the barbarism of that law pronounced death in cases of treason, and, in case of felony or *petit* treason, subjected him to *peine forte et dure*, that is, pressing to death,⁶⁹ though sometimes he was *mercifully hanged*.⁷⁰ In criminal cases the number allowed to the State and to the accused is regulated by statute in every American jurisdiction,⁷¹ and can seldom be the subject of

⁶⁴ *Rex v. Oakey*, 1 Levinz, 61, Sid. 72; *Sir J. Kelyng*, 13; 1 Keble, 244 (Case of Regicides). See also *Rex v. Ratcliffe*, 1 W. Bl. 3, 18 How. St. Tr. 429.

⁶⁵ *Freeman v. People*, 4 Denio (N. Y.), 1, 22.

⁶⁶ *Opothle-Yoholo v. Mitchell*, 2 Stew. & Port. (Ala.) 125.

⁶⁷ *Schwenk v. Umsted*, 6 Serg. & R. (Pa.) 351; *Schuykill Nav. Co. v. Farr*, 4 Watts & S. (Pa.) 362; *Blanchard v. Brown*, 1 Wallace, Jr. (U. S.), 309; *St. v. Moore*, 28 Ohio St. 595; *O'Byrne v. St.*, 29 Ga. 36; *Cleveland etc. R. Co. v. Stanley*, 7 Ohio St. 155. But see *McDermott v. Hoffman*, 70 Pa. St. 31. And where less than twelve of the special jurors appeared, and the jury was completed by talesmen, peremptory challenges were allowed. *Cleveland etc. R. Co. v. Stanley*, supra. For this reason a struck jury was never granted at common law for the trial at bar of a capital case (*Farrington's Case*, *Sir T. Jones*, 222), since this would deprive the prisoner of his challenges. *Rex v. Duncombe*, 12 Mod. 224.

⁶⁸ Co. Litt. 156. b.; 2 Hawk. P. C., ch. 43, § 7; 2 Hale P. C. 268; *Trials per Pais* (1725), 455.

⁶⁹ 2 Hale P. C. 268.

⁷⁰ Kel. 36. It is inconceivable that this should have been regarded as a matter of importance, since the court clearly had the right to proceed in disregard of such excessive challenging. *St. v. Gainer*, 2 Hayw. (N. C.) 140; *Funk v. Ely*, 45 Pa. St. 444. It is said the enlightenment of our law demands a showing of prejudice for such an error. *Stevens v. Railroad*, 26 R. I. 90, 58 Atl. 492. In South Carolina it is held there arises a presumption of prejudice. *St. v. Anderson*, 59 S. C. 229, 37 S. E. 820.

⁷¹ Code Ala. 1907, § 7275; Ark. Dig. 1904, § 2356; Cal. Penal Code, § 1070; *People v. Clough*, 59 Cal. 428; *People v. Harris*, 61 Cal. 136; *People v. O'Neil*, 61 Cal. 435; Laws Colo. 1905, § 181; G. S. Conn. 1902, § 1507; *St. v. Neuner*, 49 Conn. 232; Laws Del. 1893, ch. 109, § 19; *Bush's Dig. Fla.* 1906, § 3911; Code Ga. 1895, § 974; R. S. Ill. 1909, p. 1704, § 69; Ind. Rev. 1908, § 556;

doubt except in the case of two or more persons jointly indicted. In civil cases the number is variously fixed at *two*,⁷² *three*,⁷³ *four*⁷⁴ and *five*,⁷⁵ and in one jurisdiction at *one-fourth* of the jurors summoned.⁷⁶

§ 45. Number in Cases of Persons Jointly Indicted.—Though formerly doubted,⁷⁷ it is now generally settled⁷⁸ that, where several

Iowa Code 1897, § 3686; Comp. L. Kan. 1909, § 6774; Ky. Cr. Code, 1909, § 3079; R. S. La. 1904, p. 980, § 14; St. v. Everage, 33 La. Ann. 120; St. v. Demouchet (La.), 3 South. 565; R. S. Me. 1903, ch. 84, § 88; R. C. Md. 1904, art. 51, § 19; G. S. Mass. 1902, p. 1591, § 29; R. C. Miss. 1906, § ———; Comp. L. Mich. 1897, § 11944; Minn. Stats. 1905, § 5387; R. S. Mo. 1909, § 5223; G. S. Neb. 1907, § 2628; Comp. L. Nev. 1873, § 1960; Gen. Stat. N. H. 1901, p. 722; Rev. N. J. 1896, p. 1852, § 41; Rev. Stat. N. Y. (6th ed.), p. 1029, § 9 et seq.; N. Y. Code Cr. Proc. (ch. 442, Laws of 1881), § 370; Rev. N. C. 1908, § 3264; R. S. Ohio, 1910, § 13649; Gen. Laws Ore. 1902, § 1389; Pa. Dig. p. 1038, § 42; Gen. Stat. R. I. 1909, ch. 291, § 2; R. S. S. C. 1902, § 2940; Stat. Tenn. 1896, § 5825; R. S. Tex. 1897, § 3212; R. L. Vt. 1906, § 2274; Code Va. 1904, § 45; Rev. Stat. W. Va. 1906, § 4568; Rev. Stat. Wis., 1908, § 4689. Federal Courts: R. S. U. S. 1901, § 1031. Construed in U. S. v. Coppersmith, 4 Fed. 198. Cases removed from State courts are governed by the Federal, and not by the State statute. St. v. O'Grady, 3 Woods (U. S.), 496. Construction of former Federal statutes: Thomp. & Mer. Jur., § 164; U. S. v. Shackelford, 18 How. (U. S.) 588; U. S. v. Reed, 2 Blatchf. (U. S.) 435; U. S. v. Cottingham, 2 Blatchf. (U. S.) 470; U. S. v. Tallman, 10 Blatchf. (U. S.) 21; U. S. v. Devlin, 6 Blatchf. (U.

S.) 71, 7 Int. Rev. Rec. 94; S. C. Crim. Code § 55; Watkins v. U. S., 1 Ind. T. 364, 41 S. W. 1044.

⁷² R. S. Me. 1903, ch. 84, § 88; Comp. L. Mich. 1897, § 10238; G. S. Mass. 1902, p. 1591, § 29; G. S. Vt. 1906, § 1580; R. S. S. C. 1902, § 2940; Gen. Stat. N. H. 1901, p. 722, § 17; R. S. Ohio, 1910, § 7082; Stat. Tenn. 1896, § 5824; G. S. Conn. 1902, § 672.

⁷³ Rev. N. J. 1896, p. 1852, § 40; R. S. Ill. 1909, p. 1376, § 21; Laws Minn. 1905, § 5387; Comp. L. Kan. 1909, § 5874; Stats. Wis. 1908, § 2851; Bush Dig. Fla. 1906, § 1492; Gen. Laws Ore. 1902, § 125; R. S. Del. 1893, p. 807, § 19; Ark. Dig. Stat. 1904, § 4536; R. S. Laws N. M. 1897, § 956; Comp. L. Utah, 1907, § 3143.

⁷⁴ Code Ala. 1907, § 4634; Cal. Code Civ. Proc., § 601; Rev. Stat. W. Va. 1906, § 3717; Civ. Code Prac. La. 1904, § 997; Rev. N. C. 1908, § 1436; Bright. Purd. Pa., p. 2074, § 77; Code Miss. 1906, § ———; Comp. L. Nev. 1900, § 3258; Colo. Civ. Code, 1905, p. 418, § 185.

⁷⁵ Rev. Code Iowa, 1908, § 3686. Where the number varies according to grade of offense charged this applies to infants the same as to adults. St. v. Davidson, 71 Kan. 494, 80 Pac. 945. And where the offense is against a child. St. v. Cannon, 72 N. J. L. 46, 60 Atl. 177.

⁷⁶ G. S. Ky. 1908, § 3686. St. v. Ballou, 20 R. I. 607, 40 Atl. 861.

⁷⁷ 2 Hale, P. C. 263; 1 Chitty C. L. 535; St. Dreany, 65 Kan. 292, 69 Pac. 182.

persons are jointly indicted, they must join in their challenges, and cannot claim for each the number accorded by the common law or by statute, except in cases where the statute accords them this right, which it does in some jurisdictions,⁷⁹ either in express terms or by reasonable interpretation.⁸⁰ Many statutes, on the other hand, expressly require that defendants jointly indicted shall join in their challenges;⁸¹ and it would seem that, where the question is not governed by statute, if, in the judgment of the court, good cause exists for trying the defendants severally, the court may order a

⁷⁸ U. S. v. Marchant, 4 Mason (U. S.) 158, affirmed, 12 Wheat. (U. S.) 480; U. S. v. Wilson, Baldw. C. C. (U. S.) 81; Hawkins v. St., 9 Ala. 137; Bixbe v. St., 6 Ohio, 86; St. v. Wise, 7 Rich. L. (S. C.) 412; Hill v. St., 2 Yerg. (Tenn.) 246; Maton v. People, 15 Ill. 536; St. v. McGrew, 13 Rich. L. (S. C.) 316; U. S. v. Gibert, 2 Sumn. 19; U. S. v. Kelly, 4 Wash. C. C. 528; St. v. Soper, 16 Me. 293; St. v. Conley, 39 Me. 78; St. v. Smith, 2 Ired. L. (N. C.) 402; St. v. Stoughton, 51 Vt. 362, 8 Reporter, 762; People v. Loughlin, 3 Utah, 133; Cochran v. U. S., 14 Okl. 108, 76 Pac. 672; Carpenter v. People, 31 Colo. 284, 72 Pac. 1072; Booth v. Territory (Ariz.), 80 Pac. 354 (not reported in state reports).

⁷⁹ R. S. Ohio, 1910, § 13655; G. S. Neb. 1907, § 3631; Bright. Purd. Pa., p. 1038, § 44; Rev. N. C. 1904, § 3263; Stats. Wis. 1908, § 4690. In *Texas* persons jointly indicted are entitled to challenge separately, but not to the same number as is allowed to a single defendant. R. S. Tex. 1897 (Code Crim. Proc.) arts. 635, 652. St. v. Caron, 118 La. 349, 42 South. 960; St. v. Rachman, 68 N. J. L. 1205, 53 Atl. 1046.

⁸⁰ U. S. v. Marchant, 4 Mason (U. S.), 158, 12 Wheat. (U. S.) 480; U. S. v. Johns, 4 Dall. (U. S.) 412; Hill v. St., 2 Yerg. (Tenn.) 246; Hawkins v. St., 9 Ala. 137; Brister v. St., 26 Ala. 107; U. S. v. Haskell,

4 Wash. C. C. (Va.) 412, n; Bixbe v. St., 6 Ohio, 86; Maton v. People, 15 Ill. 536; St. v. McLean, 11 La. Ann. 546; St. v. Reed, 47 N. H. 466; Cruce v. St., 59 Ga. 83; St. v. Stoughton, 51 Vt. 362, 8 Reporter, 762; Smith v. St., 57 Miss. 822; St. v. Durien, 29 Kan. 688. Compare St. v. Ford, 37 La. Ann. 443; St. v. Wolf, 112 Iowa, 458, 84 N. W. 536. Such an interpretation was adopted by the federal circuit court of appeals, where an indictment charged nine offenses, in different counts, where the statute said there should only be prosecution for three offenses in any six months. *Betts v. U. S.*, 132 Fed. 228, 65 C. C. A. 452. But consolidating for one trial a number of indictments, where all of the counts might have been included in one, does not give challenges but for one case. *Krause v. U. S.*, 147 Fed. 442, 78 C. C. A. 642.

⁸¹ Rev. Stat. U. S. 1901, § 819; R. S. Mo. 1909, § 5223; Code Miss. 1906, § —; Laws. Minn. 1905, § 5382; Gen. Laws Ore. 1902, § 1388; Code Va. 1904, § —; Ky. Cr. Code, 1909, § —; Cal. Penal Code, § 1056; Ark. Dig. Stat. 1904, § 2372; R. S. Del. 1893, p. 979, § 16; Laws Utah, 1907, § 4817; Rev. Stat. W. Va. 1906, § 3717; Comp. L. Ariz. 1901, § 903; Hudson v. St., 137 Ala. 60, 34 South. 854; St. v. Rachman, 68 N. J. L. 1205, 53 Atl. 1046.

severance, although they may prefer to be tried jointly.⁸² By some statutes the right of *election* is given them, either to be tried separately or jointly.⁸³ Although the defendants, so jointly indicted, may severally be permitted the statutory number of challenges, this does not increase the *number allowed to the State* beyond the number allowed to it in the case of a single defendant.⁸⁴ The prosecution cannot complain of this, since it is a matter of its own choice to proceed against the defendants jointly, when it might have proceeded against them severally.⁸⁵ It should be added that whatever view is taken of this question, it has been *usual*, and it is hence *proper*, to allow them to elect to be tried jointly and hence to join in their challenges, or to be tried separately.⁸⁶

§ 46. [Continued.] In Case of Several Parties Plaintiffs or Defendants in a Civil Action.—Where several persons are joined as plaintiffs or defendants in a civil action, the general rule, arising upon the express terms or the reasonable interpretation of statutes, is, that the number of peremptory challenges is restricted to each aggregate party considered as a unit,—that is to say, all the parties plaintiff or defendant must join in their challenges.⁸⁷ But in one

⁸² *Stewart v. St.*, 58 Ga. 577. See *Cruce v. St.*, 59 Ga. 83, 88. In the earlier case of *Hawkins v. St.*, 13 Ga. 322, it was held that, where the evidence was of such a nature that the acquittal of one would be the acquittal of both, they might be required to join in their challenges.

⁸³ *People v. McCalla*, 8 Cal. 301; *Caldwell v. St.*, 34 Ga. 10; *Horne v. St.*, 37 Ga. 80; *R. S. Ohio*, 1910, § 13677; *Rev. Stat. W. Va.* 1906, § 4573; *Hudson v. St.*, 137 Ala. 60, 34 South. 854.

⁸⁴ *Mahan v. St.*, 10 Ohio, 232; *Savage v. St.*, 18 Fla. 909; *St. v. Earle*, 24 La. Ann. 38; *St. v. Gay*, 25 La. Ann. 472. The statute of *Texas* allows the State one-half the number of peremptory challenges which may be exercised by each of the joint defendants. *R. S. Tex.* 1879 (Code Cr. Prob.), arts. 635, 652. So in *Louisiana*: *La. Acts* 1878, No. 24;

St. v. Green, 33 La. Ann. 1408. Contra, *St. v. Marsh*, 70 Vt. 288, 40 Atl. 836.

⁸⁵ *Wiggins v. St.*, 1 Lea (Tenn.), 738.

⁸⁶ 1 Chitty Cr. L. 535; *Charnock's Case*, 3 Salk. 81, Holt, 133; 12 How. St. Tr. 1378; *Swan and Jeffrey's Case*, Foster Cr. L. 104, 106; *Grahme's Case*, 12 How. St. Tr. 673; *St. v. Monaquo*, T. U. P. Charlt. (Ga.) 22; *People v. McCalla*, 8 Cal. 301; *St. v. Yancey*, 3 Brev. (S. C.) 306; *Com. v. James*, 99 Mass. 438. In one old case it was held that they could not insist on separate trials. *Noble's Case*, 15 How. St. Tr. 731, 746. Compare *People v. Howell*, 4 Johns. (N. Y.) 296, and *U. S. v. Sharp*, 1 Pet. C. C. (U. S.) 118.

⁸⁷ *Schmidt v. Chicago etc. R. Co.*, 83 Ill. 405. To the same effect, see, *Snodgrass v. Hunt*, 15 Ind. 274; *Sodousky v. McGee*, 4 J. J. Marsh.

jurisdiction, this rule is restricted, in the case of defendants, to instances where they *plead jointly*,⁸⁸ and where they plead separately by different counsel, they are allowed to challenge separately, on the theory that, if the right of challenge could not be exercised without agreement among the parties on either side, it might be lost altogether.⁸⁹ But this conception would seem not to apply to parties plaintiff, since they generally join as such by their voluntary action.

(Ky.) 267, 269; *Stone v. Segur*, 11 Allen (Mass.) 568; *Bryan v. Harrison*, 76 N. C. 360; *St. v. Reed*, 47 N. H. 466; *Blackburn v. Hays*, 4 Coldw. (Tenn.) 227. The statutes of the United States and of many of the States expressly require the parties plaintiff or defendant in a civil case to join in making their peremptory challenges. Rev. Stat. U. S., § 819; Rev. St. Mo. 1909, § 7281; Gen. Laws Ore. 1902, § 125; Rev. Code Iowa, 1897, § 4170; Laws Minn. 1905, § 3678; Gen. Laws N. M. 1900, § 3258. The Compiled Laws of Nevada provide that the several persons plaintiffs or defendants must join in a challenge before it can be made, "unless the court otherwise order or direct." § 1224. See, also, Comp. L. Utah, 1876, § 1387; *Freiberg v. South Side El. R. Co.*, 221 Ill. 508, 77 N. E. 920; *Hall v. Hargadine etc. Co.*, 23 Tex. Civ. App. 149, 55 S. W. 747. Though their interests be wholly distinct, e. g., condemnation proceedings. *San Luis Obispo County v. Simas*, 1 Cal. App. 175, 81 Pac. 972. If against owner of fee and his tenants' challenges are joint. *Freiberg v. Elevated Co.*, 221 Ill. 508. Where cases are consolidated for trial challenges are to be allowed as for one case only. *Hodges v. Southern Pac. Co.*, 3 Cal. App. 307, 86 Pac. 620. But it has been ruled, if the causes of action are such as to require sepa-

rate verdicts, the challenges are to be as if each case were tried separately. *Butler v. Evening Post Pub. Co.*, 148 Fed. 821, 78 C. C. A. 511.

⁸⁸*Stroh v. Hinchman*, 37 Mich. 490. In Texas the rule is for separate challenges, if the defendants are at variance with each other in certain particulars, as to which, see *First Nat. Bank v. R. Co.*, 97 Tex. 201, 77 S. W. 410. Where in a will contest proponents joined with certain contestants to defeat other contestants, it was held erroneous to allow them double the number of challenges. *Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242. In Kentucky antagonistic interests do not give increased challenges. *Cumberland Telephone Co. v. Ware's Admr.*, 24 Ky. Law Rep. 2519, 74 S. W. 289.

⁸⁹See *Frazer v. Jennison*, 42 Mich. 206. Where there is to be an apportionment of damages against defendants separately, the total being certain and the apportionment uncertain, for example, against carriers for damage to freight, this makes separate causes on trial giving full challenges to each defendant, under Texas rule. *Texas & Pacific R. Co. v. Stell* (Tex. Civ. App.), 61 S. W. 980 (not reported in state reports). An intervenor whose interest coincides with that of defendant must join in his challenges. *Bruce v. First Nat. Bank*, 25 Tex.

§ 47. **Power of Legislature to Increase or Diminish Number.**—Statutes increasing or diminishing the number of challenges allowed by the common law, do not infringe the provision of American constitutions that “the right of trial by jury shall remain inviolate;”⁹⁰ and there is much authority for the conclusion that this may be done by a statute enacted after the commission of the offense for which the prisoner is brought to trial, without infringing his constitutional rights.⁹¹

§ 48. **Canons of Construction touching the Number of Challenges.**—Construing these statutes, it is a settled principle, in determining the number of peremptory challenges to which the parties are entitled, to consider the extent of the punishment to which the prisoner *may* be subjected, and not the punishment which actually *was assessed*,⁹² and to disregard the fact that the offense charged against him is one for which the court may impose a shorter term of imprisonment,⁹³ unless the prosecuting attorney announces that he will ask merely for a conviction for a *lower grade* of the crime.⁹⁴ In determining whether the action is a *civil* or *criminal* action within the meaning of such statutes, regard is generally had to its *form*. If it proceeds by indictment or information for a public offense, it

Civ. App. 295, 60 S. W. 1006; Hoggatt v. Traction Co. (Tex. Civ. App.), 118 S. W. 807.

⁹⁰ Walter v. People, 32 N. Y. 147, 159. See, also, Jones v. St., 1 Ga. 610; Boon v. St., 1 Ga. 618; Com. v. Walsh, 124 Mass. 32; St. v. Wilson, 48 N. H. 398; St. v. Pike, 49 N. H. 406; Com. v. Dorsey, 103 Mass. 412; Hartzell v. Com., 40 Pa. St. 462; Warren v. Com., 37 Pa. St. 45; Mountfort v. Hall, 1 Mass. 443; Hudgins v. St., 2 Ga. 173; St. v. McClear, 11 Nev. 39, 49; Cregier v. Bunton, 2 Strob. L. (S. C.) 487; Dowling v. St., 5 Sm. & M. (Miss.) 664; St. v. Ryan, 13 Minn. 370; Stokes v. People, 53 N. Y. 164; St. v. Hoyt, 47 Conn. 518.

⁹¹ St. v. Hoyt, 47 Conn. 518; Walston v. Com., 16 B. Mon. (Ky.) 15; St. v. Ryan, 13 Minn. 370. Compare Dowling v. St., 5 Smed. & M. (Miss.)

664; Rafe v. St., 20 Ga. 60; Jesse v. St., 20 Ga. 156; Beers v. Beers, 4 Conn. 535, 539; Colt v. Eves, 12 Conn. 243; Re Penn. Hall, 5 Pa. St. 204, 208; Stokes v. People, 53 N. Y. 164; Edmondson v. St. (Tex. Cr. R.), 44 S. W. 154 (not reported in state reports.)

⁹² Fowler v. St., 8 Baxt. (Tenn.) 573; People v. Logan, 123 Cal. 414, 56 Pac. 56. This applies also to a capital case, on a new trial, in a state where the ruling is that a verdict of guilty in a lower, is an acquittal of the higher degree. People v. Smith, 134 Cal. 453, 67 Pac. 754.

⁹³ Dull v. People, 4 Denio (N. Y.) 91.

⁹⁴ People v. Comstock, 55 Mich. 405; St. v. Hunt, 128 N. C. 584, 38 S. E. 473; Goins v. St., 46 Ohio St. 457, 21 N. E. 476.

is a criminal action; if in any other mode, it is a civil action.⁹⁵ This is not, however, an unvarying test; for we find that it has been held that a *bastardy* proceeding, prosecuted by the State by information, is a *civil* suit;⁹⁶ and so is a complaint under a statute for a *forcible entry and detainer*,⁹⁷ and an action prosecuted for the violation of a municipal ordinance in selling *intoxicating liquors*;⁹⁸ while another court has taken the view that a proceeding *in rem* by the State against certain intoxicating liquors kept and sold contrary to law, to procure their forfeiture under a statute, is criminal in its nature.⁹⁹ The offense of *prosecuting false claims* against the government,¹ or of *counterfeiting*,² is not a *felony*, within the meaning of § 819 of Rev. Stat. U. S., and therefore the accused is not entitled to more than *three* peremptory challenges. The fact that the indictment contains *two counts*, stating similar offenses separately, does not increase the number of the defendant's peremptory challenges.³

§ 49. **Right of Prosecution to stand Jurors aside.**—Originally the crown had an unlimited right of peremptory challenge.⁴ This was remedied by statute 33 Edw. I., Stat. 4, called the "Ordinance for Inquests," which restricted the right of the crown to challenges for cause shown.⁵ It applied to all causes, civil and criminal; and,

⁹⁵ See *State v. Pate*, Busb. (N. C.) 244.

⁹⁶ *Ibid*; *Dorgan v. St.*, 72 Ala. 173; *Kremling v. Lallman*, 16 Neb. 280.

⁹⁷ *Quinebaug Bank v. Tarbox*, 20 Conn. 510; *Miner v. Brown*, 20 Conn. 519.

⁹⁸ *Kleinback v. St.*, 2 Speers L. (S. C.) 418.

⁹⁹ *Com. v. Certain Intoxicating Liquors*, 107 Mass. 216.

¹ *U. S. v. Daubner*, 17 Fed. 793.

² *U. S. v. Coppersmith*, 2 Flip. (U. S.) 546. In a case of *murder* in *Maine*, the State is entitled to *five*: *St. v. Chadbourne*, 74 Me. 506. No right to challenge *talesmen* supplied in place of jurors challenged, under Gen. St. S. C. 523: *Burckhalter v. Coward*, 16 S. C. 435. Nor misapplying assets by an officer of national bank under sec. 5209 R. S. U. S.

Jewett v. U. S., 100 Fed. 832, 41 C. C. A. 88; *Tyler v. U. S.*, 106 Fed. 137, 45 C. C. A. 247.

³ *Smith v. St.*, 8 Lea (Tenn.) 386; *St. v. Skinner*, 34 Kan. 256.

⁴ 1 Chitty Cr. L. 533.

⁵ The following is the text of the statute: "Of inquests to be taken before any of the justices, and wherein our lord the King is party, howsoever it be, it is agreed and ordained by the King and all his council, that from henceforth, notwithstanding it be alleged, by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the

as it was found in practice to put the crown at a disadvantage, it was evaded by the fiction of allowing the crown's counsel to direct successive jurors to stand aside, without showing any cause against them, until the whole panel had been gone over; after which, in case of a deficiency, the crown was obliged to show cause in respect of such members.⁶ As the court had the power of directing the sheriff to summon any number of jurors in its *discretion*, this power of standing them aside placed the prisoner, where the court was disposed to side with the crown, at an enormous disadvantage. Nevertheless, the practice, though often and ably challenged, has apparently stood in England to the present time;⁷ was adopted in this

same challenge shall be inquired of according to the custom of the court." This statute was re-enacted in 6 Geo. IV., c. 50, § 29. See *Reg. v. Frost*, 9 Car. & P. 129, 137. It was ruled in a *nisi prius* case shortly after the passage of this last act, that the crown must show cause upon making the challenge. See *Sawdon's Case*, 2 Lewin C. C. 117. Such, however, is not the law. The later statute made no change in the rule. *Mansell v. Reg.*, 8 El. & Bl. 54; *Rex v. Parry*, 8 Car. & P. 836.

⁶ *Staunford P. C.* 162, b.; 2 Hawk. P. C., ch. 43, § 3; 2 Hale P. C. 271; 1 Chitty Cr. L. 534; Bac. Abr. Juries E. 10; 4 Bl. Com. 353; *Fitzharris' Case*, 8 How. St. Tr. 436; *Count Conigsmark's Case*, 9 How. St. Tr. 12; *Stapleton's Case*, 8 How. St. Tr. 503; *Lord Grey's Case*, 9 How. St. Tr. 128, Skin. 82; *Cook's Case*, 13 How. St. Tr. 318; *Cowper's Case*, 13 How. St. Tr. 1108; *Layer's Case*, 16 How. St. Tr. 135; *Brandreth's Case*, 32 How. St. Tr. 755, 772; *Reg. v. Geach*, 9 Car. & P. 499; *Reg. v. Frost*, 9 Car. & P. 129; *Mansell v. Reg.*, 8 El. & Bl. 54; *Reg. v. Dougall*, 18 Low. Can. Jur. 85. The panel having been gone over and a jury not procured, the proper practice was to call over the whole of the panel in the same order as before, omitting those who

had previously been challenged by the prisoner, and, as each juror appeared, for the prosecuting counsel to state the crown's cause of challenge. If this challenge was not allowed, and the juror remained unchallenged by the accused, he was sworn. *Reg. v. Geach*, 9 Car. & P. 499. The panel might be gone over a second time and the same jurors stood aside a second time, if certain members of the panel, absent when their names were first called, returned in season for the second calling. *Cook's Case*, 13 How. St. Tr. 311, 317; *Mansell v. Reg.*, 8 El. & Bl. 54. In cases of *misdemeanor* this right of standing jurors aside was exercised by the *private prosecutor*. *Reg. v. McGowen*, cited in *Reg. v. McCartie*, 11 Ir. C. L. (n. s.) 188. By the Canada statute (*Can. Stat. 37 Vict.*, ch. 38, § 11) this right cannot be exercised by a private prosecutor in a criminal prosecution for libel. See *Reg. v. Patteson*, 36 Up. Can. Q. B. 129.

⁷ *Horne Tooke's Case* (Anno 1794), 25 How. St. Tr. 1, 25; *O'Coigly's Case*, 26 How. St. Tr. 1191, 1231; *Mansell v. Reg.*, 8 El. & Bl. 54, 72, *Deers & B.* 375. See, also, *Reg. v. Benjamin*, 4 Up. Can. C. P. 179; *Reg. v. Fellows*, 19 Up. Can. Q. B. 48.

country, together with the ancient statute of Edward on which it was founded,⁸ and has been retained in some States even after the passage of statutes giving peremptory challenges to the prosecution,⁹ though in such cases its retention cannot be defended upon principle.¹⁰

ARTICLE III.—CHALLENGES FOR GENERAL DISQUALIFICATION.

SECTION

52. Of Challenges for Cause.
53. Lack of the Statutory Qualifications.
54. Alienage.
55. Ignorance of the English Language.
56. Inability to Read and Write.
57. Party to Another Suit at Same Term.
58. Prior Service as a Juror within a Stated Period.

§ 52. Of Challenges for Cause.—These were divided in the old law into two classes: 1. *Principal* challenges. 2. Challenges to the

⁸ *Com. v. Addis*, 1 Bro. (Penn.) 285, and cases cited in note; *St. v. Barrontine*, 2 Nott & McC. (S. C.) 553; *U. S. v. Marchant*, 12 Wheat. (U. S.) 480; *U. S. v. Wilson*, Bald. C. C. (U. S.) 78, 82; *Com. v. Marrow*, 3 Brewst. (Pa.) 402, sub nom. *Com. v. Marra*, 8 Phila. (Pa.) 440; *Jewell v. Com.*, 22 Pa. St. 94; *Com. v. Jolliffe*, 7 Watts (Pa.), 585; *St. v. Arthur*, 2 Dev. (N. C.) 217; *St. v. Craton*, 6 Ired. L. (N. C.) 164; *St. v. Benton*, 2 Dev. & Bat. (N. C.) 196; *St. v. Stalmaker*, 2 Brevard, (S. C.) 1; *Sealy v. St.*, 1 Ga. 213; *U. S. v. Douglass*, 2 Blatch. (U. S.) 207; *Com. v. Twitchell*, 1 Brewst. (Pa.) 551; *Waterford etc. Tp. v. People*, 9 Barb. (N. Y.) 161; *People v. Atchinson*, 7 How. Pr. (N. Y.) 241; *People v. Henries*, 1 Park. Cr. (N. Y.) 579; *St. v. Shaw*, 3 Ired. L. (N. C.) 532; *St. v. Bone*, 7 Jones, L. (N. C.) 121. But see *Montague v. Com.*, 10 Gratt. (Va.) 767; *U. S. v. Shackelford*, 18 How. (U. S.) 588.

⁹ *Warren v. Com.*, 37 Pa. St. 45;

Haines v. Com., 100 Pa. St. 317; *Smith v. Com.*, Id. 324; *St. v. McNinch*, 12 S. C. 89; *St. v. Benton*, 2 Dev. & B. (N. C.) 200; *St. v. Stephens*, 13 S. C. 285; *St. v. Compaquet*, 48 La. Ann. 476, 21 South. 46; *Matthis v. St.*, 31 Fla. 291. Federal court will follow practice of standing jurors aside in a state doing same as by a rule of that court based on sec. 800, R. S. U. S., the right of peremptory challenges being also exercised. *Sawyer v. U. S.*, 202 U. S. 150. Pennsylvania statute has later abolished this rule. *Com. v. Conroy*, 207 Pa. 212, 56 Atl. 427. Those stood aside, in a struck jury, are returned to the box and redrawn when panel is exhausted. *Brown v. St.*, 62 N. J. L. 666, 42 Atl. 811.

¹⁰ *Sealy v. St.*, 1 Ga. 213; *Reynolds v. St.*, 1 Ga. 222; *U. S. v. Butler*, 1 Hughes (U. S.) 457. The latter case was tried before Chief Justice Waite in the U. S. Circuit Court for the District of South Carolina, April, 1877.

favor. The former were tried by the court;¹¹ the latter by persons sworn specially to try them, called *triors*.¹² The former class seems to have included all causes of challenge which were such as matter of law, and which, upon being shown, could accordingly be allowed by the court; the latter appears to have included the almost infinite mass of grounds of challenge of a nature so dubious as not to fall within the former class. The second ground seems to have included everything that might give rise to a suspicion of partiality springing out of the relations of the parties to the venire-man and the circumstances of the particular case.¹³ With the general abolition of the practice of swearing triors to determine challenges to the favor,¹⁴ the distinction between these two kinds of challenges has so far disappeared in this country that it may now be disregarded;¹⁵ and these latter are in turn divided into challenges for "*implied bias*" and challenges for "*actual bias*."¹⁶

§ 53. **Lack of the Statutory Qualifications.**—First, then, as to challenges for general disqualification; and of these a numerous class is grounded upon a lack of the statutory qualifications for jury duty. Here it may be premised that in general it must appear that

¹¹ *People v. Stout*, 4 Park. Cr. (N. Y.) 71, 109; *St. v. Potter*, 18 Conn. 166, 171.

¹² *Rex v. Kirwan*, cited in Finlay's Irish Dig., p. 347; *People v. Dewick*, 2 Park. Cr. (N. Y.) 230; *Mima Queen v. Hepburn*, 2 Cranch C. C. (U. S.) 3; *U. S. v. Watkins*, 3 Cranch (U. S.), 443; *Boon v. St.*, 1 Ga. 618; *Copenhagen v. St.*, 14 Ga. 22; *McGuffie v. St.*, 17 Ga. 497; *McCormick v. Brookfield*, 4 N. J. L. 69; *Joice v. Alexander*, 1 Cranch C. C. (U. S.) 528; *Reason v. Bridges*, 1 Cranch C. C. (U. S.) 478.

¹³ *Co. Litt.* 157a.

¹⁴ The practice of ascertaining the qualifications of jurors by triors seems to have been abolished in some States at an early date. *St. v. Baldwin*, 1 Const. Rep. (S. C.) 296; *McGowan v. St.*, 9 Yerg. (Tenn.) 184; *St. v. Wall*, 9 Yerg. (Tenn.) 349; *Rollins v. Ames*, 2 N. H. 350;

St. v. Potter, 18 Conn. 166, 171; *St. v. Knight*, 43 Me. 11. That challenges based on bias are not mentioned in the statute does not exclude them. *St. v. Miller*, 156 Mo. 76, 56 S. W. 907.

¹⁵ The distinction is retained in several jurisdictions, by statutes (cited in the next note), drawn upon the model of the statute of New York, under the name of "General Causes of Challenge and Particular Causes of Challenge."

¹⁶ *New York Code Crim. Proc.* 1881, §§ 374-378; *Ark. Dig.* 1904, § 2361; *Cal. Penal Code*, §§ 1071-1074; *Ky. Cr. Code*, 1909, § 3079; *Gen. Laws Ore.* 1902, §§ 122, 123; *Laws Minn.* 1905, §§ 5391, 5392; *Comp. L. Nev.* 1900, § 3259; *Laws Utah*, 1907, § 3144. This system is found in the *Iowa Revision* of 1860 (§§ 4768-4771), but not in the later codes of 1873 and 1880.

the juror is qualified *at the time of service*, and not merely that he was qualified when the jury list was prepared.¹⁷ Such challenges have been made, and allowed or denied, under various statutes, according to the facts of the case on the ground of *non-residence*,¹⁸ not a *voter*, though if he has qualified he need not be registered;¹⁹ not a *freeholder*, which means a freeholder of the county wherein the issue is tried,²⁰ though it will be sufficient if he has an *equitable interest* in land,²¹ as where he holds it by an ordinary *title bond*,²² not a *householder*, which term does not refer to the holding of a

¹⁷ 2 Hawk P. C., c. 43, § 13; Kelley v. People, 55 N. Y. 565; Armsby v. People, 2 Thomp. & C. (N. Y.) 157; St. v. Williams, 2 Hill (S. C.), 381; Orcutt v. Carpenter, 1 Tyler (Vt.) 250; Conway v. Clinton, 1 Utah, 215. But see St. v. Middleton, 5 Port. (Ala.) 484, 486; St. v. Ligon, 7 Port. (Ala.) 167. Compare People v. Shafer, 1 Utah, 260.

¹⁸ This happens where the venireman, having been a resident, has left the county with the purpose of not returning, but otherwise where he has left it for a temporary purpose, intending to return (People v. Stoncifer, 6 Cal. 405, 410); or where, after removal, he has acquired a new residence outside the county. Graham v. Trimmer, 6 Kan. 231. Residence for two months, *animo manendi*, sufficient: St. v. France, 76 Mo. 681. Where an *unorganized county* is attached to an organized county for judicial purposes, a resident of the former is qualified in respect of the latter. Groom v. St. (Tex.), 3 S. W. 668.

¹⁹ Craft v. Com., 24 Gratt. 602; St. v. Courtney, 28 La. Ann. 789; St. v. Salge, 1 Nev. 455. The constitutionality of a statute prescribing this qualification has been denied. Gibbs v. St., 3 Heisk. (Tenn.) 72; Gunter v. Patton, 2 Heisk. (Tenn.) 257. Under the Michigan statute an *alien* is qualified, if a *voter*. People v.

Scott, 56 Mich. 154; People v. Rosevear, Id. 158.

²⁰ 2 Hawk. P. C., c. 43, § 13; Day v. Com., 3 Gratt. 630; Wills v. St., 69 Ind. 286. See, also, St. v. Cooper, 83 N. C. 671; 21 Vin. Abr. 250, § 21. But contra, see New Orleans etc. R. Co. v. Hemphill, 35 Miss. 17. A statutory requirement of freehold qualification for *talesmen* will not by implication be extended to members of the *regular panel*. St. v. Wincroft, 76 N. C. 38. See, also, St. v. Wiley, 88 N. C. 691. In Texas a juror is disqualified who is not a *freeholder* in the State or a *householder* in the county Rev. St. Tex., art. 3009; Boren v. St. (Tex.), 4 S. W. 463, 466.

²¹ Com. v. Helmondoller, 4 Gratt. (Va.) 536; St. v. Ragland, 75 N. C. 12; Com. v. Carter, 2 Va. Cas. 319. Each member of a firm is qualified. People v. Owens, 123 Cal. 482, 56 Pac. 251.

²² Hawkins, *ubi supra*; New Orleans etc. R. Co. v. Hemphill, 35 Miss. 17. See, also, Com. v. Burcher, 2 Rob. (Va.) 826; Kerby v. Com., 7 Leigh (Va.), 747; Com. v. Cunningham, 6 Gratt. (Va.) 695. But one who has sold all the land owned by him when his name was put upon the list of jurors, and has taken a mortgage thereof to secure payment of the purchase money, is no longer a competent juror. Kelley v. People, 55 N. Y. 565; 2 Th. & C. (N. Y.) 157.

house,²³ but is used to designate the *head* or *master* of a *family*;²⁴ not a *taxpayer*, which means one who has not been *assessed* for taxes, and not one who possesses taxable property not listed.²⁵

§ 54. **Alienage.**—This has always been held good ground of challenge, though the objection is *waived* if not taken before the juror is sworn.²⁶

§ 55. **Ignorance of the English Language.**—Unquestionably the court has power to discharge a venire-man who is ignorant of the

²³ Nelson v. St., 57 Miss. 286; St. v. Wincroft, 76 N. C. 38. One court has held that one who "rents a room and boards" is a householder within such a statute (Robles v. St., 5 Tex. App. 347); but this is an obvious judicial aberration. Becoming disqualified after being sworn, or from reaching age limit does not preclude continuing to serve. Frank v. U. S., 16 App. D. C. 478.

²⁴ Bowne v. Witt, 19 Wend. (N. Y.) 475; Sylvester v. St., 72 Ala. 201 (house in wife's name). Compare Calhoun v. Williams, 32 Gratt. (Va.) 19; Bradford v. St., 15 Ind. 347; Thomp. Homest. & Ex., § 65.

²⁵ People v. Thompson, 34 Cal. 671. Compare St. v. Doan, 2 Root (Conn.) 451; St. v. Heaton, 77 N. C. 505 (taxes assessed but collector *enjoined*); St. v. Wincroft, 76 N. C. 38 (*conclusiveness* of finding of trial court on the question); St. v. Jennings, 15 Rich. L. (S. C.) 176 (excludes those who pay *poll taxes* only). In North Carolina *tales jurors* and members of the original panel must have *paid* their taxes for the *preceding year*; otherwise as to special venire-men. St. v. Carland, 90 N. C. 668. That is, for the year preceding the time when he was placed on the jury list, though not for the year preceding the trial. Sellers v. Sellers (N. C.), 3 S. E. 917; Read v. Peacock, 123 Mich. 244, 82 N. W. 53.

²⁶ Hollingsworth v. Duane, 4 Dall. (U. S.) 353; Rex v. Sutton, 8 Barn. & Cress. 417, 15 Eng. L. & Eq. 252; Com. v. Thompson, 4 Phila. (Pa.) 215; Borst v. Beecker, 6 Johns. 332. It has been held that the objection may be made even after verdict, if the fact was not discovered until then (Schumacker v. St., 5 Wis. 324; St. v. Vogel, 22 Wis. 471); but we shall hereafter see (post, § 116), that the weight of authority is greatly the other way. It is stated in one case to have been decided that alienage was not a good cause of challenge (Mima Queen v. Hepburn, 2 Cranch C. C. (U. S.) 3); but it seems from a conflicting report of the same case on appeal that the question was one of non-residence merely, and besides the objection was not taken until after the juror had been sworn. 7 Cranch (U. S.), 290, 297. The objection, though taken at the proper time, has been held unavailing where the accused went to trial *without exhausting his peremptory challenges*. Territory v. Hart (Mont.), 14 Pac. 768, 774. Under some systems one who has *declared his intention* of becoming a citizen under the Act of Congress, is competent. St. v. Pagels (Mo.), 4 S. W. 931; Rev. St. Mont., § 780; Territory v. Harding (Mont.), 12 Pac. 750; McNish v. St., 47 Fla. 69, 36 South. 176.

English language,²⁷ although such a disqualification is not mentioned in the statute;²⁸ and the better opinion is that this is a ground of challenge,²⁹ though one court has held the contrary.³⁰

§ 56. Inability to Read and Write.—This, though not a disqualification at common law,³¹ is made such by statute in one State,³² and perhaps in others. Although such a statute excepts cases where the requisite number who can read and write are not to be found in the county, the judge has no right to dispense with the statutory qualification because the county is *sparsely populated*.³³

§ 57. Party to another Suit at same Term.—It has been made a statutory cause of challenge that a juror has a suit pending for trial at the term of court for which he has been summoned as a juror.³⁴

§ 58. Prior Service as a Juror within a Stated Period.—Prior service as a juror within a stated period is made by some statutes, levelled against a well known class of persons called "professional jurors," a ground of challenge.³⁵

²⁷ *St. v. Ring*, 29 Minn. 78; *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *St. v. Rousseau*, 28 La. Ann. 579; *People v. Arceo*, 32 Cal. 40; *St. v. Marshall*, 8 Ala. 302; *Montague v. Com.*, 10 Gratt. (Va.) 767, 772.

²⁸ *Sutton v. Fox*, 55 Wis. 531, 42 Am. Rep. 744.

²⁹ *Lyles v. St.*, 41 Tex. 172; *Yanez v. St.*, 6 Tex. App. 429; *Etheridge v. St.*, 8 Tex. App. 133; *McCampbell v. St.*, 9 Tex. App. 124; *Nolen v. St.*, 9 Tex. App. 419. The same view was taken at nisi prius in *Fisher v. Philadelphia*, 4 Brewst. (Pa.) 395, and by the Supreme Court of Louisiana in *St. v. Push*, 23 La. Ann. 14 (disregarding *Gay v. Ardry*, 14 La. 288); *St. v. Gay*, 25 La. Ann. 472; *St. v. Tazwell*, 30 La. Ann. 884. In Louisiana the court holds it disqualification as to grand juror and within the court's discretion as to a petit juror. *St. v. Anderson*, 52 La. Ann. 101, 26 South. 781.

³⁰ *Trinidad v. Simpson* (Colo.), 22 Alb. L. J. 409, 10 Cent. L. J. 149, 5 Colo. 65. This last decision had reference to trials in a portion of

the State of Colorado in which nearly all the inhabitants spoke and understood only the Spanish language. It proceeded upon the impracticability of administering justice without the aid of the inhabitants of those counties; suggested that the proceedings could be made known to the jurors by means of *interpreters*; and held that the statute of the State which provided that judicial proceedings must be conducted in the English language (Civil Code Colo., § 405), would be satisfied by a *record* in that language.

³¹ *Ante*, § 10.

³² The Texas statute has been construed to mean inability to read and write the English language. *Wright v. St.*, 12 Tex. App. 163. Compiled Laws Missouri, 1909, § 7296.

³³ *Garcia v. St.*, 12 Tex. App. 335.

³⁴ *Riley v. Bussell*, 1 Heisk. (Tenn.) 294; *Plummer v. People*, 74 Ill. 361; *St. v. Smarr* (N. C.), 28 S. E. 54.

³⁵ *Brooks v. Bruyn*, 35 Ill. 392; *Bissell v. Ryan*, 23 Ill. 566; *Barker*

ARTICLE IV.—CHALLENGES FOR DISQUALIFICATION IN RESPECT OF THE PARTICULAR CASE.

Subdivision 1.—Challenges Grounded on Consanguinity, Affinity, Interest, Affection.

SECTION

59. Grounds of Principal Challenge at Common Law.
60. Member of the Grand Jury.
61. Consanguinity and Affinity.
62. [Continued.] Whether the Party so Related to the Venire-man must be a Party to the Record.
63. Members of Public Corporations.
64. Members of Private Corporations and Societies.
65. Interest in the Suit.
66. Membership in Associations for the Suppression of Crime.
67. Business Relations.
68. Prior Service in the Same or a Similar Case.

§ 59. Grounds of Principal Challenge at Common Law.—These statutory grounds of challenge are not, in the view of some courts, exclusive of others which existed at common law.³⁸ Indeed, it has

v. Hine, 54 Ind. 542; Christie v. St., 44 Ind. 408; Kassebaum v. St., 45 Ind. 277; Demaree v. St., 45 Ind. 299; Williams v. St., 45 Ind. 299. For the construction of such statutes, see Burden v. People, 26 Mich. 162; Gracia v. St., 5 Tex. App. 337; Tuttle v. St., 6 Tex. App. 556; Myers v. St., 7 Tex. App. 640; Etheridge v. St., 8 Tex. App. 133; St. v. Thorne, 81 N. C. 555. See Prov. Inst. v. Burnham, 128 Mass. 458; Famulener v. Anderson, 15 Ohio St. 473. That such a statute applies to one who had been summoned as a *talesman* in a street-opening case. Williams v. Grand Rapids, 53 Mich. 271; People v. Thacker, 108 Mich. 652, 66 N. W. 562. The service must have been actual and not as of one summoned and excused. Humphrey v. St. (Ark.), 88 S. W. 431 (not reported in state reports). And such as those excused on a panel that is quashed on challenge. Randolph v. St., 65 Neb. 520, 91 N. W. 356. Nebraska statute is construed not to embrace talesmen. Carlson &

Harrison v. Holm, 2 Neb. Unof. 38, 95 N. W. 1125. See Hughes v. St., 109 Wis. 397, 85 N. W. 333, which says no person "shall be drawn" etc. creates merely an exemption. Yates v. St., 43 Fla. 177, 29 South. 965. Held a mere cause of challenge. St. v. Hall, 24 Wash. 255, 64 Pac. 153. The Georgia statute relates to service at a regular term and does not disqualify from service at a special term. Wall v. St., 126 Ga. 86, 54 S. E. 815. It has also been ruled, that prior service as a grand juror is not meant in a challenge to a petit juror Nat. Bank of Boyertown v. Schufelt, 145 Fed. 509. Nor does it apply to special venire summoned in a capital case. Harrison v. St., 144 Ala. 20, 40 South. 568. The prior service disqualification has also been held not to be that in other cases at same term performed by bystanders. Mich. City v. Phillips, 163 Ind. 449, 71 N. E. 205.

³⁸ Birdsong v. St., 47 Ala. 68; Smith v. St., 55 Ala. 1 (overruling

been held not within the power of the legislature, under a *constitution* preserving the right of trial by jury, to deprive an accused person of the right of challenge for *actual bias*, which was a challenge to the favor at common law.³⁷ It is important, then, to bear in mind what were the grounds of challenge for principal cause at common law. These, according to Chief Baron Gilbert, were as follows: "All causes of objection from partiality or incapacity, consanguinity and affinity, are contained in the writ; if the juror be under the power of either party, as if counsel, serjeant of the robes, or tenant, these are expressly within the intent of the writ; so that, if he has declared his opinion touching the matter, or has been chosen arbitrator by one side, or done any act by which such an opinion might be conceived, as if he has eaten and drank at the expense of either party after he is returned. All incapable persons, as infants, idiots and people of non-sane memory, are likewise excluded."³⁸

Boggs v. St., 45 Ala. 30; Lyman v. St., 45 Ala. 72, and restoring St. v. Marshall, 8 Ala. 302; Chouteau v. Pierre, 9 Mo. 3; St. v. West, 69 Mo. 401; Lyles v. St., 41 Tex. 172; Lester v. St., 2 Tex. App. 433; Williams v. St., 44 Tex. 34; Caldwell v. St., 41 Tex. 86; Trinidad v. Simpson (Sup. Ct. Col.), 22 Alb. L. J. 409, 10 Cent. L. J. 149; Quesenberry v. St., 3 Stew. & Port. (Ala.) 308; Dumas v. St., 63 Ga. 600. Thus, it has been held a good ground of challenge that a juror had grossly *misbehaved* on a former occasion, by declaring that he had tried to acquit every one whom the judge desired to convict, and also that he "would as lief swear on a spelling book as a bible, because he was a Tom Paine man." McFadden v. Com., 23 Pa. St. 12, 17. At nisi prius, however, it was ruled by Coleridge, J., to be no ground for a challenge, that the juror had sat on several cases during the assize, and in no instance had consented to a verdict for the crown. Sawdon's Case, 2 Lewin, C. C. 117. Nor that, in a previous case, the juror had shown some dissatisfaction with the law as laid down by

the judge in favor of the challenging party. Pearse v. Rogers, 2 Fos. & Fin. 137; St. v. Brock, 61 S. C. 141, 39 S. E. 369.

³⁷ St. v. McClear, 11 Nev. 39. The statutory causes of challenge for "implied bias" are held to be exclusive of all others under this head. People v. Cotta, 49 Cal. 166; People v. Welch, 49 Cal. 174, 178. See also St. v. Thomas, 19 Minn. 484. But the definition of "actual bias" is sufficiently broad to embrace the most important objections formerly taken to the favor. Graff v. St., 155 Ind. 277, 58 N. E. 74. Thus though relationship be not within the disqualifying degree fixed by statute, if, in a particular case the court believes it carries bias, a challenge to a juror should be sustained. St. v. Hatfield, 48 W. Va. 561, 37 S. E. 626. See also St. v. Stentz, 30 Wash. 134, 63 L. R. A. 807.

³⁸ Gilb. Hist. C. P. 95. Other old authorities show that all of the foregoing were principal grounds of challenge. Co. Litt. 157a; Bac. Abr. Juries E. 5; Trials per Pais (6th ed.), 137, et seq. Serjeant Hawkins enumerates still others as

§ 60. **Member of the Grand Jury.**—To these may be added another which has come down to the present day, namely, that the person challenged was a member of the *grand jury* which returned the indictment;³⁹ but the mere fact that he was the *bailiff* who attended upon the grand jury which returned the indictment is not a disqualification, unless it appears that he knew something of their proceedings touching the particular case.⁴⁰

§ 61. **Consanguinity and Affinity.**—This is reckoned according to the rule of the *civil law*,⁴¹ as distinguished from that of the *canon law*, which latter was the English law of descent.⁴² In so reckoning, we reckon from one of the persons up to the common ancestor and then down to the other.⁴³ Thus, under this rule *first cousins* are related to each other in the *fourth degree*.⁴⁴ *Affinity* is the relationship which springs from the marriage tie, and which subsists between one marital partner and the blood relatives of the other.⁴⁵

allowed in criminal cases, namely, that the person challenged had been a member of the grand jury that returned the indictment; had a claim to the forfeiture which would ensue from the conviction; had declared an opinion beforehand of the defendant's guilt, or had "given his dogs the names of the King's witnesses." 2 Hawk. P. C., ch. 43, §§ 27, et seq.

³⁹ So enacted by Stat. 25 Edw. III., c. 3. See Oates' Case, 10 How. St. Tr. 1082; Cook's Case, 13 How. St. Tr. 311, 339; Rex v. Percival, 1 Sid. 243; Young v. Slaughterford, 11 Mod. 228; Com. v. Hussey, 13 Mass. 221. In an action for malicious prosecution, for causing the plaintiff to be indicted, he may challenge any of the jurors who were on the grand jury that found the indictment. Rogers v. Lamb, 3 Blackf. 155; Britt v. St., 112 Ga. 583, 37 S. E. 886; St. v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181. This does not disqualify as to service in suit on bond of officer indicted for embezzlement. Medlock v. Commissioners, 115 Ga. 337, 41 S. E. 579.

⁴⁰ Spittorff v. St. (Ind.), 8 N. E. 911.

⁴¹ 4 Kent Com. 412, 413.

⁴² 4 Kent Com. 374.

⁴³ Ibid. See an instructive note by the reporter to Hardy v. Sprowle, 32 Me. 310.

⁴⁴ For illustrations of the rule in its application to challenges, see Hardy v. Sprowle, 32 Me. 310; Hudspeth v. Herston, 64 Ind. 133; Rust v. Shackelford, 47 Ga. 538; Morrison v. McKinnon, 12 Fla. 552; Hartford Bank v. Hart, 3 Day (Conn.), 491; Churchill v. Churchill, 12 Vt. 661; St. v. Perry, 1 Busb. (N. C.) 330; Trullinger v. Webb, 3 Ind. 198; Denn v. Clark, 1 N. J. L. 446; O'Connor v. St., 9 Fla. 215. That the *father* of the venire-man is second cousin to the defendant's *mother* disqualifies under Mo. R. S., § 1894. St. v. Walton, 74 Mo. 270.

⁴⁵ See the definition of Chancellor Walworth in Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331, 333; also Dailey v. Gaines, 1 Dana (Ky.), 529. Relationship by affinity through affinity does not subsist—e. g., the husbands of first cousins are not

The rule will be best illustrated by the statement that the blood relatives of the wife stand in the same degree of affinity to the husband as they stand in consanguinity to her. It is important to bear in mind that, in theory of law, if one of the parties to the marriage which created the affinity be dead, the affinity still subsists if there be *issue living*; ⁴⁶ otherwise the tie is broken and the disqualification removed.⁴⁷ This consanguinity or affinity between a party and a juror disqualified the latter at common law, when it existed within the *ninth degree*.⁴⁸

§ 62. [Continued.] **Whether the Party so related to the Venire-man must be a Party to the Record.**—The general rule is that, in order that a juror shall be disqualified for this cause, he must stand so related to a party to the suit. It is ordinarily not enough that he is so related to one of the counsel,⁴⁹ or to a *brother*,⁵⁰ or *sister*,⁵¹ or *nephew*⁵² of the party. So, it has been held not a ground of such

related to each other. *Stringfellow v. St.*, 42 Tex. Cr. R. 588, 61 S. W. 719. See also *Baldwin v. St.*, 120 Ga. 188, 47 S. E. 558; *North Arkansas etc. Ry. Co. v. Cole*, 71 Ark. 38, 70 S. W. 312.

⁴⁶ *Co. Litt.* 156*a*; *Ibid.* 157*a*; *Pad-dock v. Wells*, 2 Barb. Ch. (N. Y.) 331; *Mounson v. West*, 1 Leon. 88; *Jacques v. Com.*, 10 Gratt. (Va.) 690; *Dearmond v. Dearmond*, 10 Ind. 191; *Ga. R. R. & Banking Co. v. Clarke*, 97 Ga. 652, 25 S. E. 366.

⁴⁷ *Cain v. Ingham*, 7 Cow. (N. Y.) 478; *Carman v. Newell*, 1 Den. (N. Y.) 25; *Vannoy v. Givens*, 23 N. J. L. 201; *St. v. Shaw*, 3 Ired. L. (N. C.) 532.

⁴⁸ 3 Bl. Comm. 363; 1 Chitty Cr. L. 541; *Tidd's Pr.* 853. Lord Coke stated the rule to be that if a juror be of kin to either party in any degree, however remote, he is disqualified to serve. *Co. Litt.* 157*a*. But this, if ever the common law, is certainly not such at the present day. No disqualification that venire-man is husband of third cousin of defendant. *Todd v. Gray*, 16 S.

C. 635. Nor that *uncle* of party married *aunt* of venire-man, and that *two uncles* of venire-man married *aunts* of the party,—all the marriages being dissolved by death, and no issue living. *Bigelow v. Sprague*, 140 Mass. 425. "Within" the prescribed degree includes that degree. *Hamilton v. St.*, 101 Tenn. 417, 47 S. W. 695.

⁴⁹ *Funk v. Ely*, 45 Pa. St. 444; *Wood v. Wood*, 52 N. H. 422; *Piper v. Lodge*, 16 Serg. & R. 214. Aliter, where the counsel have a lien for their fees upon the proceeds of the suit. *Melson v. Dickson*, 63 Ga. 685, 36 Am. Rep. 128; *La. Ry. & Nav. Co. v. Movee*, 116 La. 997, 41 South. 236. Or to his client under statute excluding client of a party. *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186.

⁵⁰ *Johnson v. Richardson*, 52 Tex. 481; *Smith v. Smith*, 119 Ga. 239, 46 S. E. 106.

⁵¹ *Chase v. Jennings*, 38 Me. 44.

⁵² *Rank v. Shewey*, 4 Watts (Pa.), 218; *Hensley v. Com.*, 26 Ky. L. R. 769, 82 S. W. 456.

challenge that a juror was married to the widow of the prosecutor's *uncle*,⁵³ or that he was the *father-in-law* of the prosecuting attorney,⁵⁴ or a *half-uncle* of the plaintiff's *wife*.⁵⁵ But it has been held not necessary that the party who stands in this relationship to the challenged juror should be the beneficial party in the full sense; and accordingly the rule applies so as to sustain the challenge where an *administrator* is the party related to the juror.⁵⁶ On the other hand, the reason of the rule excludes the juror where he is related to one who is a beneficial party, though not a party to the record,—as where a *corporation* is a party and the juror is related to a member or *shareholder*.⁵⁷ Other cases extend the rule still further,—holding that a juror is excluded, in a prosecution for arson, who is related to the person whose house is alleged to have been burned;⁵⁸ or who, in the case of a slave indicted for robbery, is related to the owner of the slave;⁵⁹ or who, in the case of a jail-keeper indicted for a negligent escape, is related to the prisoners who escaped.⁶⁰ But.

⁵³ *Oneal v. St.*, 47 Ga. 229; *Doyle v. Com. (Va.)*, 40 S. E. 925. Or related in any other way. *People v. Waller*, 70 Mich. 237, 38 N. W. 261; *St. v. Cadotte*, 17 Mont. 315, 42 Pac. 857.

⁵⁴ *St. v. Jones*, 64 Mo. 391; *St. v. Cadotte*, *supra*. Or his brother-in-law. *St. v. Cadotte*, *supra*.

⁵⁵ *Eggleston v. Smiley*, 13 Johns. (N. Y.) 133; *Atkinson v. St.*, 112 Ga. 411, 37 S. E. 747. Relationship to wife, when the suit regards community property, disqualifies. *Tex. & P. R. Co. v. Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410.

⁵⁶ *Trullinger v. Webb*, 3 Ind. 198. Not so as to a public official who is a nominal party. *Pool v. Warren County*, 123 Ga. 205, 51 S. E. 328. Unless he is pecuniarily interested in the result. *Moro County v. Flannigan*, 130 Cal. 105, 62 Pac. 293.

⁵⁷ *Co. Litt.* 157*a*; *Quinebaugh Bank v. Leavens*, 20 Conn. 87; *Georgia Railroad v. Hart*, 60 Ga. 550; *Young v. Marine Ins. Co.*, 1 Cranch C. C. (U. S.) 452; *Nat. Bank v. Dangerfield* (Tex. Civ. App.), 51 S. W. 661 (not reported in state reports).

This has been held also to embrace the case of relationship to shareholder in a corporation which is a shareholder in the corporation party. *McLaughlin v. Louisville Electric etc. Co. (Ky.)*, 37 S. W. 551, 34 L. R. A. 812. And where the shareholder is lessee of such party. *Augusta etc. R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420.

⁵⁸ *Jaques v. Com.*, 10 Gratt. (Va.) 690. Or to the shareholder in a corporation in a prosecution for mutilation of its records. *St. v. McElhannon*, 99 Ga. 672, 26 S. E. 501.

⁵⁹ *St. v. Anthony*, 7 Ired. L. (N. C.) 234.

⁶⁰ *St. v. Baldwin*, 80 N. C. 390. But, in an action against a sheriff for the act of his deputy, a *release* of the deputy rendered the deputy's father competent as a juror. *Seavy v. Dearborn*, 19 N. H. 351. Relationship by affinity to sons of deceased, who were private prosecutors in a murder case, has been held to disqualify. *Stringfellow v. St.*, 42 Tex. Cr. R. 588, 61 S. W. 719. So also relationship to deceased in murder trial. *St. v. Byrd*, 72 S. C.

in an action by a municipal corporation to recover over against a wrong-doer the damages which it had been compelled to pay through his negligence, the *husband* of the plaintiff in the original action is not competent by reason of affinity.⁶¹

§ 63. **Members of Public Corporations.**—The rule of the common law, established by Lord Mansfield,⁶² and generally followed in this country,⁶³ where not changed by statute, as it frequently has been,⁶⁴

104, 51 S. E. 542. Relationship to either defendant in same indictment, where trials are separate, disqualifies. *Thomas v. St.*, 133 Ala. 139, 32 South. 250.

⁶¹ *Faith v. Atlanta* (Ga.), 4 S. E. 3.

⁶² *Hesketh v. Braddock*, 3 Burr. 1847. See also *Day v. Savadge*, Hob. 85. Compare *Martin v. Reg.*, 12 Irish L. 399.

⁶³ *Wood v. Stoddard*, 2 Johns. (N. Y.) 194; *Garrison v. Portland*, 2 Ore. 123; *Boston v. Tileston*, 11 Mass. 468; *Hawkes v. Kennebeck*, 7 Mass. 461; *Watson v. Tripp*, 11 R. I. 98, 15 Am. L. Reg. 282; *Alexandria v. Brockett*, 1 Cranch C. C. (U. S.) 505; *Diveny v. Elmira*, 51 N. Y. 507; *Hawes v. Gustin*, 2 Allen (Mass.), 402; *St. v. Williams*, 30 Me. 484; *Dively v. Cedar Falls*, 21 Iowa, 565; *Cramer v. Burlington*, 42 Iowa, 315; *Kendall v. Albia* (Iowa), 34 N. W. 833; *Ford v. Umatilla County* (Ore.), 16 Pac. 33; *Davenport Gas Company v. Davenport*, 13 Iowa, 229; *Gibson v. Wyandotte*, 20 Kan. 156; *Eberle v. St. Louis Public Schools*, 11 Mo. 247; *Fine v. St. Louis Public Schools*, 30 Mo. 166; *Columbus v. Goetchius*, 7 Ga. 139; *Russell v. Hamilton*, 3 Ill. 56; *Bailey v. Trumbull*, 31 Conn. 581; *Hearn v. Greensburgh*, 51 Ind. 119; *Johnson v. Americus*, 46 Ga. 80; *Rose v. St. Charles*, 49 Mo. 509; *Fulweiler v. St. Louis*, 61 Mo. 479. But contra, see *Middletown v. Ames*, 7 Vt. 166;

Omaha v. Olmstead, 5 Neb. 446, 16 Am. L. Reg. 356; *Kemper v. Louisville*, 14 Bush (Ky.), 87. Member of city council disqualified, if city a party. *Boston v. Baldwin*, 139 Mass. 315. *Cases not within the rule:* *Phillips v. St.*, 29 Ga. 105; *Phipps v. Mansfield*, 62 Ga. 209. Holder of municipal bonds, incompetent where municipality is a party. *Jefferson County v. Lewis*, 20 Fla. 980.

⁶⁴ *Bliss Anno. Code*, § 1179, N. Y. 1906; *Bright. Purd. Pa.*, p. 2074, viii; *G. S. Mass.* 1902, p. 1591, § 29; *Gen. St. R. I.* 1909, p. 1023; *Fla. Laws* 1906, § 1492; *R. S. S. C.* 1902, § 2944; *Comp. L. Mich.* 1897, § 10226; *R. S. Me.* 1903, p. 751, § 101; *Rev. N. J.* 1901, p. 1852, § 39; *R. S. Ill.* 1909, p. 358, § 174; *R. S. La.* 1904, p. 970, § 1; *Code Ga.* 1895, vol. 3, § 876; *R. S. W. Va.* 1906, § 3717; *Wis. Stats.* 1908, § 3850; *Laws Minn.* 1905, § 413; *G. S. Neb.* 1907, § —; *R. S. Mo.* 1909, § 7288; *Comp. L. Kan.* 1909, § 2063. Such statutes have been held not unconstitutional as invading the right of trial by an impartial jury. *Com. v. Reed*, 1 Gray, 472. See also *Com. v. Worcester*, 3 Pick. 462; *Com. v. Ryan*, 5 Mass. 90; *St. v. Wells*, 46 Iowa, 662. Construction of such statutes. *Baltimore etc. R. Co. v. Pittsburgh etc. R. Co.*, 17 W. Va. 812; *Doyal v. St.*, 70 Ga. 134. One who would find for the city if the evidence was equally balanced is disqualified. *Omaha v. Kane*, 15

excludes from the jury the inhabitants of a town or city which is a party to the action.⁶⁵

§ 64. **Members of Private Corporations and Societies.**—The same rule excludes from the jury box a member of a private corporation which is a party to a suit, or immediately interested in the question to be tried.⁶⁶ Thus, in an action between the trustees of two religious societies, involving the right of possession of lands, the members of each society are, by reason of interest, incompetent as jurors.⁶⁷ But the rule does not disqualify a juror who has been active in forming a company, but who has never been a shareholder in it.⁶⁸ And it is no objection that the juror is an officer or stockholder in another corporation, organized for a similar purpose to that of the corporation which is a party to the suit.⁶⁹ Nor, accord-

Neb. 657. Statutes on this subject are regarded as constitutional, because of the remoteness of the interest. *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368.

⁶⁵ A city defendant has no right of challenge on the ground that, though a resident, the venire-man is not a taxpayer. *Hollenbeck v. Marshalltown*, 62 Iowa, 21. Nor on the ground that he is a tax-payer. *Conklin v. Keokuk* (Iowa), 35 N. W. 444. But it is a good ground of challenge by the party adverse to the city. *Kendall v. Albia* (Iowa), 34 N. W. 833; and see note to same. *Carson v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192. Not so as to county. *Watson v. Dewitt County*, 19 Tex. Civ. App. 150, 46 S. W. 1061. And so as it has been held as to school district. *St. v. McDonald*, 110 Kan. 122, 42 Pac. 453. As opposed to the text see *Jackson v. Pool*, 91 Tenn. 448, 19 S. W. 324.

⁶⁶ *Republica v. Richards*, 1 Yeates (Pa.), 480; *Silvis v. Ely*, 3 Watts & S. (Pa.) 421; *Fleeson v. Savage* S. M. Co., 3 Nev. 157. Compare *Williams v. Smith*, 6 Cow. (N. Y.) 166; *Peninsular R. Co. v. Howard*, 20

Mich. 18; *Page v. Contocook Valley R. Co.*, 21 N. H. 438. So, of a juror who has given his note to a railway company to aid in building its road. *Michigan etc. R. Co. v. Barnes*, 40 Mich. 383; *Price v. Patrons etc. Protection Co.*, 77 Mo. App. 236; *Martin v. Farmers Mut. Ins. Co.*, 139 Mich. 148, 102 N. W. 656.

⁶⁷ *Cleage v. Hyden*, 6 Heisk. (Tenn.) 73.

⁶⁸ *Portland etc. Ferry Co. v. Pratt*, 2 Allen (N. B.), 17. Compare *Williams v. Smith*, 6 Cow. (N. Y.) 166; *Com. v. Boston etc. R. Co.*, 3 Cush. (Mass.) 25.

⁶⁹ *Craig v. Fenn*, Car. & M. 43; *Miller v. Wild Cat Gravel Rd. Co.*, 52 Ind. 51. No objection that a party and a juror are both *stockholders* in the same corporation, it not being interested in the suit. *Brittain v. Allen*, 2 Dev. L. (N. C.) 120. On a trial of an indictment for passing counterfeit money, it is no objection that a juror is a *director* in the bank whose money was counterfeited. *Billis v. St.*, 2 McCord (S. C.), 12. There is some conflict in decision whether disqualification extends to a stockholder in a company obligated to indemnify defendants

ing to the better opinion, does the fact that the venire-man and the opposite party to the suit are members in the same *benevolent organization*, such as the *Masonic Fraternity*, disqualify.⁷⁰ Nor, in an action by a grand lodge of this order, are members of subordinate lodges disqualified by reason of interest in the suit.⁷¹ So, a *church member* is not incompetent as a juror in a case to which a church of his denomination is a party.⁷² But if the church is such an important one that its tenets are above the law of the land, and if belief in those tenets renders it unconscientious for him to enforce the human as against the divine law, the venire-man will be disqualified,—especially in a case where the venire-man is a member of the *Mormon church*, and the accused is on trial for bigamy, and the divine law, as graciously revealed to the saints of that church, commands polygamy, while the human law is so wicked as to condemn it.⁷³ On the trial of a criminal action for unlawfully selling intoxicating liquors, members of a *social club*, apparently organized for the purpose of getting liquor for their own use,—are not, for that reason, subject to challenge by the defendant.⁷⁴

§ 65. **Interest in the Suit.**—Any direct or contingent interest in the result of the suit about to be tried, disqualifies the venire-man. Thus, if he is interested in a *similar* suit, or in one depending on the event of the particular suit,⁷⁵ or if he is under indictment for an

against loss in personal injury or other suits, or to its clerks and employes, or whether inquiry only may be made with respect thereto, so as to guide one in his right to exercise his peremptory challenges. *Grant v. National Ry. etc. Co.*, 91 N. Y. S. 105, 100 App. Div. 234; *Antletz v. Smith*, 97 Minn. 217, 106 N. W. 517; *Chylouski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833. And it has been held not permissible to ask, or withhold in the court's discretion to refuse or not, questions on voir dire in respect thereto. *Eckert & Swan M. Co. v. Schaeffer*, 101 Ill. App. 500.

⁷⁰ *Purple v. Horton*, 13 Wend. (N. Y.) 11, 23. *Contra*, *Brittain v. Allen*, 2 Dev. L. (N. C.) 120.

⁷¹ *Burdine v. Grand Lodge*, 37 Ala.

478; *Delaware Lodge No. 1 v. Allmon*, 1 Pen. (Del.) 160, 39 Atl. 1098. Being of same lodge does disqualify. *Reed v. Peacock*, 123 Mich. 244, 82 N. W. 53.

⁷² *Barton v. Erickson*, 14 Neb. 164. That charity organization is of the church of the juror. *Smith v. Sisters of Good Shepherd*, 27 Ky. Law Rep. 1107, 87 S. W. 1083.

⁷³ *U. S. v. Miles*, 2 Utah, 19, 103 U. S. 304.

⁷⁴ *Boldt v. St.* (Wis.), 35 N. W. 935.

⁷⁵ *Courtwright v. Strickler*, 37 Iowa, 382; *Lord v. Brown*, 5 Den. (N. Y.) 345; *Davis v. Allen*, 11 Pick. (Mass.) 466; *Flagg v. Worcester*, 8 Cush. (Mass.) 69; *Gardner v. Lan- ning*, 2 N. J. L. 651. But see *Com.*

offense *similar* to that charged against the prisoner,⁷⁶ this will disqualify him; but the fact that the plaintiff *has had* a suit against the challenged venire-man, similar to the one about to be tried, will at most support a challenge to the favor.⁷⁷ So, if the venire-man is an *executor*, though not a party, and the recovery will benefit the estate;⁷⁸ or, if he is bound as a *surety* for the *costs* of the suit,⁷⁹ or for the *appearance* of the accused.⁸⁰ Moreover, if the venire-man once had a direct interest in the pending suit, he is disqualified since the fact of his ceasing to have such an interest would not purge him of the bias which he thereby acquired,⁸¹ though this objection would not be good after verdict.⁸²

§ 66. Membership in Associations for the Suppression of Crime.—The decisions on this branch of the inquiry are not in a satisfactory state. We shall see hereafter that prejudice against the particular crime with which the accused stands charged does not disqualify a venire-man.⁸³ Upon analogous grounds, some

v. Boston etc. R. Co., 3 Cush. (Mass.) 25. But see Jones v. Wright (Tex. Civ. App.), 92 S. W. 1010 (not reported in state reports). That one has a claim for personal injuries against the same railroad being sued for personal injuries, and intends to prosecute same does not disqualify. South. Ry. Co. v. Oliver, 102 Va. 710, 47 S. E. 862.

⁷⁶ McGuire v. St., 37 Miss. 369. Or as being an accomplice in the same offense where separately indicted. Thomas v. St., 133 Ala. 139, 39 South. 250.

⁷⁷ Austin v. Cox, 60 Ga. 520. And so if the suit is of a wholly different nature. City of San Antonio v. Diaz (Tex. Civ. App.), 62 S. W. 549 (not reported in state reports).

⁷⁸ Smull v. Jones, 6 Watts & S. (Pa.) 122. Compare Gratz v. Benner, 13 Serg. & R. (Pa.) 110, a decision which it is difficult to understand. For a further illustration of disqualification of an administrator by reason of contingent interest in the event of the suit, see Meeker v.

Potter, 5 N. J. L. 586. A juror has been permitted to release his interest in lands claimed in ejectment, in order that he might sit upon the trial. Isaac v. Clarke, 2 Gill. (Md.) 1.

⁷⁹ Glover v. Woolsey, Dudley (Ga.), 85.

⁸⁰ St. v. Prater (S. C.), 2 S. E. 108; Brazelton v. St., 11 Reporter, 291; People v. McCollister, 1 Wheeler C. C. (N. Y.) 391; Anderson v. St., 63 Ga. 675. This objection was held to be good as against the *son-in-law* and *brother-in-law* of the surety (Sehorn v. Williams, 6 Jones L. (N. C.) 575; Woodbridge v. Raymond, Kirby (Conn.), 279), but denied as against *tenant*. Brown v. Wheeler, 18 Conn. 199.

⁸¹ Phelps v. Hall, 2 Tyler (Vt.), 401.

⁸² Bradshaw v. Hubbard, 6 Ill. 390, 394.

⁸³ U. S. v. Hanway, 2 Wall. Jr. 139; Williams v. St., 3 Ga. 453; Parker v. St., 34 Ga. 262; U. S. v. Noelke, 17 Blatch. (U. S.) 554, 1 Fed. 426, 9 Reporter, 505; U. S. v.

courts have reached the conclusion that membership in a society organized for the prosecution of crimes of the nature of the one with which the accused is charged, does not disqualify,⁸⁴ unless the relation of the venire-man to the society is such as to render him liable to contribute towards the *expenses of the prosecution*.⁸⁵ But he is disqualified if he has participated in the prosecution of the accused person, or belongs to a committee the members of which have agreed to indemnify each other against any action which the accused might prosecute against any of them for *false imprisonment*.⁸⁶

§ 67. **Business Relations.**—That the venire-man is the *inferior* or *dependent* in business relations of the opposite party to the suit, will generally disqualify. Thus, if he is his *surety*, and the rendition of a judgment against him will diminish the probability of

Borger (U. S. Cir. Ct. S. D. N. Y., May, 1881), 7 Fed. 193; U. S. v. Duff (same court, Jan., 1881), 6 Fed. 45, 48.

⁸⁴ St. v. Wilson, 4 Iowa, 407; Boyle v. People, 4 Colo. 176; Com. v. Livermore, 4 Gray (Mass.), 18; Com. v. O'Neil, 6 Gray (Mass.), 343; Musick v. People, 40 Ill. 268. Compare Missouri etc. R. Co. v. Munkers, 11 Kan. 223; Reg. v. Nicholson, 8 Dowl. P. C. 422, 4 Jur. 558; U. S. v. Borger, 7 Fed. 193, 12 Reporter, 134. The refusal of the judge to ask venire-men whether they belong to any association formed for the purpose of enforcing the law under which the defendant is indicted, has been held no ground of exception, if the defendant's counsel disclaims any knowledge or suspicion of such connection and assigns no ground for making the request. Com. v. Thrasher, 11 Gray, 55; Reg. v. Stewart, 1 Cox C. C. 174. Contra, Lavin v. People, 69 Ill. 303; St. v. Sultan, 142 N. C. 569, 54 S. E. 841. This rule has been frequently applied in local option liquor cases. St. v. Hoxie, 15 R. I. 1, 29 Atl. 97.

⁸⁵ Some cases make no mention of this distinction. Musick v. People, 40 Ill. 268. Compare Mylock v. Saladine, 1 W. Bl. 480; People v. Lee, 5 Cal. 353; People v. Graham, 21 Cal. 261; St. v. Fullerton, 90 Mo. App. 411; Guy v. St., 96 Md. 692, 54 Atl. 879. Or if he has already contributed thereto. St. v. Moore, 48 La. Ann. 380, 19 South. 285. Not, however, if the contribution paid was merely general towards the suppression of crime. Guy v. St., *supra*.

⁸⁶ Fleming v. St., 11 Ind. 234; Pierson v. St., 11 Ind. 341. Contra, that *subscribers* to a *general fund* to secure counsel for the prosecution of the defendant are not disqualified. Heacock v. St., 13 Tex. App. 97. That members of the "Law and Order League," who contribute to its funds are not disqualified on trial of a complaint for selling intoxicating liquors. Com. v. Burroughs (Mass.), 13 N. E. 884. Aliter, if the League had initiated or was conducting the particular prosecution. *Ibid.*; Com. v. Moore, 143 Mass. 136, 9 N. E. 884.

⁸⁷ Ferriday v. Selser, 4 How. (Miss.) 506.

his being exonerated;⁸⁷ or if he is his *tenant*,⁸⁸ although *distress for rent* may have been abolished;⁸⁹ or is his *clerk*,⁹⁰ or other *employee*,⁹¹ or even his *partner* in business.⁹² But the mere fact that an *innkeeper* is a party and the *venire-man* is his *guest* does not disqualify the latter;⁹³ and while, as elsewhere seen,⁹⁴ a *shareholder* in a *corporation* is disqualified from serving as a juror where the corporation is a party, yet this does not extend so far as to exclude from such service an *employee of a shareholder*.⁹⁵

§ 68. **Prior Service in the Same or a Similar Case.**—It is a ground of challenge that the *venire-man* has sat as a juror upon a former trial of the same action.⁹⁶ But the fact of having sat at

⁸⁸ Co. Litt. 157*a*; Bac. Abr. Juries E. 343; Anon., 2 Dyer, 176. a. pl. (27); Pipher v. Lodge, 16 Serg. & R. (Pa.) 214; Harrisburg Bank v. Foster, 8 Watts (Pa.), 304. But that the opposite party to the suit is a tenant to the juror is ground of challenge to the favor only. People v. Bodine, 1 Denio (N. Y.), 306. Contra, Arnold v. Producers Fruit Co., 141 Cal. 738, 75 Pac. 326.

⁸⁹ Hathaway v. Helmer, 25 Barb. (N. Y.) 29.

⁹⁰ Hubbard v. Rutledge, 57 Miss. 7.

⁹¹ Central R. Co. v. Mitchell, 63 Ga. 173. See Co. Litt. 157*b*; Gilb. Hist. C. P. 95; 3 Bl. Com. 363; Bac. Abr. Juries E.; 2 Tidd Pr. 853. But not if he was merely in his employ a year before. East Line etc. R. Co. v. Brinker (Tex.), 3 S. W. 99; Georgia R. etc. Co. v. Tice, 124 Ga. 459, 52 S. E. 916.

⁹² Stumm v. Hummell, 39 Iowa, 478. That a prosecuting attorney is the adviser of a justice of the peace offered as a juror does not disqualify. St. v. Lewis, 31 Wash. 75, 71 Pac. 778. Or that the juror is the prosecuting attorney's client. St. v. Bradford (Iowa), 96 N. W. 677.

⁹³ Cummings v. Gann, 52 Pa. St. 484.

⁹⁴ Ante, § 64.

⁹⁵ Frederickton Boom Co. v. McPherson, 2 Hannay (N. B.), 8. Or the tenant of one who is president of the corporation party. Decker v. Laws, 74 Ark. 286, 85 S. W. 425. Being the clerk of a corporation whose president is also that of defendant corporation will warrant the court, in its discretion, to reject him as a juror. Glasgow v. Ry. Co., 191 Mo. 347, 89 S. W. 915. Nor is a shareholder in a bank disqualified in a suit in which the bank teller alone is interested. Stevenson v. Moore (Ky.), 118 S. W. 951.

⁹⁶ Co. Litt. 157*b*; Argent v. Darrell, 2 Salk. 648. For the construction of statutes asserting this disqualification, see Dunn v. St., 7 Tex. App. 600; Jacobs v. St., 9 Tex. App. 278; Willis v. St., 9 Tex. App. 297; St. v. Sheeley, 15 Iowa, 404; St. v. Leicht, 17 Iowa, 28. Bailiff of jury at such trial not disqualified. McNish v. St., 47 Fla. 69, 36 South. 176.

⁹⁷ Dew v. McDivitt, 31 Ohio St. 139, 17 Am. L. Reg. 621; Algier v. Steamer Maria, 14 Cal. 167; Nugent v. Trepagnier, 2 Martin (La.), 205; Smith v. Wagenseller, 21 Pa. St. 491; Board of Levee Comrs. v. Dillard (Miss.), 24 South. 292. Or in other capital cases at same term and ren-

the same term upon the trial of an action brought by the same plaintiff against other defendants and having returned a verdict for the plaintiff, does not disqualify,⁹⁷ unless the cause involves the same questions, determinable on the same evidence as the one about to be tried.⁹⁸ One court holds,⁹⁹ and others deny, that the fact of the juror having sat on a former trial of the same action, which resulted in a *mistrial*, will operate to exclude him, where not discovered until after he has been impaneled and sworn. Nor does this rule extend so far as to disqualify venire-men who have sat on the trial of other defendants jointly indicted with the defendant in the particular case, but who had severed for the purposes of their trial.² Nor is a venire-man, who has sat on a jury which has found the defendant guilty upon one indictment, thereby disqualified from sitting upon his trial under another indictment at the same term, although for a similar offense.³

dered verdicts of guilty. *Gerald v. St.*, 128 Ala. 6, 29 South. 614. Or in a rape case where another defendant has been convicted of rape on some female. *St. v. Van Waters*, 36 Wash. 358, 78 Pac. 897.

⁹⁸ *Spear v. Spencer*, 1 G. Greene (Iowa), 534; *Garthwaite v. Tatum*, 21 Ark. 336. But see *Sheppard v. Cook*, 2 Hayw. (N. C.) 238; *Hunt v. City of Columbia*, 122 Mo. App. 31, 97 S. W. 955. That a similar offense was proved by the same witnesses as the one about to be tried does not disqualify, this being merely an incidental circumstance. *Fletcher v. Com.*, 106 Va. 850, 56 S. E. 151. It was said by South Dakota court that, if one of the same material issues is involved in both cases, this disqualifies. *St. v. Hammond*, 14 S. D. 545, 88 N. W. 627. If both prosecutions grow out of one transaction, this disqualifies. *Simpson v. St.*, 47 Tex. Cr. R. 578, 85 S. W. 16. In Michigan it was held, that a juror, who tried one member of a city council for bribery, was dis-

qualified in the trial of another for the same bribery. *People v. Mol*, 137 Mich. 692, 100 N. W. 913. But he was not disqualified from trying for perjury committed on such trial the defendant in both cases, there being an acquittal in the former case. *People v. Albers*, 137 Mich. 678, 100 N. W. 908.

⁹⁹ *Weeks v. Medler*, 20 Kan. 57.

¹ *Whitner v. Hamlin*, 12 Fla. 18; *Atkinson v. Allen*, 12 Vt. 619.

² *Regicide's Case*, 5 How. St. Tr. 978 (Resolution 7); *Sir J. Kelyng*, 9. See also *Cranburne's Trial*, 13 How. St. Tr. 222, 235; *Thomas v. St.*, 36 Tex. 315; *Bowman v. St.*, 41 Tex. 417; *U. S. v. Wilson, Baldwin, C. C. 84*; *Rex v. Hanly*, 1 *Craw. & Dix Cir. (Irish)*, 188, note; *Turner v. St.*, 114 Ga. 421, 40 S. E. 308.

³ *U. S. v. Watkins*, 3 *Cranch C. C. (U. S.)* 578; *Com. v. Hill*, 4 *Allen (Mass.)*, 591. If also the facts are substantially identical, he is disqualified. *Curtis v. St.*, 118 Ala. 125, 24 South. 111; *Ross v. St. (Tex. Civ. App.)*, 118 S. W. 1034.

Subdivision 2.—Challenges Grounded on Bias, Prejudice, Scruple, Opinion.

SECTION

71. Grounds of Challenge the same for the State as for the Accused.
72. Bias, Prejudice, Opinion.
73. Kinds of Bias and Prejudice that do not Excuse.
74. Conscientious Scruples against Capital Punishment.
75. Conscientious Scruples against Capital Punishment on Circumstantial Evidence.
76. Opinions Touching the Merits of the Particular Case.
77. Nature of the Opinion which Disqualifies.
78. [Continued.] Must be of a Fixed and Positive Character.
79. Opinions which do not Disqualify.
80. Opinions which will Require Evidence to Remove them.
81. Newspaper Reports of Former Trial.
82. Statutes Removing Common-Law Disqualification.
83. Declaration of Venire-Man that he can Render an Impartial Verdict.

§ 71. **Grounds of Challenge the same for the State as for the Accused.**—Here it should be observed that, in respect of the *grounds* of challenge, though not always in respect of the *number* of the challenges, the rights of the State and the accused are precisely the same. The bias, prejudice or opinion which will disqualify the venire-man when entertained against the case of the accused will equally disqualify him when entertained against the case of the prosecution.⁴ Indeed, it has been held, under a statute which is little less than declaratory of the generally accepted rule, that a juror cannot be interrogated as to *which side* his opinion favors or disfavors, and accordingly that it is not necessary, in order to reverse a judgment for overruling a challenge to a juror entertaining a disqualifying opinion, to show that the opinion was unfavorable to the complaining party.⁵ But the better opinion would seem to be that the party complaining of the disallowance of his challenge ought to show that the juror was prejudiced *against him*, and therefore that he *waives* his ground of complaint by not interrogating the juror as to the *direction* of his opinion.⁶

⁴ St. v. West, 69 Mo. 401, 403; Com. v. Leshner, 17 Serg. & R. (Pa.) 155; Commander v. St., 60 Ala. 1; 1 Burr. Tr. 495; Pierson v. St., 18 Tex. App. 524; St. v. Faulkner, 185 Mo. 673, 84 S. W. 967.

⁵ People v. Williams, 6 Cal. 206; St. v. Shelledy, 8 Iowa, 477; Coghill v. Kennedy, 119 Ala. 641, 24 South. 459.

⁶ St. v. Effer, 85 N. C. 585.

§ 72. **Bias, Prejudice, Opinion.**—Some useless casuistry has been expended upon a supposed distinction between *prejudice* and *bias*, resulting in the conclusion that, while prejudice is a prejudgment of the particular case, bias is a predisposition or leaning, from some other cause, toward one side or the other of it.⁷ As the usual mental conception which is conveyed by the word “prejudice” is a condition of the mind, founded in opinion, which has resulted in bias more or less complicated with *ill feeling*, and as plain men on a jury panel will not ordinarily take any essential distinction between the two expressions,—it must follow that refinements upon this subject can serve no useful purpose in the administration of justice.

§ 73. **Kinds of Bias and Prejudice that do not excuse.**—A general prejudice against crime,⁸ or prejudice against the particular *crime* with which the accused stands charged,⁹ or against the *criminal business* for which he is prosecuted;¹⁰ or against the particular *unlawful act* for the alleged doing of which the action is brought, it being a civil action;¹¹ or against the class of actions to which his suit belongs;¹² or even a prejudice against the *defendant* himself,

⁷ Thomp. & Mer. Jur., § 191. Compare the following cases: Com. v. Webster, 5 Cush. (Mass.) 297; Winnesheik Ins. Co. v. Schueller, 60 Ill. 473; People v. Reyes, 5 Cal. 347, 349; Willis v. St., 12 Ga. 444, 448; McCausland v. McCausland, 1 Yeates (Pa.), 372, 378; Willis v. St., 12 Ga. 444, 448, per Nisbet, J.; Lucas v. St., 75 Neb. 11, 105 N. W. 976. Under a somewhat broad statute it was held in Idaho giving challenge for implied bias, that one who is the client of the counsel of adverse party is challengeable. St. v. McGraw (Idaho), 57 Pac. 178.

⁸ St. v. Burns, 85 Mo. 47, aff'd, 16 Mo. App. 555.

⁹ U. S. v. Hanway, 2 Wall. Jr. (U. S.) 139; Williams v. St., 3 Ga. 453; Parker v. St., 34 Ga. 262; U. S. v. Noelke, 17 Blatch. (U. S.) 554, 1 Fed. 426; 9 Reporter, 505; St. v. Nelson, 58 Iowa, 208; St. v. Snyder, 182 Mo. 462, 82 S. W. 12; Higgins v.

Monaghan, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138.

¹⁰ U. S. v. Noelke, 17 Blatchf. (U. S.) 554; Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991.

¹¹ Davis v. Hunter, 7 Ala. 135. In an action for the killing of sheep by dogs, a juror who said that he had such a bias or prejudice about the matter of dogs killing sheep as would interfere with his impartial judgment in the case, was held to have been properly excused, upon a challenge for cause. Anson v. Dwight, 18 Iowa, 241.

¹² That is, against *slander* suits. Young v. Bridges, 34 La. Ann. 333. Or against *personal damage* suits. McCarthy v. Ry. Co., 92 Mo. 536, 4 S. W. 516; Graybill v. De Young, 146 Cal. 421, 80 Pac. 618. Where a defense is based on justification under the rules of a hack driver's association, a prejudice against unions has been held to disqualify. Gat-

arising solely from the fact of his being engaged in a criminal or unlawful business, and therefore tantamount to a prejudice against the business merely;¹³ or a prejudice against the kind of *defense* which he sets up, *e. g., insanity*;¹⁴ or an unfavorable opinion of his *nationality*,¹⁵ or of his *character*, derived from general reputation,¹⁶

zow v. Buening, 106 Wis. 1, 81 N. W. 1003. If the prejudice is generally one of sympathy with plaintiffs in any class of actions this does not necessarily disqualify. *Dale v. Colfax C. C. Co.*, 131 Iowa, 67, 107 N. W. 1096.

¹³ *U. S. v. Borger*, 7 Fed. 193; *U. S. v. Duff*, 6 Fed. 45, 48. The fact that the venire-man is prejudiced against the *business* of the challenging party but not against him, is not a sufficient ground of challenge for principal cause. *Maretzek v. Cauldwell*, 2 Abb. Pr. (N. S.) 407, 5 Robt. 660; *U. S. v. Noelke*, 17 Blatchf. (U. S.) 554; *Elliott v. St.*, 73 Ind. 10. Though it has been held that a man who in order to suppress *liquor-selling*, would stop short of *mob violence* only, ought to be excused. *Albrecht v. Walker*, 73 Ill. 69. See also *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465; *Swigart v. St.*, 67 Ind. 287, 21 Alb. L. J. 278; *Keiser v. Lines*, 57 Ind. 431. Compare *Elliott v. St.*, 73 Ind. 10. In a similar case a juror is properly rejected whose prejudice against the defendant's business is such that he cannot give the testimony of a person engaged in the same business as the defendant the same weight which he could the testimony of other persons. *Robinson v. Randall*, 82 Ill. 515. *Contra*, *Shields v. St.*, 95 Ind. 299. Aliter, where the business is per se unlawful. This distinction was overlooked in *Meaux v. Whitehall*, 8 Bradw. (Ill.) 173. One who believes that only an immoral man would sell liquor is incompetent on the trial of an application

for a license. *Chandler v. Ruebett*, 83 Ind. 139; *People v. Hughes*, 154 N. Y. 153, 47 N. E. 1092; *St. v. Croney*, 31 Wash. 122, 71 Pac. 783. Being on the side of the farmer against a merchant, if the juror can lay that aside. *Schwarz v. Lee Gon*, 46 Or. 219, 80 Pac. 110.

¹⁴ *People v. Carpenter*, 38 Hun (N. Y.), 490, 102 N. Y. 238; *Hall v. Com.* (Pa.), 12 Atl. 163, 11 Cent. Rep. 183; *Butler v. St.*, 97 Ind. 378. Provided the prejudice is not unreasonable. *Ibid.* If the prejudice is not in fact against real insanity as a defense, but against feigned insanity only, there is no ground of challenge. *People v. Sowers*, 145 Cal. 292, 78 Pac. 717; *St. v. Welsor*, 117 Mo. 570, 21 S. W. 443; *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. The Supreme Court of Pennsylvania held it to be such an obvious fact, that there was no prejudice except as to simulated insanity, that it refused to allow inquiry on voir dire, where the claim of insanity was based on physical injury to the head. *Com. v. Barnes*, 199 Pa. 335, 47 Atl. 60.

¹⁵ *Balbo v. People*, 19 Hun (N. Y.), 424, affirmed, 80 N. Y. 484. Compare *People v. Christie*, 2 Park. Cr. (N. Y.) 579, 2 Abb. Pr. (N. Y.) 256; *People v. Keyes*, 5 Cal. 347; *People v. Gar Soy* (Sup. Ct. Cal., Dec. 1880), 23 Alb. L. J. 418. Or of his race. *St. v. Brown*, 188 Mo. 451, 87 S. W. 519.

¹⁶ *People v. Lohman*, 2 Barb. (N. Y.) 450; *People v. Knickerbocker*, 1 Park. Cr. (N. Y.) 302; *People v. Allen*, 43 N. Y. 28; *Anderson v. St.*, 14 Ga. 710; *Willis v. St.*, 12 Ga. 444;

—will not excuse the venire-man, provided he is able, for the time being, to lay aside his unfavorable opinion and give the accused a fair trial according to the evidence.¹⁷ So, on a trial for murder, the result of an anarchical conspiracy, a prejudice against *socialists*, *communists* and *anarchists* is not of itself a disqualification.¹⁸ On the other hand, a belief that the accused is *innocent*, although the law presumes him to be such;¹⁹ an expressed wish or desire that he may prevail;²⁰ an expressed opinion by one who has signed a petition for his pardon, that he has been already sufficiently punished;²¹ a feeling of *unwillingness* on the part of the venire-man to *trust himself* as a juror on the trial,²² a *preference* in case the evidence is *evenly balanced*,²³ such as would incline the mind of the

St. v. Schnapper, 22 La. Ann. 43; People v. Mahoney, 18 Cal. 180; St. v. Davis, 14 Nev. 439, 450; Monroe v. St., 23 Tex. 210; People v. Murphy, 146 Cal. 502, 80 Pac. 709.

¹⁷ See preceding cases, and also Martin v. St., 25 Ga. 494; St. v. Rodriguez, 115 La. 1004, 40 South. 438. Where a juror, in a personal injury suit, during the trial asked certain questions which showed his mind not favorable to one of the parties more than another, does not entitle that party to have the jury discharged or a new trial after verdict. Ky. & I. Bridge Co. v. Schrader, 26 Ky. Law Rep. 206, 80 S. W. 1094.

¹⁸ The Anarchists' Case (Spies v. People), 122 Ill. 1, 12 N. E. 865.

¹⁹ 1 Burr. Tr. 425, per Marshall, C. J.; St. v. West, 69 Mo. 401, 403, per Henry, J. See also Com. v. Leshner, 17 Serg. & R. (Pa.) 155; Commander v. St., 60 Ala. 1.

²⁰ Mason v. St., 15 Tex. App. 534; Pike County v. Griffin etc. Plank Road Co., 15 Ga. 39.

²¹ Asbury Ins. Co. v. Warren, 66 Me. 523.

²² Com. v. Webster, 5 Cush. (Mass.) 295, 298; Montague v. Com., 10 Gratt. (Va.) 767, overruling upon this point Lithgow v. Com., 2 Va. Cas. 297; McLaren v. Birdsong, 24

Ga. 265; Edwards v. Farrar, 2 La. Ann. 307; Dejarnette v. Com. (Va.), 11 Reporter, 653; O'Brien v. People, 36 N. Y. 276; in court below, 48 Barb. (N. Y.) 274; Walter v. People, 32 N. Y. 147, 6 Park. Cr. (N. Y.) 15, 18 Abb. Pr. 147. See the dissenting opinion of Brockenbrough, J., in Lithgow v. Com., 2 Va. Cas. 297; Jones v. People, 23 Colo. 276, 47 Pac. 275. Admitting inability to lay aside race prejudice presents such a ground of challenge. People v. Decker, 157 N. Y. 186, 51 N. E. 1018.

²³ Mima Queen v. Hepburn, 7 Cranch (U. S.), 290; Meaux v. Whitehall, 8 Bradw. (Ill.) 173. Accordingly, it has been held that venire-men may be interrogated as to which way they would be inclined to decide the case, if, upon hearing the testimony, they should find it evenly balanced. Chicago etc. R. Co. v. Adler, 56 Ill. 345; Chicago etc. R. Co. v. Buttoff, 66 Ill. 347; Galena etc. R. Co. v. Haslan, 73 Ill. 494; Richmond v. Roberts, 98 Ill. 472. This seems to be an exception to the general rule that *hypothetical questions* are not to be put to the venire-man on his voir dire with a view of testing his competency. See St. v. Arnold, 12 Iowa, 479; St. v. Davis,

juror to *lean* one way or the other,²⁴—have generally, though not always, been held good grounds of challenge. It is not ground of rejecting a venire-man that he has an *unfriendly feeling* towards one of the *attorneys* of the challenging party.²⁵

§ 74. **Conscientious Scruples against Capital Punishment.**—It is now settled that these are good grounds of challenge in a capital case,²⁶ without reference to the grounds upon which such scruples

14 Nev. 439; *St. v. Leicht*, 17 Iowa, 28; *St. v. Ward*, 14 La. Ann. 673; *St. v. Bennett*, 14 La. Ann. 651; *St. v. Bill*, 15 La. Ann. 114. But in one jurisdiction such a disposition does not disqualify, provided the venire-man states that if the evidence were against the party toward whom he would be inclined if it were equally balanced, he would do his duty as a juror under the instructions of the court. *McFadden v. Wallace*, 38 Cal. 51; *Trenor v. Central Pacific R. Co.*, 50 Cal. 222. Facts showing this preference may be so pronounced that the juror's statement that he has no bias may even call for the appellate court's overruling of the trial court's judgment allowing him to serve. *Tex. Cent. R. Co. v. Blanton*, 36 Tex. Civ. App. 307, 81 S. W. 537.

²⁴ *Chicago etc. R. Co. v. Adler*, 56 Ill. 345, with which compare *Richmond v. Roberts*, 98 Ill. 472. See, also, *Curry v. St.*, 4 Neb. 545; *Sam v. St.*, 13 Sm. & M. (Miss.) 189, 193; *Richey v. Missouri etc. R. Co.*, 17 Mo. App. 581; *St. v. Faulkner*, 185 Mo. 673, 84 S. W. 967. Where the prejudice is personal, as against a street railway because of a feeling that a member of the juror's family had been injured by its criminal negligence, he should not be allowed to serve. *Theobald v. Transit Co.*, 191 Mo. 395, 90 S. W. 314.

²⁵ *Hutchinson v. St.*, 19 Neb. 262. Nor merely friendly relations with

one of the parties. *Chesapeake & O. Ry. Co. v. Smith*, 103 Va. 326, 49 S. E. 487. Prejudice of a juror against an important witness is no ground of challenge. *Southern Kansas Ry. Co. v. Sage*, 43 Tex. Civ. App. 38, 94 S. W. 1074.

²⁶ *U. S. v. Cornell*, 2 Mason (U. S.), 91, 104; *U. S. v. Ware*, 2 Cranch C. C. (U. S.) 477; *O'Brien v. People*, 36 N. Y. 276, 48 Barb. (N. Y.) 274; *Lowenburg v. People*, 5 Park. Cr. (N. Y.) 414, 425; *U. S. v. Wilson*, Baldwin, C. C. (U. S.) 83; *Clore's Case*, 8 Gratt. (Va.) 606; *Lewis v. St.*, 9 Smed. & M. (Miss.) 115; *Williams v. St.*, 32 Miss. 389; *St. v. Kennedy*, 8 Rob. (La.) 590; *Com. v. Twombly*, 10 Pick. (Mass.) 480, note; *Burrell v. St.*, 18 Tex. 713; *Hyde v. St.*, 16 Tex. 445; *White v. St.*, 16 Tex. 207; *Kennedy v. St.*, 19 Tex. App. 618; *Jackson v. St.*, 74 Ala. 26; *Garrett v. St.*, 76 Ala. 18; *Montague v. Com.*, 10 Gratt. (Va.) 767; *People v. Sanchez*, 24 Cal. 17; *Waller v. St.*, 40 Ala. 325; *People v. Tanner*, 2 Cal. 257; *Pierce v. St.*, 13 N. H. 536, 556; *St. v. Ward*, 39 Vt. 225; *Etheridge v. St.*, 8 Tex. App. 133; *Com. v. Sherry*, Whart. on Hom. 481; *Martin v. St.*, 16 Ohio. 364; *Haywood v. Calhoun*, 2 Ohio St. 164; *St. Louis v. St.*, 8 Neb. 405; *Williams v. St.*, 3 Ga. 453; *Russell v. St.*, 53 Miss. 367; *White v. St.*, 52 Miss. 216; *Fortenberry v. St.*, 55 Miss. 403; *Jones v. St.*, 2 Blackf. (Ind.) 475; *Gross v. St.*, 2 Ind. 329;

arise;²⁷ though some courts have held such venire-men competent where they were confident of their ability to do justice between the State and the accused, notwithstanding such scruples,²⁸ but this seems to be an unsound view.²⁹ This rule of exclusion applies, although the offense is one for which capital punishment *may* be given, although a lower degree of punishment may be assessed³⁰ by the jury.³¹

§ 75. Conscientious Scruples against Capital Punishment on Circumstantial Evidence.—For the same reason the venire-man will be excused where he declares that his conscientious scruples against capital punishment are limited to cases in which circumstantial evidence is relied upon for a conviction,³² since the law

Driskill v. St., 7 Ind. 338; Fahnestock v. St., 23 Ind. 231; Greenley v. St., 60 Ind. 141; Stephenson v. St. (Ind.), 4 N. E. 360; Monday v. St., 32 Ga. 672; St. v. West, 69 Mo. 401; People v. Wilson, 3 Park. Cr. (N. Y.) 199; St. v. Mullen, 14 La. Ann. 570; St. v. Reeve, 11 La. Ann. 685; St. v. Clark, 32 La. Ann. 559; Metzger v. St., 18 Fla. 481; St. v. Hing, 16 Nev. 307; People v. Damon, 13 Wend. (N. Y.) 351. Contra, Com. v. Gross, 1 Ashm. (Pa.) 281, 287 (overruled by Com. v. Leshner, 17 Serg. & R. (Pa.) 155. In U. S. v. McMahon, 4 Cranch C. C. (U. S.) 573, the question was submitted to triors. Compare People v. Ryan, 2 Wheel. Cr. Cas. (N. Y.) 47; People v. Jones, Edm. Sel. Cas. (N. Y.) 112. It was so established by statute in New York as early as 1801, in respect of Quakers. 2 Rev. Stat. N. Y. 734, § 12; People v. Cebulla, 137 Cal. 314, 70 Pac. 181; St. v. Shaw, 73 Vt. 149, 50 Atl. 863.

²⁷ Walter v. People, 32 N. Y. 147, 161; O'Brien v. People, 36 N. Y. 276, 278; Gordon v. People, 33 N. Y. 501; People v. Stewart, 7 Cal. 140, 143, per Murray, C. J. See also Com. v. Webster, 5 Cush. (Mass.) 295, 298; Atkins v. St., 16 Ark. 568. It is no

evidence of the existence of the conscientious scruples in question that a juror, when interrogated upon the subject, simply says that he "would not like for a man to be hung." Smith v. St., 55 Miss. 410; St. v. Vick, 132 N. C. 995, 43 S. E. 626.

²⁸ Williams v. St., 32 Miss. 389; People v. Wilson, 3 Park. Cr. (N. Y.) 199; Stratton v. People, 5 Colo. 276.

²⁹ Waller v. St., 40 Ala. 325. A juror who stated upon the voir dire that he did not think he could do the prisoner justice, was held incompetent, although he subsequently stated that he could come to the trial with an unbiased and unprejudiced mind Wright v. Com., 32 Gratt. (Va.) 941.

³⁰ People v. Tanner, 2 Cal. 257. See also Caldwell v. St., 41 Tex. 87; St. v. Melvin, 11 La. Ann. 535; Driskill v. St., 7 Ind. 338; Greenley v. St., 60 Ind. 141; People v. Majors, 65 Cal. 138; Leigh v. Territory, (Ariz.), 85 Pac. 948 (not reported in state reports).

³¹ Spain v. St., 59 Miss. 19; Cooper v. St., Id. 267; Dinsmore v. St., 61 Neb. 418, 85 N. W. 445.

³² Schafer v. St., 7 Tex. App. 239; Clanton v. St., 13 Tex. App. 139; Jones v. St., 57 Miss. 684; St. v.

recognizes such evidence as of equal value with other evidence,³³ although the particular case depends on direct testimony.³⁴ But it has been held that *some prejudice* against convicting on circumstantial evidence is not sufficient ground of challenge for cause.³⁵

§ 76. Opinions Touching the Merits of the Particular Case.—

This is by far the most frequent ground of challenge in criminal cases. The American law in respect of it is in such a state of confusion that little success can be hoped for in reconciling conflicting opinions, or even in arraying the decisions in logical order.³⁶ A disqualifying opinion is at common law a *principal* cause of challenge, as distinguished from a cause of challenge *to the favor*,³⁷ though under that system a challenge to the favor may be taken on this ground and submitted to triors,³⁸ whose decision in favor of competency will be conclusive, notwithstanding the court might have ruled otherwise on a challenge for principal cause.³⁹ At common law, it was necessary not merely that the venire-man should have *formed*, but also that he should have *expressed* a disqualifying opinion, in order to suport a challenge for principal cause,⁴⁰—the

Pritchard, 15 Nev. 74; *Smith v. St.*, 55 Ala. 1; *People v. Ah Chung*, 54 Cal. 398; *St. v. West*, 69 Mo. 401; *Gates v. People*, 14 Ill. 433, 2 Am. L. Reg. 671; *St. v. Bunger*, 11 La. Ann. 607; *St. v. Pritchard*, 15 Nev. 74; *Coker v. St.*, 144 Ala. 28, 40 South. 516. Or depends principally thereon. *Holland v. St.*, 39 Fla. 178, 22 South. 298. Or has a material bearing thereon. *St. v. Anderson*, 52 La. Ann. 101, 26 South. 781.

³³ *Smith v. St.*, 55 Ala. 1; *People v. Ah Chung*, 54 Cal. 398; *St. v. West*, 69 Mo. 401; *Gates v. People*, 14 Ill. 433; *Jones v. St.*, 57 Miss. 685; *St. v. Bunger*, 11 La. Ann. 607; *St. v. Stephens*, 116 La. 36, 40 South. 523; *People v. Warren*, 147 Cal. 546, 82 Pac. 196.

³⁴ *Coleman v. St.*, 59 Miss. 484. The court, at least, should not assume that direct evidence will be relied on alone. *People v. Anaya*, 134 Cal. 531, 66 Pac. 794.

³⁵ *St. v. Shields*, 33 La. Ann. 991.

³⁶ See the observations of Clark, J., in *Rothschild v. St.*, 7 Tex. App. 519, 542; also, *People v. Reynolds*, 16 Cal. 128.

³⁷ *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *Ex parte Vermilyea*, 6 Cow. (N. Y.) 555; *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *People v. Allen*, 43 N. Y. 28; *Rice v. St.*, 1 Yerg. (Tenn.) 432; *McGowan v. St.*, 9 Yerg. (Tenn.) 184; *Com. v. Leshner*, 17 Serg. & R. (Pa.) 156.

³⁸ *Freeman v. People*, 4 Den. (N. Y.) 9, 35; *People v. Honeyman*, 3 Den. (N. Y.) 121; *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *People v. McMahon*, 2 Park. Cr. (N. Y.) 663; *Anderson v. St.*, 14 Ga. 709; *Ray v. St.*, 15 Ga. 223; *Stout v. People*, 4 Park. Cr. (N. Y.) 132; *Schoeffler v. St.*, 3 Wis. 823.

³⁹ *People v. Allen*, 43 N. Y. 28.

⁴⁰ 1 Burr. Tr. 44, per Marshall, C. J.; *St. v. Godfrey*, Brayt. (Vt.) 170; *U. S. v. Watkins*, 3 Cranch C. C. (U. S.) 565; *U. S. v. Devaughan*,

reason being that one who has expressed an opinion is likely to be restrained by his own pride from recanting it. But numerous American holdings make the *existence* of such an opinion, admitted by the venire-man on his *voir dire*, a good cause of challenge.⁴¹

§ 77. **Nature of the Opinion which Disqualifies.**—By the common law the fact that a venire-man had *declared* his opinion that the accused was guilty, that he would be hanged, and the like, was good cause of challenge,⁴² unless it should appear that the declaration was made from his own knowledge of the cause, and not out of any ill-will to the party.⁴³ This exception carries us back to the

3 Cranch C. C. (U. S.) 84; St. v. Madoil, 12 Fla. 151; Boardman v. Wood, 3 Vt. 570; St. v. Clark, 42 Vt. 629; St. v. Phair, 48 Vt. 366; St. v. Tatro, 50 Vt. 483; Noble v. People, 1 Ill. 29; Hudgins v. St., 2 Ga. 173; Boon v. St., 1 Ga. 619; Reynolds v. St., 1 Ga. 228; Baker v. St., 15 Ga. 498; Griffin v. St., 15 Ga. 476. One of the grounds alleged against Mr. Justice Chase on the trial of his impeachment was that, in the trial of Callender's Case, he had coupled these two elements together, though he had put the question in the disjunctive on the previous trial of Fries' Case (Chase Tr. 117; Fries' Case, Whart. St. Tr. 610, 614; Callender's Case, Whart. St. Tr. 688, 696); and the invective launched against the traverser by John Randolph on this ground showed that distinguished man to be a better orator than lawyer; for it was only the *expression* of a disqualifying opinion at common law that afforded ground of challenge. Hawk. P. C., ch. 43, § 28; Rex v. Edmunds, 4 Barn. & Ald. 471, 492.

⁴¹ Osiander v. Com., 3 Leigh (Va.), 780; Armistead's Case, 11 Leigh (Va.), 657; St. v. Wilson, 38 Conn. 126; U. S. v. Hanway (Walsh's Case), 2 Wall. Jr. (U. S.) 139; U. S. v. Wilson, Bald. C. C. 84; People v.

Christie, 2 Park. Cr. (N. Y.) 579, 2 Abb. Pr. (N. Y.) 256; Com. v. Knapp, 9 Pick. (Mass.) 496, 498; Com. v. Webster, 5 Cush. (Mass.) 295, 298; People v. Hettick, 1 Wheeler Cr. C. (N. Y.) 399; People v. Melvin, 2 Wheeler Cr. C. (N. Y.) 265; People v. Johnson, 2 Wheeler Cr. C. (N. Y.) 361, 367; Romaine v. St., 7 Ind. 63; Stewart v. St., 13 Ark. 720; Maize v. Sewell, 4 Blackf. (Ind.) 447; Front v. Williams, 29 Ind. 18. Or in respect to an important contested issue in a case. St. v. Grier, 111 Iowa, 706, 83 N. W. 718; St. v. Brownfield, 67 Kan. 625, 73 Pac. 925; St. v. Snyder, 182 Mo. 462, 82 S. W. 12.

⁴² 2 Hawk. P. C., ch. 43, § 28; Cook's Case, 13 How. St. Tr. 333; Barbot's Case, 18 How. St. Tr. 1233; Layer's Case, 16 How. St. Tr. 137; O'Coigly's Case, 26 How. St. Tr. 1227; Horne Tooke's Case, 25 How. St. Tr. 17.

⁴³ 2 Hawk. P. C., ch. 43, § 28. See also Brooke's Abr., Challenge, pl. 90, citing 21 Hen. VII. 29; Bac. Abr., Juries, E. 5; Rex v. Edmunds, 4 Barn. & Ald. 471, 490. See also Brooke's Abr., Challenge, 55, and Fitzherbert's Abr. Challenge, 22, citing the charge of Babington to the triors in the Year Book, 7 Hen. VI. fol. 25; Trials per Pais (1725), 189.

early days of jury trial, when jurors were summoned *de vicineto*, because they had knowledge of the controversy to be tried, and therefore sat in the character of *witnesses* as well as in that of *triors*. It is unsuited to modern conceptions, and, though approved in England as late as 1821,⁴⁴ and in a few instances in this country,⁴⁵ it is not in general the law with us; but here the question usually is whether, from any cause, the juror has such a bias of mind as may disqualify him from deciding impartially.⁴⁶ In some States the fact that the venire-man has been *summoned as a witness*, is a good cause of challenge.⁴⁷

⁴⁴ By Lord Tenterden in *Rex v. Edmunds*, *supra*.

⁴⁵ *State v. Spencer*, 21 N. J. L. 196, 198; *St. v. Fox*, 29 N. J. L. 566; *Pettis v. Warren*, Kirby, 426. See also *St. v. Howard*, 17 N. H. 171, 192.

⁴⁶ *Trial of Aaron Burr*, vol. I, p. 414, opinion of Marshall, C. J.; *Blake v. Millspaugh*, 1 Johns. (N. Y.) 316; *Durell v. Mosher*, 8 Johns. (N. Y.) 445; *Ex parte Vermilyea*, 6 Cow. (N. Y.) 555; *People v. Mather*, 4 Wend. (N. Y.) 229, 241; *People v. Van Alstyne*, MS., cited in 6 Cow. (N. Y.) 565; *People v. Vermilyea*, 7 Cow. 108; *Solander v. Pople*, 2 Col. 48, 59; *Boon v. Georgia*, 1 Ga. 618, 622; *St. v. Williams*, 3 Stew. (Ala.) 454; *Waters v. St.*, 51 Md. 430; *Hudgins v. St.*, 2 Ga. 173. If a juror has *knowledge* of the facts in controversy, he should be sworn and examined as a witness, so that he may be cross examined, and so that his testimony shall not be given for the first time in the jury room out of the presence of the parties. *Rex v. Perkins*, Holt, 403; *Hauser v. Com.*, 5 Am. L. Reg. (n. s.) 668; *Dunbar v. Parks*, 2 Tyler (Vt.), 217; *Green v. Hill*, 4 Tex. 465; *U. S. v. Fourteen Packages*, Gilp. (U. S.) 236; *Fellows' Case*, 5 Me. 333; *Rondeau v. New Orleans etc. Co.*, 15 La. 160; *People v. Warner*, 147 Cal. 546, 82 Pac. 196; *St. v. Sykes*, 191 Mo. 62, 89 S. W.

851. A very broad discretion is vested in the trial court in the determination of this question, not to be reviewed except it is plainly abused. *St. v. Vick*, 132 N. C. 995, 43 S. E. 626; *Com. v. Roddy*, 184 Pa. 274, 39 Atl. 211.

⁴⁷ *Com. v. Joliffe*, 7 Watts (Pa.), 585; *Atkins v. St.*, 60 Ala. 45; *Commander v. St.*, 60 Ala. 1; *St. v. Underwood*, 2 Overton (Tenn.), 92; *Hook v. Page*, 1 Overton (Tenn.), 250. But see *Fellows's Case*, 5 Me. 333; *Handly v. Call*, 30 Me. 9; *Bell v. St.*, 44 Ala. 393; *Rondeau v. New Orleans Co.*, 15 La. 160. Where this is so, the juror does not render himself competent by disclaiming all knowledge of the case. *West v. St.*, 8 Tex. App. 119. Nor is the error of putting him on the jury cured by omitting to call him as a witness. *Atkins v. St.*, 60 Ala. 45. But it has been held no cause of challenge that the venire-man was examined as a witness on a former trial of the same cause before arbitrators. *Harper v. Keen*, 11 Serg. & R. (Pa.) 280. Nor that, in a criminal case, he had been called on a former trial as a witness for the State to testify against the general character of the prisoner. *Fellows's Case*, 5 Me. 333. Where statute required names of witnesses indorsed on information or indictment, it was reversible error to permit one of them to be on

§ 78. [Continued.] **Must be of a Fixed and Positive Character.**—Expressed in the varying terms of judicial opinions, the opinion concerning the merits of the case on trial which disqualifies the venire-man must be a *fixed, settled, absolute, positive, decided, substantial, deliberate* or *unconditional* opinion,⁴⁸ no matter from what source derived.⁴⁹ But the source is so far material that disqualify-

the jury, as the presumption is that he was possessed of knowledge of a material fact in the prosecution. *St. v. Stentz*, 30 Wash. 134, 70 Pac. 241.

⁴⁸ *Schoeffler v. St.*, 3 Wis. 823; *People v. King*, 27 Cal. 507; *Jackson v. St.*, 77 Ala. 18; *People v. Bodine*, 1 Den. (N. Y.) 308; *St. v. Howard*, 17 N. H. 192; *Staup v. Com.*, 74 Pa. St. 458; *Rafe v. St.*, 20 Ga. 60; *Osiander v. Com.*, 3 Leigh (Va.), 780; *Armistead v. Com.*, 11 Leigh (Va.), 657; *Lithgow v. Com.*, 2 Va. Cas. 297; *Sprouce v. Com.*, 2 Va. Cas. 375; *Jackson v. Com.*, 23 Gratt. (Va.) 919; *Thompson v. Updegraff*, 3 W. Va. 629; *Brown v. Com.*, 2 Leigh (Va.), 769; *St. v. George*, 8 Rob. (La.) 535; *St. v. Brown*, 4 La. Ann. 505; *Wright v. St.*, 18 Ga. 383; *People v. Stout*, 4 Park. Cr. (N. Y.) 71, 117. See also *St. v. Kingsbury*, 58 Me. 238. Judges frequently use the term "opinion" as synonymous with "fixed opinion." See *Reynolds v. St.*, 1 Ga. 222, with which decision compare *Hudgins v. St.*, 2 Ga. 173, 180; *Maddox v. St.*, 32 Ga. 581; *Dinsmore v. St.*, 61 Neb. 418, 85 N. W. 445. Pennsylvania Supreme Court says: "A preconceived opinion as to the guilt or innocence of the accused" disqualifies. *Com. v. Minney*, 216 Pa. 149, 63 Atl. 31.

⁴⁹ *Boon v. St.*, 1 Ga. 631; *Logan v. St.*, 50 Miss. 269, 275; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Leach v. People*, 53 Ill. 311; *Smith v. Eames*, 4 Ill. 76; *Carson v. St.*, 50 Ala. 134; *Hall v. St.*, 51 Ala. 9; *St. v. Davis*, 14 Nev. 439, 450; *Payne v.*

St., 3 Humph. (Tenn.) 375; *Rice v. St.*, 1 Yerg. (Tenn.) 432; *McGowan v. St.*, 9 Yerg. (Tenn.) 184; *Coleman v. Hagerman*, MS., cited in 6 Cow. (N. Y.) 564; *People v. Mather*, 4 Wend. (N. Y.) 229, 244; *Greenfield v. People*, 74 N. Y. 277; *Norfleet v. St.*, 4 Sneed (Tenn.), 340; *Sam v. St.*, 31 Miss. 480; *Goodwin v. Blachley*, 4 Ind. 438; *Meyer v. St.*, 19 Ark. 156; *Fouts v. St.*, 7 Ohio St. 471; *Armistead v. Com.*, 11 Leigh (Va.), 657; *Staup v. Com.*, 74 Pa. St. 458; *People v. Mallon*, 3 Lans. (N. Y.) 224; *Lithgow v. Com.*, 2 Va. Cas. 297; *Sprouce v. Com.*, 2 Va. Cas. 375; *Conway v. Clinton*, 1 Utah, 215; *Wright v. Com.*, 32 Gratt. (Va.) 941; *Jackson v. Com.*, 23 Gratt. (Va.) 919; *Gardner v. People*, 4 Ill. 84; *Neely's Case*, 13 Ill. 685. But see *Clore's Case*, 8 Gratt. (Va.) 607; *Trial of Aaron Burr*, p. 370; *Moses v. St.*, 10 Humph. (Tenn.) 456, 11 Humph. (Tenn.) 232; *McGowan v. St.*, 9 Yerg. (Tenn.) 184; *Payne v. St.*, 3 Humph. (Tenn.) 375; *Balbo v. People*, 80 N. Y. 484, 492, 493, per *Andrews, J.*; *St. v. McClear*, 11 Nev. 39, 67; *Logan v. St.*, 50 Miss. 269, 275; *St. v. Brette*, 6 La. Ann. 652; *Grey v. People*, 26 Ill. 344; *Armistead v. Com.*, 11 Leigh (Va.), 657; *Maddox v. St.*, 32 Ga. 581; *Neely v. People*, 13 Ill. 685; *People v. Cottle*, 6 Cal. 227; *People v. Edwards*, 41 Cal. 640; *People v. Reynolds*, 16 Cal. 128, 133; *People v. Brotherton*, 43 Cal. 530, 1 Green's Cr. L. 739; *People v. Gehr*, 8 Cal. 359; *Ruff v. Rader*, 2 Mont. 211. The juror's statement

ing opinions which have been derived from an *authentic source*,⁵⁰ as from hearing the *evidence upon a former trial* of the same case,⁵¹ or from *conversations with witnesses*,⁵² or with a *party*,⁵³ or with one

that the opinion is "unqualified" receives weighty consideration. *St. v. Gillick*, 10 Iowa, 98. The source of the opinion is material only as throwing doubt upon its disqualifying character, where doubts arise on that question. *Wormeley v. Com.*, 10 Gratt. (Va.) 658, 687. The numerous cases which hold that opinions based upon *rumor* merely do not disqualify, are reconcilable with the foregoing only upon the ground that such opinions are not, from their nature, of that fixed character which will not yield to evidence. *Alfred v. St.*, 3 Swan (Tenn.), 581. See also *Major v. St.*, 4 Sneed (Ky.), 597; *People v. Hayes*, Edm. Sel. Cas. (N. Y.) 582; *Carson v. St.*, 50 Ala. 134; *Curley v. Com.*, 84 Pa. St. 151. In the view of these cases "belief" is synonymous with a "fixed opinion." But see *Neely v. People*, 13 Ill. 685; *Bales v. St.*, 63 Ala. 30, 36. In the California Penal Code "belief" is used as synonymous with "unqualified opinion." Cal. Penal Code, § 1074, subsec. 8; *Ward v. St.*, 102 Tenn. 734, 52 S. W. 996.

⁵⁰ *Troxdale v. St.*, 9 Humph. (Tenn.) 411. As statement by one assuming to know the facts. *Caldwell v. St.*, 69 Ark. 322, 63 S. W. 59. Though one may assume to repeat evidence and be believed, this has been decided to be not authentic, but merely hearsay. *St. v. Williams*, 49 La. Ann. 1148, 22 South. 759.

⁵¹ *Ex parte Vermilyea*, 6 Cow. (N. Y.) 555; *People v. Vermilyea*, 7 Cow. (N. Y.) 121; *Grissom v. St.*, 4 Tex. App. 374; *Jacobs v. St.*, 9 Tex. App. 278; *Willis v. St.*, Id. 297; *Jackson v. Com.*, 23 Gratt. (Va.) 919; *Apperson v. Logwood*, 12 Helsk. (Tenn.)

262; *Lloyd v. Nourse*, 2 Rawle (Pa.), 49; *Garthwaite v. Tatum*, 21 Ark. 336; *Irvine v. Kean*, 14 Serg. & R. (Pa.) 292; *St. v. McClear*, 11 Nev. 39, 67; *McGuffie v. St.*, 17 Ga. 497; *St. v. Webster*, 13 N. H. 491; *Studley v. Hall*, 22 Me. 198; *Sam v. St.*, 13 Smed. & M. (Miss.) 189. One who has formed an opinion from reading the evidence on the trial of an *accomplice* is so disqualified. *Brown v. St.*, 70 Ind. 576. Contra, that the mere fact of having heard such evidence does not disqualify. *Thompson v. St.*, 19 Tex. App. 593; *St. v. Miller*, 46 Or. 485, 81 Pac. 363.

⁵² *People v. Johnson*, 46 Cal. 78; *Logan v. St.*, 50 Miss. 275; *St. v. George*, 8 Rob. (La.) 535, 537; *Goodwin v. Blachley*, 4 Ind. 438; *Dugle v. St.*, 100 Ind. 259 (by statute); *Bishop v. St.*, 9 Ga. 121. But see *St. v. Guidry*, 28 La. Ann. 630. The mere circumstance that a juror has listened to the testimony, or has conversed with witnesses in a case, is not a cause of challenge, if he has formed no opinion based upon such testimony or conversation. *Page v. Com.*, 27 Gratt. (Va.) 954; *Thomson v. People*, 24 Ill. 60; *Parchman v. St.*, 2 Tex. App. 228; *Shields v. St.*, 8 Tex. App. 427; *Harper v. Kean*, 11 Serg. & R. (Pa.) 280; *Ray v. St.*, 2 Kan. 405; *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *St. v. Ayer*, 23 N. H. 301; *Com. v. Reid*, 8 Phila. (Pa.) 385; *U. S. v. Duff* (U. S. Cir. Ct. S. D. New York, Jan., 1881, *Benedict, D. J.*), 6 Fed. 45; *McCune v. Com.*, 2 Rob. (Va.) 777; *Monroe v. St.*, 23 Tex. 10. Compare *Moran v. Com.*, 9 Leigh (Va.), 651. Such conversations as to incidental or collateral matters do not disqualify

who heard the witnesses testify on a former trial or examination,⁵⁴ will be a good ground of challenge. Within this rule, a mere *impression*, not amounting to a fixed or settled opinion,⁵⁵ will not disqualify; though if, on examination, what the juror calls an *impression* appears to be a fixed opinion, the challenge will be sustained.⁵⁶ Conversely, what the juror calls an *opinion* may turn out on examination to be a slight *impression* which will yield to evidence, in which case the challenge will be overruled.⁵⁷ It is but another expression of the same idea that an *indefinite opinion* does not disqualify.⁵⁸ In short, the rule cannot be better stated than in the language of Chief Justice Shaw in the celebrated trial of Professor Webster for the murder of Dr. Parkman: "The opinion or judgment," said he, "must be something more than a vague impression, formed from casual observation with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or pervert a candid judgment upon a full hearing of the evidence. If one has formed what in some sense might be called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror."⁵⁹

Walker v. St., 102 Ind. 502; Caldwell v. St., 69 Ark. 322, 63 S. W. 59.

⁵³ Rogers v. Rogers, 14 Wend. (N. Y.) 131; Young v. Marine Ins. Co., 1 Cranch C. C. (U. S.) 452; St. v. Smith, 124 Iowa, 334, 100 N. W. 40.

⁵⁴ Nelms v. St., 13 Smed. & M. (Miss.) 500, 504; Quesenberry v. St., 3 Stew. & Port. (Ala.), 308; Sam v. St., 13 Smed. & M. (Miss.) 189; Ned v. St., 7 Porter (Ala.), 187. But see Jackson v. Com., 23 Gratt. (Va.) 919. An opinion must have been actually formed. St. v. Riddle, 179 Mo. 287, 78 S. W. 606. And the juror be unable to lay the same aside or possessed of bias. St. v. Prins, 117 Iowa, 682.

⁵⁵ People v. Honeyman, 3 Denio (N. Y.), 121; People v. Symonds, 22 Cal. 348; Gold Mining Co. v. Nat. Bank, 96 U. S. 640; Noe v. St., 4 How. (Miss.) 330; White v. St., 52 Miss. 216; St. v. Ward, 14 La. Ann. 673; St. v. Coleman, 27 La. Ann. 691;

St. v. Hugel, 27 La. Ann. 375; St. v. Medlicott, 9 Kan. 257; Travis v. Com., 106 Pa. St. 597; St. v. Royce, 24 Wash. 440, 64 Pac. 742. A mere suspicion does not disqualify. Lindley v. St., 69 Ohio St. 215, 69 N. E. 126.

⁵⁶ Greenfield v. People, 74 N. Y. 277, 283; St. v. Morrison, 64 Kan. 669, 68 Pac. 48.

⁵⁷ Payne v. St., 3 Humph. (Tenn.) 375; St. v. Wilson, 38 Conn., 126, 138; Norfleet v. St., 4 Sneed (Tenn.), 340, 343; Palmer v. People, 4 Neb. 68, 75; Com. v. Lenox, 3 Brewst. (Pa.) 249; U. S. v. Reynolds, 1 Utah, 319; People v. Munley, 142 Cal. 441, 76 Pac. 45. His statement that it will take evidence to remove same, the court may deem him qualified. St. v. Armstrong, 43 Or. 207, 73 Pac. 1022.

⁵⁸ St. v. Hoyt, 47 Conn. 518.

⁵⁹ Com. v. Webster, 5 Cush. (Mass.) 295, 297. See also St. v. Pike (Sup.

§ 79. **Opinions which do not Disqualify.**—Lord Mansfield's standard that "a juror should be as *white as paper*,"⁶⁰ has long since been discarded as impracticable,⁶¹ and that of Chief Justice Marshall, laid down in the trial of Aaron Burr, has been generally substituted in its place. "Were it possible," said he, "to obtain a jury without any prepossessions whatever, respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him."⁶² *Improper expressions* of opinion, shown to have been made in a spirit of levity, have been often overlooked;⁶³ but if the venire-man has talked

Ct. N. H.), 11 Am. L. Reg. 233, and particularly the opinion of Lomax, J., in *Clore's Case*, 8 Gratt. (Va.) 606, 617; *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690. The Virginia court says the trend of opinion is towards limiting, rather than extending, disqualification, and to make it depend upon a substantial opinion, and not an impression in no way calculated to interfere with fairness in the juror's mind. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. Neither formation or expression of opinion nor both combined are given the importance of the question as to whether there is an existing bias or prejudice. *St. v. Kellogg*, 104 La. 682, 29 South. 285.

⁶⁰ *Mylock v. Saladin*, 1 W. Bl. 480, 481.

⁶¹ *McCausland v. McCausland*, 1 Yeates (Pa.), 372, 378; *O'Mara v. Com.*, 75 Pa. St. 424, 428; *Reynolds v. U. S.*, 98 U. S. 145, 156; *Dimmick v. U. S.*, 121 Fed. 638, 57 C. C. A. 664.

⁶² *Trial of Aaron Burr*, vol. 1, p. 416. See also *Boon v. St.*, 1 Ga. 618, 625; *Nelms v. St.*, 13 Smed. & M. (Miss.) 500, 504; *Smith v. Eames*, 4 Ill. 76; *Leach v. People*, 53 Ill. 311; *Black v. St.*, 42 Tex. 377; *St. v. Desmouchet*, 32 La. Ann. 1241; *St. v. Croney*, 31 Wash. 122, 71 Pac. 783.

⁶³ *John v. St.*, 16 Ga. 200; *Moughon v. St.*, 59 Ga. 308; *Com. v. Flanagan*, 7 Watts & S. (Pa.) 415, 421; *Lovett v. St.*, 60 Ga. 257; *Simms v. St.*, 8 Tex. App. 230; *Com. v. Hailstock*, 2 Gratt. (Va.) 564; *St. v. Diskin*, 35 La. Ann. 46; *Johnson v. St.*, 11 Lea (Tenn.), 47. Compare *St. v. Revells*, 35 La. Ann. 342; *St. v. Coleman*, 20 S. C. 441. It was so held in the case of one of the veniremen summoned on the trial of Aaron Burr, who on his voir dire, admitted as follows: "I met an intimate friend to whom I observed that I had come to town with a hope of being placed on this jury, and if I were, I would hang Colonel

about the case and has strong opinions, he should be rejected.⁶⁴ Accordingly it is no longer ground of disqualification that the juror has *heard much* about the case, provided he has formed no opinion thereon;⁶⁵ nor that what he has heard has impressed itself upon his mind as a fact, provided the *impression* is such as will *readily yield to the evidence* presented in the case.⁶⁶ Of this character are many opinions formed from *reading newspapers*⁶⁷ and from other sources of so unsubstantial a character that a contradiction from the same source would be as readily accepted as true,⁶⁸—but, as all opinions,

Burr at once without further inquiry. 1 Burr. Tr. 423. Contra, Brakefield v. St., 1 Sneed (Tenn.), 215. Compare St. v. Coleman, 20 S. C. 441; Kugadt v. St., 18 Tex. Cr. R. 363, 44 S. W. 889. Or of indignation on hearing of the homicide involved. St. v. Perioux, 107 La. 601, 31 South. 1016.

⁶⁴ Ward v. St., 19 Tex. App. 664; People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

⁶⁵ St. v. Howard, 17 N. H. 171; St. v. Potter, 18 Conn. 166; Com. v. Thrasher, 11 Gray (Mass.), 57.

⁶⁶ Scranton v. Stewart, 52 Ind. 68; McGregg v. St., 4 Blackf. (Ind.) 101; Van Vacter v. McKillip, 7 Blackf. (Ind.) 578; Morgan v. Stevenson, 6 Ind. 169; Rice v. St., 7 Ind. 332; Lithgow v. Com., 2 Va. Cas. 297, 313; Ulrich v. People, 39 Mich. 245; St. v. George, 8 Rob. (La.) 535; St. v. Coleman, 27 La. Ann. 691, 692; St. v. De Rance, 34 La. Ann. 186; St. v. Dugay, 35 La. Ann. 327; St. v. Walton, 74 Mo. 270; St. v. Baber, Id. 292. Compare St. v. Johnson, 33 La. Ann. 889; Guetig v. St., 66 Ind. 94; Noe v. St., 92 Ind. 92; Conaster v. St., 12 Lea (Tenn.), 436. A juror whose frame of mind is such that he is in doubt as to whether the opinion he has formed would readily yield to the evidence sought to be excluded. Dejarnette v. Com., 11 Reporter, 653, 75 Va. 867. Compare Stout v.

People, 4 Park. Cr. (N. Y.) 71, 111; People v. Ochoa, 142 Cal. 263, 75 Pac. 847; St. v. Landano, 74 Conn. 638, 51 Atl. 860.

⁶⁷ St. v. Meyer, 58 Vt. 457; Spence v. St., 15 Lea (Tenn.), 539; Bohanan v. St., 18 Neb. 57; St. v. Wilson, 85 Mo. 130; Dolan v. St., 40 Ark. 454; Allison v. Com., 99 Pa. St. 17; Gradle v. Hoffman, 105 Ill. 147; St. v. Meaker, 54 Vt. 112; St. v. Hoyt, 47 Conn. 518; People v. Oyer & Terminer Court, 83 N. Y. 436. Contra, in McHugh v. St., 38 Ohio St. 153, it is held that one who has formed and *expressed* an opinion of guilt, from newspaper accounts, in a capital case, is disqualified. Daughtry v. St., 80 Ark. 13, 96 S. W. 748; St. v. Church, 199 Mo. 605, 98 S. W. 16; St. v. Haworth, 24 Utah, 398, 68 Pac. 155; St. v. Boyce, 24 Wash. 514, 64 Pac. 719; Palmer v. St. (Tenn.) 118 S. W. 1022.

⁶⁸ People v. Stout, 4 Park. Cr. (N. Y.) 71; People v. Johnson, 2 Wheeler Cr. Cas. (N. Y.) 361, 369; Lowenberg v. People, 5 Park. Cr. (N. Y.) 414, 423; Eason v. St., 6 Baxter (Tenn.), 466, 477; St. v. Potter, 18 Conn. 166; St. v. Wilson, 38 Conn. 126; O'Connor v. St., 9 Fla. 215; Montague v. St., 17 Fla. 662; Bradford v. St., 15 Ind. 347; St. v. Benton, 2 Dev. & B. (N. C.) 196; Morgan v. St., 31 Ind. 193; Clem v. St., 33 Ind. 418; Cluck v. St., 40 Ind. 263; Scranton v. Stewart, 52 Ind.

founded on the belief of facts derived from the testimony of others, are of this character, it is obvious that we get no safe rule from the use of this expression. Such opinions may involve the rankest prejudice. Great care should therefore be exercised in interrogating the venire-man who entertains them, as to the strength of his belief in them.⁶⁹ Such opinions are frequently disregarded in the venire-man, on the ground of their being *hypothetical* opinions merely.⁷⁰

68; Fahnestock v. St., 23 Ind. 231; Meyer v. St., 19 Ark. 156; St. v. Spaulding, 24 Kan. 1; People v. Reynolds, 16 Cal. 128; Shoeffler v. St., 3 Wis. 823; People v. Mallon, 3 Lans. (N. Y.) 224; Lithgow v. Com., 2 Va. Cas. 297; Holt v. People, 13 Mich. 224; King v. St., 5 How. (Miss.) 730; St. v. Flower, Walker (Miss.), 318; St. v. Raymond, 11 Nev. 98; People v. King, 27 Cal. 507; People v. Williams, 17 Cal. 142; St. v. Morea, 2 Ala. 275; Hudgins v. St., 2 Ga. 133; St. v. Cockman, 2 Winst. (N. C.) 95; St. v. Ellington, 7 Ired. L. (N. C.) 61; Waters v. St., 51 Md. 430, 8 Reporter, 560; Little v. Com., 25 Gratt. (Va.) 921; U. S. v. McHenry, 6 Blachf. (U. S.) 503; Brown v. Com., 2 Leigh (Va.), 769; McCune v. Com., 2 Rob. (Va.) 771; Irvine v. Lumbermen's Bank, 2 Watts' & S. (Pa.) 190; Wright v. St., 4 Humph. (Tenn.) 194; Cooper v. St., 16 Ohio St. 328; Frazier v. St., 23 Ohio St. 551; St. v. Dove, 10 Ired. L. (N. C.) 469; Hart v. St., 57 Ind. 102; St. v. Bone, 7 Jones L. (N. C.) 121; St. v. Collins, 70 N. C. 241; Sanchez v. People, 4 Park. Cr. (N. Y.) 535; Union Gold M. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565; St. v. Johnson, Walker (Miss.), 392; Sam v. St., 13 Smed. & M. (Miss.) 189; Lee v. St., 45 Miss. 114; St. v. Bunger, 14 La. Ann. 461; St. v. Lartigue, 29 La. Ann. 642; St. v. Hinkle, 6 Iowa, 380; St. v. Sater, 8 Iowa, 420; St. v. Lawrence, 38 Iowa, 51; McGregg v. St., 4 Blackf. (Ind.)

101; Plummer v. People, 74 Ill. 361; Thompson v. St., 24 Ga. 297; People v. McCauley, 1 Cal. 379; Skinner v. St., 53 Miss. 399; St. v. Hoyt, 47 Conn. 518. Within this category are impressions formed from vague and floating rumors, of whose authenticity the venire-man has no just grounds of belief. Payne v. St., 3 Humph. (Tenn.) 375; People v. O'Loughlin, 3 Utah, 133. It is obvious that this rule must be guardedly applied. Eason v. St., 6 Baxt. (Tenn.) 466, 477; Cobb v. Chicago R. I. & P. R. Co., 134 Iowa, 411, 109 N. W. 723.

⁶⁹ Trimble v. St., 2 G. Greene (Iowa), 404; Armistead v. Com., 11 Leigh (Va.), 657; People v. Johnston, 46 Cal. 78; Gardner v. People, 4 Ill. 83; Rothschild v. St., 7 Tex. App. 519; Moses v. St., 10 Humph. (Tenn.) 456; Neely v. People, 13 Ill. 685; Brown v. St., 70 Ind. 577; St. v. Ricks, 32 La. Ann. 1098. But see Epes' Case, 5 Gratt. (Va.) 676; Smith v. Com., 6 Gratt. (Va.) 696; Smith v. Com., 7 Gratt. (Va.) 593; Dejanette v. Com., 75 Va. 867.

⁷⁰ Durell v. Mosher, 8 Johns. (N. Y.) 445. See also Com. v. Hughes, 5 Rand. (Va.) 655; St. v. Farrow, 74 Mo. 531; People v. Johnson, 2 Wheeler Cr. Cas. 361, 369; People v. Fuller, 2 Park. Cr. (N. Y.) 16; Mann v. Glover, 14 N. J. L. 195; St. v. Spencer, 21 N. J. L. 197; Burk v. St., 27 Ind. 430; St. v. Williams, 3 Stew. (Ala.) 454; Oslander v. Com., 3 Leigh (Va.), 780; St. v. Flower,

§ 80. **Opinions which will require Evidence to Remove them.**—Opinions which will *require evidence to remove them* disqualify the juror in the opinion of many courts.⁷¹ Other courts, following the lead of Chief Justice Marshall in Burr's case, lay this test aside, reasoning that "the fact that it would take evidence to remove an opinion would appear to be only the natural adjunct of every opinion formed upon rumor."⁷² But not only the opinion of Chief Justice Marshall,⁷³ but all other judicial opinion, so far as known, is to the effect that, if the venire-man has acquired that *fixed* and *positive* opinion which disqualifies him—if, in other words, he has made up his judgment in the case—the law will not trust him to change that opinion or that judgment after hearing the evidence.⁷⁴ A venire-

Walker (Miss.), 318; People v. Murphy, 45 Cal. 137; Jackson v. Com., 23 Gratt. (Va.) 919; Moran v. Com., 9 Leigh (Va.), 651; Loeffener v. St., 10 Ohio St. 598; St. v. Ostrander, 18 Iowa, 435; St. v. Hoyt, 47 Conn. 518; Jackson v. Com., 23 Gratt. (Va.) 919, 928; Wright v. Com., 32 Gratt. (Va.) 941, 943; Balding v. St. (Tex.), 9 S. W. 579; Thompson v. People, 26 Colo. 496, 59 Pac. 51; Williams v. Supreme Court of Honor, 221 Ill. 152, 77 N. E. 542.

⁷¹ U. S. v. Wilson, Baldwin (U. S.), 85; People v. Mather, 4 Wend. (N. Y.) 229; Eason v. St., 6 Baxt. (Tenn.) 466, 476; Com. v. Knapp, 9 Pick. (Mass.) 496; Cotton v. St., 31 Miss. 504; White v. Moses, 11 Cal. 68; Fahnestock v. St., 23 Ind. 231; Armistead v. Com., 11 Leigh (Va.), 657; People v. Mallon, 3 Lans. (N. Y.), 224; Stephens v. People, 38 Mich. 739; People v. Cottle, 6 Cal. 227; People v. Gehr, 8 Cal. 359; Conway v. Clinton, 1 Utah, 215; Rothschild v. St., 7 Tex. App. 519; U. S. v. Hanway, 2 Wall. Jr. (U. S.) 139; Ruff v. Rader, 2 Mont. 211; Moses v. St., 10 Humph. (Tenn.) 456; Sam v. St., 13 Smed. & M. (Miss.) 189; Alfred v. St., 37 Miss. 296; St. v. Bunger, 11 La. Ann. 607;

Collins v. People, 48 Ill. 145; Gray v. People, 26 Ill. 344; Cancemi v. People, 16 N. Y. 501; Olive v. St., 11 Neb. 1; Polk v. St., 45 Ark. 165 (overruling Casey v. St., 37 Ark. 67); People v. Welmarth, 51 N. Y. S. 688, 29 App. Div. 612; Bryant v. St., 7 Wyo. 311, 51 Pac. 879.

⁷² Per Lewis, P. J., in St. v. Barton, 8 Mo. App. 15, 17, 71 Mo. 288. See also St. v. Core, 70 Mo. 491; St. v. Greenwade, 72 Mo. 298; St. v. Davis, 29 Mo. 397; St. v. Carson, 50 Ala. 134; Bales v. St., 63 Ala. 30; Reynolds v. U. S., 98 U. S. 145; Curley v. Com., 84 Pa. St. 151 (the juror Lorah); Ortwein v. Com., 76 Pa. St. 414; Estes v. Richardson, 6 Nev. 128; People v. King, 27 Cal. 507; Wilson v. St., 94 Ill. 299; Ogle v. St., 33 Miss. 383; Thomas v. St., 36 Tex. 316; Post v. St., 10 Tex. App. 579; O'Mara v. Com., 75 Pa. St. 424; Myers v. Com., 79 Pa. St. 308; St. v. Lawrence, 38 Iowa, 51; St. v. Medicott, 9 Kan. 257; Guetig v. St., 66 Ind. 94; People v. Brown, 48 Cal. 253; People v. Welch, 49 Cal. 174; Stout v. St., 90 Ind. 1; Leigh v. Territory (Ariz.), 85 Pac. 948 (not reported in state reports); Dolan v. U. S., 123 Fed. 52.

⁷³ 1 Burr Tr. 416.

⁷⁴ Com. v. Leshner, 17 Serg. & R.

man entertaining such an opinion is not to be put upon the jury in the confidence that he can render an impartial verdict; since, under such circumstances, his effort to justify such a confidence might incline him too far in the opposite direction.⁷⁵ Therefore, if he has an opinion which it would require *strong evidence* to change, it is an abuse of discretion to admit him, although he may testify that he believes he can render an impartial verdict.⁷⁶ If his opinion of

(Pa.) 155, 156; U. S. v. Wilson, Bald. C. C. (U. S.) 84; Rothschild v. St., 7 Tex. App. 519; People v. Johnson, 46 Cal. 78; St. v. Ricks, 32 La. Ann. 1098; Burr's Trial, vol. I, p. 416. See also Fouts v. St., 7 Ohio St. 471; Trimble v. St., 2 G. Greene (Iowa), 404; Staup v. Com., 74 Pa. St. 458; People v. Gehr, 8 Cal. 359; Baker v. Harris, 1 Winst. (N. C.) 277; Conway v. Clinton, 1 Utah, 215; Cotton v. St., 32 Tex. 614; Black v. St., 42 Tex. 377; Goodwin v. Blachley, 4 Ind. 438; Irvine v. Kean, 14 Serg. & R. (Pa.) 292; Sam v. St., 13 Smed. & M. (Miss.) 189, 194; Alfred v. St., 37 Miss. 296; Logan v. St., 50 Miss. 275; St. v. Bunger, 11 La. Ann. 607; Eason v. St., 6 Baxter (Tenn.), 466, 476; People v. Weil, 40 Cal. 268; Stephens v. People, 38 Mich. 739; St. v. Miller, 29 Kan. 43; St. v. Carrick, 6 Nev. 120. The *mind of the court* must be satisfied that the challenged juror is free from bias and prejudice and not merely that of the juror himself. Morton v. St., 1 Kan. 468; Cooper v. St., 16 Ohio St. 328, 332; People v. Woods, 29 Cal. 135. But see Thomas v. St., 36 Tex. 315. It seems that the fact that the venire-man has formed an *unqualified opinion* does not now disqualify in *California*. People v. Cochran, 61 Cal. 548.

⁷⁵ Rice v. St., 1 Yerg. (Tenn.) 432, 434; St. v. Allen, 46 Conn. 531, 549. The penetrating mind of Aaron Burr, when on trial for treason

against the United States, appreciated the force of this last proposition, as will be seen from the following extract from the report of his trial: "Mr. Bott (a juror): 'I have gone as far as to declare that Col. Burr ought to be hanged.' Mr. Burr: 'Do you think that such declarations would now influence your judgment? Would not the evidence alter your opinion?' Mr. Bott: 'Human nature is very frail. I know that the evidence ought, but it might or might not influence me. I have expressed myself in this manner, perhaps, within a fortnight; and I do not consider myself a proper jurymen.' Mr. Burr: '* * * I will take Mr. Bott under the belief that he will do me justice.'" 1 Burr's Trial, 426. The mind of the court must be convinced of his impartiality. St. v. Caron, 118 La. 349, 42 South. 960; Turner v. St., 111 Tenn. 593, 69 S. W. 774.

⁷⁶ Palmer v. St., 42 Ohio St. 596 (Johnson, J., dissenting); Williams v. U. S., 93 Fed. 396, 35 C. C. A. 369; St. v. McCoy, 109 La. 682, 23 South. 730. Nevertheless great weight is placed by many courts upon the unequivocal statement by a juror of his belief in his ability and of his having the purpose to decide a case fairly and impartially; especially if there exists no bias or prejudice independently of the juror's opinion. St. v. Brady, 100 Iowa, 194, 67 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560.

guilt is so strong that he can only admit the *possibility* of innocence, he must be rejected.⁷⁷ An *intimate* friend of the deceased, who has expressed the opinion that the defendant is guilty of his murder, is incompetent, although he states on his *voir dire* that he can give the accused a fair trial.⁷⁸

§ 81. **Newspaper Reports of Former Trial.**—Again, one court has taken the view that opinion derived from reading newspaper reports of a former trial may or may not disqualify, according to the fullness of the reports, the attention with which they have been read, and other circumstances. Accordingly, we find that such opinions have operated to disqualify⁷⁹ or not,⁸⁰ according to the circumstances, and the extent to which the particular courts were disposed to relax the strict rule. Following back and forth the oscillations of the pendulum, we find that one court has hit upon the

⁷⁷ *Olive v. St.*, 11 Neb. 1; *St. v. Hatfield*, 48 W. Va. 561, 37 S. E. 626; *Walker v. St.*, 146 Ala. 45, 41 South. 878. In Iowa the ruling in favor of competency is more liberal than thus stated. *St. v. Bone*, 114 Iowa, 537, 87 N. W. 507.

⁷⁸ *St. v. Jackson*, 37 La. Ann. 768.

⁷⁹ *Staup v. Com.*, 74 Pa. St. 458. Compare with this case *Myers v. Com.*, 79 Pa. St. 308. See also *St. v. Clark*, 42 Vt. 629; *Greenfield v. People*, 74 N. Y. 277 (compare *Balbo v. People*, 19 Hun (N. Y.), 424, 80 N. Y. 484); *Carroll v. St.*, 5 Neb. 31; *Smith v. St.*, 5 Neb. 181; *Guetig v. St.*, 66 Ind. 94; *St. v. Culler*, 82 Mo. 623. In *Ohio* a juror is rendered incompetent by statute who forms an opinion from reading reports of the testimony of witnesses as to the facts of the case. Laws 1872, p. 11. This includes *newspaper reports*. *Frazier v. St.*, 23 Ohio St. 551. The Arkansas court excluded a juror where his brother-in-law had written the reports the juror having confidence in him. *Sullins v. St.*, 79 Ark. 127, 95 S. W. 159. In Tennessee it was held that a full and accurate report might produce a dis-

qualifying opinion. *Ward v. St.*, 102 Tenn. 734, 52 S. W. 996. In Missouri it was said that a juror's belief that a report was accurate did not disqualify him, but it must be shown to be such before it had this effect. *St. v. Darling*, 199 Mo. 168, 97 S. W. 592.

⁸⁰ *Grisson v. St.*, 4 Tex. App. 374. See also *Smith v. Com.*, 6 Gratt. (Va.) 697; *Smith v. Com.*, 7 Gratt. (Va.) 593; *St. v. Brown*, 71 Mo. 454; *Reynolds v. U. S.*, 98 U. S. 145; *Ortwein v. Com.*, 76 Pa. St. 414; *Weston v. Com.*, 111 Pa. St. 251 (newspaper account of trial of one *jointly indicted* with defendant). *St. v. Cronney*, 31 Wash. 122, 71 Pac. 783. The question has been elaborately discussed by the Michigan Supreme Court, reaching the conclusion, that a strict enforcement of any rule of exclusion because of opinion would bring a far more serious result, and greatly imperil life and liberty, because of ignorance and incompetency filling the jury box, instead of capacity and intelligence. *People v. Quimby*, 134 Mich. 625, 96 N. W. 1061; *People v. Foglesong*, 116 Mich. 556, 74 N. W. 730.

conception that the inquiry is to be addressed to the *present condition of the mind* of the venire-man, and that a disqualifying opinion, formerly entertained, which has changed and passed away, furnishes no ground of exclusion.⁸¹ Another court has taken the view that, after a venire-man has expressed a positive opinion, he ought not to be heard on his *voir dire* to say that he *then* had no opinion.⁸²

§ 82. **Statutes removing Common-Law Disqualification.**—The advance in the popular intelligence and the wide dissemination of a knowledge of current events through the medium of the press, have rendered it impracticable to secure a jury of intelligent men for the trial of causes which have excited much public attention, and have resulted in the necessity of trying such causes before juries composed of the more ignorant portion of the community. To remedy this evil, statutes have recently been passed in several States, removing the common-law ground of challenge explained in the preceding sections, provided the venire-man shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence, and that his previously formed opinion or impression will not bias or influence his verdict.⁸³ Such statutes have been held not unconstitutional as invading the right of trial by jury.⁸⁴

⁸¹ *Rothschild v. St.*, 7 Tex. App. 544; *Grissom v. St.*, 8 Tex. App. 386, 396; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

⁸² *Norfleet v. St.*, 4 Sneed (Tenn.), 340, 345.

⁸³ *Laws of New York 1872*, ch. 475, p. 1133; *Laws of Michigan 1873*, act 117, p. 162; *Laws Colo. 1877*, § 872; *Ill. Stat. 1885*, p. 1422. The Michigan statute has been interpreted as declaratory of the previously existing law in that State. *Stevens v. People*, 38 Mich. 739; *Ulrich v. People*, 39 Mich. 245. See also *Palmer v. People*, 4 Neb. 68, 75, construing a similar statute in that State. For the construction of the New York statute see *Thomas v. People*, 67 N. Y. 218; *Abbott v. People*, 86 N. Y. 460; *People v. Otto*, 101 N. Y. 690, 5 N. E. 788; *People v. Crowley*, 102 N. Y. 234, 6 N. E. 384; *People v.*

Carpenter, 102 N. Y. 238, 6 N. E. 584; *People v. Buddenseick* (N. Y.), 9 N. E. 44; *Balbo v. People*, 19 Hun (N. Y.), 421, 80 N. Y. 484; *Phelps v. People*, 6 Hun (N. Y.), 401, 72 N. Y. 334; *Cox v. People*, 19 Hun (N. Y.), 430, affirmed, 80 N. Y. 500; *Manke v. People*, 17 Hun (N. Y.), 410; *Pender v. People*, 18 Hun (N. Y.), 560; *Greenfield v. People*, 13 Hun (N. Y.), 242, *reversed*, 74 N. Y. 277. Cases construing the Nebraska statute: *Carroll v. St.*, 5 Neb. 32; *Smith v. St.*, 5 Neb. 181; *St. v. Sikes*, 191 Mo. 62, 89 S. W. 551. The source or not of opinion as or not disqualifying is considered according to the exigency of those statutes. *Jones v. St.*, 120 Ala. 303, 25 South. 204. Thus the New York courts consider any opinion, however derived, as *prima facie* disqualifying, but, under the statute and in conformity

§ 83. Declaration of Venire-man that he can render an Impartial Verdict.—It has come to this, under many recent statutes and holdings, especially in cases where the opinion was formed from newspaper reports, that it is not error to seat the venire-man, where he declares on oath that, notwithstanding his previous opinion, he believes that he can render an *impartial verdict* on the evidence, —a statement which the natural pride of many men would lead them to make.⁸⁵ But if he *hesitates* in saying whether his previously formed opinion would influence his verdict, he should be rejected.⁸⁶

to its requirements, the juror may establish his competency. *People v. Wilmarth*, 156 N. Y. 566, 51 N. E. 277. Some courts restrict interpretation in order to save the statute, so that the guarantee by the constitution of an impartial jury shall not be violated, and distinguish thus between opinion and bias or prejudice, allowing the juror ordinarily to qualify himself by his declaration in the one case, but not in the other. *Klyce v. St.*, 79 Miss. 652, 31 South. 339.

⁸⁴ *Stokes v. People*, 53 N. Y. 164, 173; *Jones v. People*, 2 Colo. 351; *Cooper v. St.*, 16 Ohio St. 328; *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *People v. Thiede*, 11 Utah, 241, 39 Pac. 837. Some statutes are conditioned upon the court being satisfied of the juror's impartiality. *Gammons v. St.*, 85 Miss. 103, 37 South. 609.

⁸⁵ *People v. Willett*, 36 Hun (N. Y.), 500; *People v. Casey*, 96 N. Y. 115 (under N. Y. Code, § 376); *Jones v. People*, 6 Colo. 452 (under a statute); *St. v. Kilgore*, 93 N. C. 533; *St. v. George*, 37 La. Ann. 786; *Allison v. Com.*, 99 Pa. St. 17 (Mer-

cur, J., dissenting); *St. v. Spaulding*, 24 Kan. 1; *St. v. Core*, 70 Mo. 491; *Zimmerman v. St.*, 56 Md. 536; *Stout v. St.*, 90 Ind. 1; *People v. Cornetti*, 92 N. Y. 85; *Murphy v. St.*, 15 Neb. 383; *Doll v. St. (Ohio)*, 15 N. E. 293; *St. v. Sopher (Iowa)*, 30 N. W. 917; *St. v. Bryant (Mo.)*, 6 S. W. 102; *St. v. Walton*, 74 Mo. 270; *St. v. Barton*, 71 Mo. 288; *St. v. Brown*, 71 Mo. 454; *Hall v. Com. (Pa.)*, 12 Atl. 163, 11 Cent. Rep. 183. And the judge may still, in his discretion, reject him. *St. v. Barnes*, 34 La. Ann. 395 (Bermudez, C. J., and Levy, J., dissenting). The fact that a *large number* of venire-men were called before the jury was finally obtained, does not show that the jury was prejudiced against the accused, or unfavorable to him, or moved by improper motives. *People v. Beckwith (N. Y.)*, 15 N. E. 53; *People v. Powell*, 145 Cal. 292, 78 Pac. 717; *St. v. Hebert*, 104 La. 227, 28 South. 898. The court should be satisfied and the juror should disclaim all ill-will. *Com. v. Rody*, 184 Pa. 274, 39 Atl. 211.

⁸⁶ *St. v. Johnson*, 49 W. Va. 684, 39 S. E. 665.

CHAPTER IV.

OF THE DETAILS OF PRACTICE IN CHALLENGING AND IMPANELING.

ARTICLE I.—CHALLENGING, IMPANELING, SWEARING.

ARTICLE II.—OBJECTIONS AND THE WAIVER AND REVIEW OF THE SAME.

ARTICLE I.—CHALLENGING, IMPANELING, SWEARING.

SECTION

88. Discretion of the Court in Respect of Impaneling the Jury.
89. [Continued.] Illustrations.
90. Power of Court to Discharge Jurors after they have been Sworn
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98. Ground of Challenge must be Specifically Stated.
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103. [Continued.] Questions Touching Religious or Political Opinions. Affiliations, etc.
104. Swearing Singly or in a Body.
105. Time of Swearing.
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107. Swearing for the Term.
108. Form of the Oath.
109. [Continued.] In Particular Cases.

§ 88. Discretion of the Court in respect of Impaneling the Jury.—In the superintendence of the process of impaneling the jury, a large *discretion* is necessarily confided to the judge, which discretion will not be revised on error or appeal, unless it appears to have been grossly abused or exercised contrary to law.¹ The

¹ Head v. St., 44 Miss. 731, 750. 641; McCarty v. St., 26 Miss. 302; See also Gilliam v. Brown, 43 Miss. Marsh v. St., 30 Miss. 627; St. v.

exercise of this discretion is generally upheld, in *excusing* juror, on grounds personal to him,² or because he is manifestly disqualified

Marshall, 8 Ala. 302; Smith v. St., 55 Ala. 1, 10; McAllister v. St., 17 Ala. 434; Johnson v. St., 58 Ga. 491; Thomas v. St., 27 Ga. 287; Powers v. Presgroves, 38 Miss. 227; Grady v. Early, 18 Cal. 108; Garrison v. Portland, 2 Ore. 123; St. v. Shelledy, 8 Iowa, 477; Chase v. St., 46 Miss. 683; St. v. Ostrander, 18 Iowa, 435; Pierce v. St., 13 N. H. 536; Hubotter v. St., 32 Tex. 479; Ray v. St., 4 Tex. App. 450; Gardenhire v. St., 6 Tex. App. 147; Dixon v. St., 2 Tex. App. 530; Harkins v. St., 6 Tex. App. 452; Walker v. Kennison, 34 N. H. 257; Wilson v. St., 31 Ala. 371; Funkhouser v. Pogue, 13 Ark. 295; Heyl v. St., 109 Ind. 589, 10 N. E. 916; Deig v. Morehead, 110 Ind. 451, 11 N. E. 458. Even where a statute makes it "the imperative duty of the court, before administering to the juror the oath, to ascertain that he is possessed of the qualifications required by law," it is not necessary that it should appear, on appeal or error, that the judge plied him with questions; but if he was satisfied from his personal knowledge of the man, his answers to other questions, or his reputation for integrity and intelligence, or otherwise, that he was qualified, it will be sufficient, and his judgment will not be reviewed. James v. St., 53 Ala. 380; People v. Lee, 1 Cal. App. 169, 81 Pac. 969.

² Ante, § 11; St. v. Moncla (La.) 2 South. 814; Ray v. St., 4 Tex. App. 450; Com. v. Livermore, 4 Gray (Mass.), 18; Atlas Mining Co. v. Johnston, 23 Mich. 37; Ware v. Ware, 8 Me. 42; Hurley v. St., 29 Ark. 17, 22; St. v. Ward, 39 Vt. 225; Maner v. St., 8 Tex. App. 361; O'Brien v. Vulcan Iron Works, 7 Mo.

App. 257; Watson v. St., 63 Ind. 548; St. v. Dickson, 6 Kan. 209; Dodge v. People, 4 Neb. 220; Anderson v. Wasatch etc. R. Co., 2 Utah, 518. But contra, see Montague v. Com., 10 Gratt. (Va.) 767; Boles v. St., 13 Smed. & M. (Miss.) 398; Parsons v. St., 22 Ala. 50. The action of the court in excusing jurors will be regarded as proper, although no cause appears of record. St. v. Whitman, 14 Rich. L. (S. C.) 113; St. v. Breaux, 32 La. Ann. 222. It was so held where it appeared from the record that the juror was excused "to relieve him from embarrassment." John v. St., 16 Fla. 554. But see Montague v. Com., 10 Gratt. (Va.) 767. A sheriff has no power to excuse jurors. But an appellate court will not infer that a sheriff who has excused a portion of the panel did so from improper motives, nor that such action prejudiced any party. Ayers v. Metcalf, 39 Ill. 307. The power of the court to excuse a juror for satisfactory reasons, is not impaired by a statutory provision to the effect that "the first twelve persons who shall appear, as their names are drawn and called, and shall be approved as indifferent between parties, shall be sworn, and shall be the jury to try the cause." Atlas etc. Co. v. Johnston, 23 Mich. 37. A *struck juror* may be excused for a sufficient reason. Stewart v. St., 1 Ohio St. 66. But where jurors are summoned upon a special venire, it has been held that no venire-man can be excused until his name is regularly called in court. Foster v. St., 8 Tex. App. 248; Robles v. St., 5 Tex. App. 346. Excusing *talesmen* who reside more than two miles from the court-house under a recent

by reason of physical or mental infirmities,²—as where he is *deaf*,⁴ *intoxicated*⁵ or *ill*,⁶ or because of serious *illness* in his *family*.⁷ So, the court may, *ex mero motu*, examine venire-men for grounds of partiality and direct them to *stand aside*, although not challenged by either party,⁸ and although not subject to challenge;⁹ though in some jurisdictions venire-men thus stood aside are not *excused*, but may be called and tried upon challenges, if the regular panel is exhausted without securing a jury;¹⁰ and the court has authority,

Ala. statute. *Steel v. St.* (Ala.), 3 South. 547; *Barnes v. Com.*, 24 Ky. Law Rep. 1143, 70 S. W. 827; *Com. v. Pogue*, 205 Pa. 101, 54 Atl. 489; *Ellis v. St.*, 114 Ga. 36, 39 S. E. 881; *St. v. Huff*, 118 La. 194, 42 South. 771. Even on an unsworn statement this would be regarded an irregularity of no consequence. *People v. Schmitt*, 165 N. Y. 568, 61 N. E. 907. It has been held and denied, that excusing one of a special venire in a capital case, in the absence of defendant, is presumptively proper. *Plant v. St.*, 140 Ala. 52, 39 S. E. 159; *Clay v. St.*, 40 Tex. Cr. R. 593, 51 S. W. 370.

² *Mansell v. Reg.*, 8 El. & Bl. 54, 80.

⁴ *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *Jesse v. St.*, 20 Ga. 156.

⁵ *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Pierce v. St.*, 13 N. H. 536, 555; *Nolen v. St.*, 2 Head (Tenn.), 520.

⁶ *Jewell v. Com.*, 22 Pa. St. 94; *Ray v. St.*, 4 Tex. App. 450; *Hubbard v. Gale*, 105 Mass. 511.

⁷ *Parsons v. St.*, 22 Ala. 50, 53. It has, however, been held that the juror should be excused only in those cases of such a serious character as to demand his personal attention, and that the decision of the court upon this point may be reviewed. *Boles v. St.*, 13 Smed. & M. 398; *Parsons v. St.*, supra. Or to save his property from threatened destruction. *Nordan v. St.*, 143 Ala. 13, 39 South. 406.

⁸ *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *Lore v. St.*, 4 Ala. 173; *Pierce v. St.*, 13 N. H. 536; *St. v. Jones*, 80 N. C. 415; *St. v. Prater* (S. C.), 2 S. E. 108; *St. v. Dodson*, 16 S. C. 459; *St. v. Coleman*, 20 S. C. 448; *White v. St.*, 52 Miss. 216; *Stagner v. St.*, 9 Tex. App. 440, 455; *Lewis v. St.*, 9 Smed. & M. (Miss.) 115; *Marsh v. St.*, 30 Miss. 627; *St. v. Van Waggoner* (La.), 3 South. 119. Contra, *Van Blaricum v. St.*, 16 Ill. 364; *Denn v. Pissant*, 1 N. J. L. 220; *Barnes v. Com.*, 22 Ky. Law Rep. 1802, 61 S. W. 733; *Glasgow v. Metropolitan St. Ry. Co.*, 191 Mo. 347, 89 S. W. 915; *People v. Decker*, 157 N. Y. 186, 51 N. E. 618. Even though defendant had exhausted his challenges and was not allowed others to those called to take the places of the excused jurors. *St. v. White*, 48 Or. 416, 87 Pac. 137. It has been held that jurors stood aside are to be recalled in the same order. *Com. v. Eisenbower*, 181 Pa. 470, 37 Atl. 521.

⁹ *Hartford Bank v. Hart*, 3 Day, 491; *Goodrich v. Burdick*, 26 Mich. 39; *St. v. Lewis*, 28 La. Ann. 84; *St. v. Williams*, 30 Me. 484; *Watson v. St.*, 63 Ind. 548; *Stout v. Hyatt*, 13 Kan. 232; *Atchison etc. R. Co. v. Franklin*, 23 Kan. 75. Thus, if informed credibly that juror is disqualified. *Barnes v. Com.*, 22 Ky. Law Rep. 1802, 61 S. W. 733.

¹⁰ *Boardman v. Wood*, 3 Vt. 570, 577; *U. S. v. Watkins*, 3 Cranch C. C. (U. S.) 578; *St. v. Howard*, 17

either to examine the venire-man or any other *witnesses*, to ascertain such matters of fact as will enable it to exercise this power discreetly.¹¹ It may exercise this power where the venire-man is ignorant of the English language,¹² unless in the particular jurisdiction this constitutes no disqualification;¹³ and, in capital cases, where the venire-man discloses a fixed opinion against capital punishment;¹⁴ and, according to a case applicable to a period in our political history through which we have happily passed, where the venire-man entertains a present and unrelenting hostility against the government of the United States.¹⁵ Caution should obviously be observed in the exercise of this discretion; since, at least under some systems, by excusing or discharging a great number of the regular panel, the court and the parties may be driven to filling it up by summoning talesmen from that well-known, disreputable class of court idlers called "professional jurors."¹⁶ A remedy for excusing an unreasonable number of venire-men, thereby reducing the panel below the number required to make a jury, has been conceded in one jurisdiction to exist in the form of a challenge to the array of those

N. H. 171, 180. See in this connection, ante, § 49. *St. v. Utley*, 132 N. C. 1022, 43 S. E. 820.

¹¹ *St. v. Benton*, 2 Dev. & B. (N. C.) 196, 221; *White v. St.*, 52 Miss. 217; *Pierce v. St.*, 13 N. H. 536. Where court is in doubt as to juror's qualification it is not error to excuse him. *St. v. Butnell*, 27 Nev. 41, 71 Pac. 532.

¹² *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *O'Neil v. Lake Superior Iron Co. (Mich.)*, 35 N. W. 162; *St. v. Rosseau*, 28 La. Ann. 579; *People v. Arceo*, 32 Cal. 40; *St. v. Marshall*, 8 Ala. 302; *St. v. Guidry*, 28 La. Ann. 630. In *Campbell v. St.*, 48 Ga. 353, it was held that the court had no right to purge the panel of jurors, returned for service during the term, of such jurors as could neither write the English language nor read the Constitution of the United States, and of the State of Georgia. It was held that a challenge to the array after such purging ought to have been sustained. Whether this decision can be supported is doubt-

ful. It is certainly true that the grounds upon which these jurors were excused do not constitute a cause of challenge. *White v. St.*, 52 Miss. 216, 224; *American Ins. Co. v. Mahone*, 56 Miss. 180; *Citizens' Bank v. Strauss*, 26 La. Ann. 736; *St. v. Lewis*, 28 La. Ann. 84; *Com. v. Winemore*, 1 Brewst. (Pa.) 356, 2 Brewst. (Pa.) 378. But it has been held that although a challenge is allowed upon this ground, a new trial will not be granted, unless it appears that the defendant has suffered in consequence of such ruling. *Citizens' Bank v. Strauss*, supra.

¹³ Ante, §§ 10, 55.

¹⁴ *U. S. v. Cornell*, 2 Mason (U. S.), 91; *Waller v. St.*, 40 Ala. 325; *Russell v. St.*, 53 Miss. 367; *White v. St.*, 52 Miss. 216; *Fortenberry v. St.*, 55 Miss. 403.

¹⁵ *Klinger v. St.*, 13 Wall. (U. S.) 257.

¹⁶ *St. v. Ostrander*, 18 Iowa, 435, 449; *Bissell v. Ryan*, 23 Ill. 566; *People v. Honeyman*, 3 Denio (N. Y.), 121.

remaining;¹⁷ though the right to make this challenge is *waived* by objecting in another form, and if the jury are sworn without a challenge to the array, it seems that it becomes a legal jury, although the objection, taken in another form, was erroneously overruled.¹⁸ The failure of the court to exercise this discretion of standing jurors aside of its own motion, for a cause of challenge known to the court and to the parties, cannot, of course, be assigned for error; since the objection is waived by failing to challenge.¹⁹ Moreover, statutes prescribing the formal details of impaneling are frequently regarded as *directory*, and hence as yielding to this judicial discretion, where no prejudice appears.²⁰

§ 89. [Continued.] Illustrations.—It is within the discretion of the court to direct the names of twelve of the regular panel in attendance to be omitted in impaneling a jury for a given cause,—as, for example, where such jurors are deliberating in the jury room,²¹ or have recently rendered a verdict in another case.²² In the absence of statutory provisions, according to one view, after the jurors are returned into court, all subsequent proceedings in the process of impaneling the jury are left to the discretion of the court.²³ The court may, accordingly, in its discretion, when a case comes on for trial, break up and rearrange the panels, if more than one is in at-

¹⁷ Smith v. Clayton, 29 N. J. L. 358.

¹⁸ Smith v. Clayton, 29 N. J. L. 358; Gropp v. People, 67 Ill. 154; Emerick v. Sloan, 18 Iowa, 140; Suttle v. Batie, 1 Iowa, 141. A challenge to the array may be waived after it has been taken, by the challenging party consenting to the removal of the objectionable persons from the panel. Whitley v. St., 38 Ga. 50.

¹⁹ St. v. Benton, 2 Dev. & B. (N. C.) 196; Murphy v. St., 37 Ala. 142; Bellows v. Weeks, 41 Vt. 590; Young v. St., 23 Ohio St. 577; Skinner v. St., 53 Miss. 399; St. v. Christian, 30 La. Ann. 367.

²⁰ Murray v. St. (Tex.), 3 S. W. 104; Wong Din v. U. S., 135 Fed. 702, 68 C. C. A. 340.

²¹ St. v. Pitts, 58 Mo. 556; Kim-

brough v. St., 62 Ala. 248; Cook v. Fogerty, 103 Iowa, 500, 72 N. W. 67, 39 L. R. A. 488. Or if they come into court while impanelling is proceeding that their names be placed in the box being drawn from. Thomas v. St., 134 Ala. 126, 33 South. 130.

²² Alexander v. Oshkosh, 33 Wis. 277; Connors v. Salt Lake City, 28 Utah, 248, 78 Pac. 479. Or may order a new jury drawn for a particular case, under Iowa statute, on the theory that the regular panel is to be used by the court, at its discretion for ordinary trials at that term. St. v. John, 124 Iowa, 230, 100 N. W. 193.

²³ Walker v. Kennison, 34 N. H. 257; St. v. Aspara, 112 La. 940, 37 South. 883.

tendance.²⁴ Within the scope of this discretion are such questions as the *order* in which the name of the jurors shall be called.²⁵ But the court cannot, of course, depart from the essential requirements of the law. Thus, where jurors have been summoned upon a special *venire* for the trial of a capital case, the court cannot take a portion of them for the trial of another case;²⁶ and a trial justice has no right, of his own motion, without any exception being taken by either party, to quash a panel and issue a new *venire*.²⁷

§ 90. Power of Court to Discharge Jurors after they have been Sworn.—Although there are some holdings to the contrary,²⁸ the sound and prevailing opinion is that the court is not bound to suffer the cause to proceed after discovering a fact going to the disqualification of a juror, in consequence of which any verdict which may be rendered may be set aside.²⁹ The obnoxious juror may be excluded,³⁰ although sworn, at any time before evidence has been in-

²⁴ *Watson v. Walker*, 33 N. H. 131, 144; *Ware v. Ware*, 8 Me. 42; *Durant v. Ashmore*, 2 Rich. L. (S. C.) 184.

²⁵ *St. v. Sims*, 2 Bailey (S. C.), 29; *St. v. Crank*, 2 Bailey (S. C.), 66; *Kleinback v. St.*, 2 Speers L. (S. C.) 418; *St. v. Brown*, 3 Strob. L. (S. C.) 508; *St. v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *St. v. Caron*, 118 La. 349, 42 South. 960.

²⁶ *Bates v. Bates*, 19 Tex. 124. Nor can the court take as jurors drawn for one month those drawn for a prior month, but there must be a new drawing. *Covington etc. Bridge Co. v. Schilling*, 25 Ky. Law Rep. 2292, 80 S. W. 440.

²⁷ *Cross v. Moulton*, 15 Johns. (N. Y.) 470. Or, where demandant has paid the required fee, to discharge the regular panel and compel him to take from a *venire* selected by the sheriff. *Tex. & N. O. R. Co. v. Pullen*, 33 Tex. Civ. App. 143, 75 S. W. 1084.

²⁸ See *St. v. Williams*, 3 Stew. (Ala.) 454; *Ward v. St.*, 1 Humph. (Tenn.) 253; *Smith v. St.*, 55 Ala. 1, 7; *St. v. Morea*, 2 Ala. 275; *Gearhart*

v. Jordan, 11 Pa. St. 325; *St. v. Stephens*, 11 S. C. 319; *U. S. v. Randall*, 2 Cranch C. C. (U. S.) 412.

²⁹ *Mitchell v. St.*, 43 Tex. 512, 516; *Wormeley's Case*, 10 Gratt. (Va.) 658; *Muirhead v. Evans*, 6 Exch. 447. In this last case, it was discovered, during the examination of the first witness, that there were thirteen jurors in the box. It was impossible to ascertain which juror was last sworn. Twelve of this jury were afterwards re-sworn, and the trial of the case proceeded. This practice was held to be correct. See upon this point *Davis v. St.*, 9 Tex. App. 634; *Bullard v. St.*, 38 Tex. 504; *Swanson v. Oregon Power Co.*, 47 Ore. 24, 82 Pac. 10. On the other hand, a court is vested with wide discretion in refusing to discharge a jury for an alleged cause. *Kelley v. Downing*, 69 Vt. 266, 37 Atl. 968.

³⁰ *St. v. Reeves*, 11 La. Ann. 685; *Robinson v. St.*, 33 Ark. 180; *St. v. Vestal*, 82 N. C. 563; *St. v. Vann*, 82 N. C. 631; *Nolen v. St.*, 2 Head (Tenn.), 520; *Hines v. St.*, 8 Humph. (Tenn.) 597; *St. v. Cummings*, 72 N. C. 469; *Pannell v. St.*, 29 Ga. 681;

roduced.³¹ So, the court may discharge a juror who has been sworn, if it appear that he will be *physically unable* to sit through the trial.³² The discharge or excusing of a juror after the jury has been sworn and charged with the prisoner, will not operate to discharge him, but will operate as a *mistrial* merely. A new jury may be called. The eleven who remain may,³³ except where the rule has

Isaac v. St., 2 Head (Tenn.), 458; Lewis v. St., 3 Head (Tenn.), 127. The court may, in its discretion, give the prosecution in a criminal case the privilege to re-examine a juror after his acceptance by the State's attorney, but before his acceptance by the defendant. The allowance of a challenge for cause shown upon the re-examination constitutes no error. Belt v. People, 97 Ill. 461.

³¹ Spoford's Case, Clayton, 78; People v. Damon, 13 Wend. (N. Y.) 351; Lewis v. St., 9 Smed. & M. (Miss.) 115; McGuire v. St., 37 Miss. 369; Tooe v. Com., 11 Leigh (Va.), 714; Spong v. Leshner, 1 Yeates (Pa.), 326; Smith v. St., 55 Miss. 513; St. v. Adair, 66 N. C. 298; Com. v. Twombly, 10 Pick. (Mass.) 480, note; St. v. Davis, 80 N. C. 412; Haynes v. Crutchfield, 7 Ala. 189; Edwards v. Farrar, 2 La. Ann. 307; Tweed's Case, 13 Abb. Pr. (N. Y.) (N. S.) 371, note; People v. Wilson, 3 Park. Cr. (N. Y.) 199; U. S. v. Morris, 1 Curt. C. C. (U. S.) 23; Gilliam v. Brown, 43 Miss. 641; Williams v. St., 32 Miss. 389; Cornelius v. St., 12 Ark. 782; Evans v. St., 6 Tex. App. 513; Stone v. People, 3 Ill. 326; Jefferson v. St., 52 Miss. 767; Jackson v. St., 51 Ga. 402; Dilworth v. Com., 12 Gratt. (Va.) 689, 705; Watkins v. St., 60 Ga. 601. It has been held by one court that the *sufficiency of the reasons* for such an exclusion will be examined on *appeal*, and unless they are found to be sound, the judgment will be reversed. Black v. St., 9 Tex. App.

328. Even though the panel be completed and court adjourns to the following day, when the taking of evidence is to begin. Dorman v. St., 48 Fla. 18, 37 South. 561.

³² Fletcher v. St., 6 Humph. (Tenn.) 249; Silsby v. Foote, 14 How. (N. Y.) 218, 1 Blatch. 444.

³³ Rex v. Edwards, Russ. & Ry. 223, 4 Taunt. 309, 3 Camp. 207; Rex v. Scalbert, 2 Leach C. C. 700; Greer v. Norvill, 3 Hill (S. C.), 262, 263. Upon the discharge of a jury after being charged with the prisoner, see notes to Rex v. Scalbert, *supra*, and to Rex v. Edwards, 3 Camp. 207; Rex v. Kinlock, 1 Wils. 157, Fost. Cr. L. 16; Wedderburn's Case, Fost. Cr. L. 23; Rex v. Delany, Jebb C. C. 106; Rex v. Barrett, Jebb C. C. 103; Com. v. McCormick, 130 Mass. 61, 39 Atl. 423; St. v. Vaughan, 23 Nev. 103, 43 Pac. 193; St. v. Scruggs, 115 N. C. 805, 20 S. E. 720; Armor v. St., 125 Ga. 3, 53 S. E. 815. In Tennessee it was held that the right of peremptory challenge was not thus enlarged. Beall v. Beall, 100 Tenn. 573, 47 S. W. 204. By consent parties in a civil case may proceed with remaining eleven. Pfeiffer v. City of Dubuque (Iowa), 94 N. W. 492 (not reported in state reports). Or where this course is not objected to. Lindsay v. Tioga Lumber Co., 108 La. 468, 32 South. 464. Calling one of the jurors as a witness does not make the proceeding a trial by eleven. Mooring v. St., 129 Ala. 66, 29 South. 664. If in a civil case defendant objects to proceeding further and saves his exception, he is

been changed by statute,³⁴ be put upon the prisoner again, and he may be allowed to exercise upon them his right of challenge anew.

§ 91. **Time and Order of Challenging.**—There can be no challenge, either to the array or to the polls, until a panel sufficiently numerous to compose a full jury appears.³⁵ By the common law, all challenges must be made before the juror is sworn;³⁶ but statutes

not compelled to stand on his defense or be deemed to have waived his objection. *Mahoney v. San Francisco Ry. Co.*, 110 Cal. 471, 42 Pac. 968.

³⁴ See *Garner v. St.*, 5 Yerg. (Tenn.) 160; *St. v. Curtis*, 5 Humph. (Tenn.) 601; *Snowden v. St.*, 7 Baxter (Tenn.), 482; *People v. Boven*, 139 Cal. 210, 72 Pac. 899.

³⁵ *Clark v. Goode*, 6 J. J. Marsh. (Ky.) 637, 638. One cannot be required to challenge peremptorily where there are less than twelve in the box. *Chicago City Ry. Co. v. Fetzer*, 113 Ill. App. 280. If the panel is full, it is not error to refuse talesmen in waiting to be examined on voir dire, before peremptory challenge is made. *Browne v. U. S.*, 145 Fed. 1.

³⁶ *Wharton's Case*, Yelverton, 24; *Vicars v. Langham*, Hob. 235; *Blewett v. Bainard*, 1 Stra. 70; *Tyndal's Case*, Cro. 291. However, the juror might be withdrawn by consent of the adverse party. *Oates' Case*, 10 How. St. Tr. 1082. A juror may be challenged for a cause happening since he was sworn. *Co. Litt.* 158a; *Vicars v. Langham*, Hob. 235; *U. S. v. Watkins*, 3 Cranch C. C. (U. S.) 441. Not so the panel; for as stated by Hobart, "no ill affection of the sheriff, arising since the jury sworn can make the jury suspected, that was impaneled before." *Vicars v. Langham*, Hob. 235. This is the practice in England at the present time. *Reg. v. Sullivan*, 1 Per. & Dav. 96, 8 Ad. & El. 831;

Reg. v. Wardle, Car. & M. 647; *Rex v. Despard*, 2 Man. & Ry. 406, 409; *Reg. v. Key*, 3 Car. & K. 371, 15 Jur. 1065. The same rule prevails in some American jurisdictions. *U. S. v. Watkins*, 3 Cranch C. C. (U. S.) 443; *Epps v. St.*, 19 Ga. 102; *St. v. Williams*, 2 Hill (S. C.), 381; *Ward v. St.*, 1 Humph. (Tenn.) 254; *McFadden v. Com.*, 23 Pa. St. 12, 17; *Queen v. Hepburn*, 7 Cranch (U. S.), 290; *St. v. Anderson*, 4 Nev. 265; *Rash v. St.*, 61 Ala. 89; *St. v. Morea*, 2 Ala. 275; *St. v. Patrick*, 3 Jones L. (N. C.) 443; *Nugent v. Trepagnier*, 2 Martin (La.), 205; *Com. v. Gee*, 6 Cush. (Mass.) 174. Under this practice the rule is that challenges must be made as the jurors come to the book, before they are sworn. The moment the oath is begun it is too late; and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. *Reg. v. Frost*, 9 Car. & P. 129, 137. See also *Brandreth's Case*, 32 How. St. Tr. 755, 777; *Morris' Case*, 4 How. St. Tr. 1255; *St. v. Davis*, 80 N. C. 412; *Com. v. Marrow*, 3 Brewst. 402. This differs from the Irish practice. By that practice it has been generally held that the oath is not commenced until after the clerk of the Crown has said: "Juror, look upon the prisoner; prisoner, look upon the juror." *Reg. v. Hughes*, 2 Craw. & Dix, Cir. 396. Likewise, if the juror is to affirm, after he has been called to his feet to take the affirmation, it is too late to challenge him. *Com. v. Mar-*

exist in several American jurisdictions which authorize the court, for reasons satisfactory to itself, to hear any objection to a juror, even after he is sworn, before the jury is completed.³⁷ The challenge to the array and the challenge to the polls are taken separately. The challenge to the array always precedes challenges to the polls. If challenges to the polls are made without challenging the array, the right to challenge the array is waived.³⁸ So, the challenge for principal cause precedes the challenge to the favor.³⁹

row, 3 Brewst. (Pa.) 402; sub nom. *Com. v. Marra*, 8 Phila. (Pa.) 440. In *Drake v. St.*, 51 Ala. 30, the juror had been accepted, and, as he rose from his seat in the box to be sworn, the defendant challenged him peremptorily. It was held that the challenge was not taken too late. The point, however, that the swearing had begun was not raised. If claimed after evidence is partly taken, challenge cannot be entertained except for disqualification of a particular juror. *Young v. St.*, 90 Md. 579, 45 Atl. 531.

³⁷ *R. L. Minn.* 1905, § 4170; *Lord's L. Ore.* 1910, § 126, *Comp. L. Nev.* 1900, § 4299; *Ark. Dig. Stat.* 1904, § 2357; *Ann. Code Iowa*, 1897, § 3684; *Cr. Code Ky.* 1906, § 202; *Cal. Penal Code*, 1909, § 1068. See *People v. Rodriguez*, 10 Cal. 50. Or before evidence is introduced to the jury. *G. S. Kan.* § 6782; *Code Ga.* 1911, vol. II, § 199; *R. S. Mo.* 1909, § 5221. See also *R. L. Mass.* 1902, p. 1591, § 31; *R. S. Me.* 1903, p. 749, § 88; *Stover's Ann. Code N. Y.* 1902, § 1180; *Code Va.* 1904, § 3155; *Code W. Va.* 1906, § 3718; *Gen. L. R. I.* 1909, p. 1023, ch. 291, § 1. *St. v. Ames*, 91 Minn. 365, 98 N. W. 190. But these statutes do not permit challenges to the array. *People v. McArrow*, 121 Mich. 1, 79 N. W. 944. Where New York statute provided that challenge to the polls of a grand jury by any one held on charge of crime must be made before they are

sworn, failure to so challenge is not excused by the fact, that accused was confined in jail and was too poor to employ counsel, though the court had no power to give him counsel until he was first indicted. *People v. Boogstrom*, 178 N. Y. 284, 70 N. E. 780.

³⁸ *Cooley v. St.*, 38 Tex. 636, 638; *People v. Roberts*, 6 Cal. 214; *People v. McKay*, 18 Johns. (N. Y.) 218; *Gropp v. People*, 67 Ill. 154; *St. Louis etc. R. Co. v. Casner*, 72 Ill. 384; *Mueller v. Rebhan*, 94 Ill. 142; *U. S. v. Loughery*, 13 Blatch. (U. S.) 267; *St. v. Bryan*, 40 Iowa, 379; *St. v. Davis*, 41 Iowa, 311; *St. v. Davis*, 14 Nev. 439, 448. A challenge to the polls cannot be taken upon grounds which would have supported a challenge to the array. *Co. Litt.* 157b. *St. v. Everson*, 63 Kan. 66, 64 Pac. 1034. In Illinois it is said that challenge to array must be before jury is accepted and sworn. *St. L. & O. Ry. Co. v. Union Trust etc. Bank*, 209 Ill. 457, 70 N. E. 651. Defendant's mere announcement of ready does not cut off challenge to array. *Porter v. St.*, 146 Ala. 36, 41 South. 421.

³⁹ *Carnal v. People*, 1 Park. Cr. (N. Y.) 272; *Stout v. People*, 4 Park. Cr. 71; *Cancemi v. People*, 16 N. Y. 501; *People v. Freeman*, 4 Den. (N. Y.) 9; *People v. Honeyman*, 3 Den. (N. Y.) 121; *People v. Mather*, 4 Wend. (N. Y.) 229. It is laid down in

§ 92. [Continued.] **Right to Hold Peremptory Challenges in Reserve.**—By the common law, a party is not compelled to make his peremptory challenges before his challenges for cause; but, after making his challenges for cause, he may hold his peremptory challenges in reserve up to the time of swearing the jury, to be used in excluding from the panel such jurors as, though challenged for cause, have been excepted, or such as for other reasons he may wish to exclude.⁴⁰ This is a very important right; since the fact of hav-

books of the common law that if a party has more than one cause of challenge, he must take them all at once. *Co. Litt.* 158*a*; *Bac. Abr.* *Juries* E. 11; *Trials per Pais* (1725), p. 149; 1 *Chitty Cr. L.* 545. The meaning of this rule seems to be that a party must prefer all of his challenges, which are of the same nature and triable by the same forum, i. e., by the court, or by triors, at once. *Mann v. Glover*, 14 *N. J. L.* 195, 202; *Carnal v. People*, 1 *Park. Cr. (N. Y.)* 272; *St. v. Pray*, 126 *Iowa*, 249, 99 *N. W.* 1065. In New Jersey it is said it must be made before the juror is directed to be sworn and has placed his hand on the book. *St. v. Lyons*, 58 *N. J. L.* 366, 52 *Atl.* 398.

⁴⁰ 4 *Bl. Com.* 353; 1 *Chit. Cr. L.* 545; *Co. Litt.* 158*a*; *Reg. v. Hughes*, 2 *Craw. & Dix, Irish Cir.* 396; *Whelan v. Reg.*, 28 *Up. Can. Q. B.* 2; *Hooker v. St.*, 4 *Ohio*, 348; *St. v. Fuller*, 39 *Vt.* 74; *Barber v. St.*, 13 *Fla.* 675, 1 *Green Cr. L. Rep.* 723; *Cooley v. St.*, 38 *Tex.* 638; *U. S. v. Butler*, 1 *Hughes (U. S.)*, 457. See *Parkyn's Case*, 13 *How. St. Tr.* 75; *Cook's Case*, 13 *How. St. Tr.* 313; *Layer's Case*, 16 *How. St. Tr.* 137; *Barbot's Case*, 18 *How. St. Tr.* 1233; *O'Coigly's Case*, 26 *How. St. Tr.* 1227; *Jackson's Case*, 25 *How. St. Tr.* 804; *Rex v. Stone*, 6 *Term. Rep.* 527. In *Brandreth's Case*, 32 *How. St. Tr.* 773 (anno 1817), this principle was challenged by the attorney-

general, but on grounds obviously untenable, as shown by the last preceding cases. In Massachusetts it was established by judicial decision that the right of peremptory challenge, if exercised at all, must be exercised in the first instance, before the juror is interrogated as to his bias or opinions. *Com. v. Rogers*, 7 *Met. (Mass.)* 500; *Com. v. Webster*, 5 *Cush. (Mass.)* 295 (overruling upon this point, *Com. v. Knapp*, 9 *Pick. (Mass.)* 496); *Com. v. McElhaney*, 111 *Mass.* 439. But this rule has been repealed and the common-law rule restored in that State by statute. *Laws of Mass.* 1873, ch. 317, § 1. It was formerly held in Missouri that the trial court might compel both parties in a capital case to make, at the same time and once for all, the peremptory challenges allowed to each by law, each being ignorant of the challenges made by the other. *St. v. Hays*, 23 *Mo.* 287. But now by statute (*R. S. Mo.* 1909, § 5228), the prosecution is required to announce its challenges before the defendant can be required to make his. *St. v. Steele*, 65 *Mo.* 218; *St. v. Degonia*, 69 *Mo.* 485. Calling over the names of those remaining unchallenged has been held to give the accused sufficient information as to whom the prosecution has challenged. *Phillips v. St.*, 6 *Tex. App.* 44; *St. v. Hunter*, 118 *Iowa*, 686, 92 *N. W.* 872. The statute may prescribe either or-

ing unsuccessfully challenged a venire-man for cause may have excited ill feeling in his breast against the challenging party, and it may be desirable to exclude him from the jury by a peremptory challenge. According to the American practice, and contrary to that of England, the swearing of the jury is generally deferred until a full jury has been procured. The jurors, as fast as they are accepted, are directed to take their places in the box. It often happens that much time is consumed in impaneling a jury, and that, during this time, a party may discover some reason for challenging peremptorily a juror who has been accepted. In many American jurisdictions it is held that he has no such right, but that all right of challenge is at an end as soon as the juror has taken his seat;⁴¹ though the court may still, in the exercise of a *discretion*, for cause shown, *remove* the juror from the panel.⁴² Other American authorities hold that the right of peremptory challenge should be kept open to the latest possible period, that is, until the actual swearing of the jury.⁴³

der. *Graves v. Horgan*, 21 R. I. 493, 45 Atl. 152. Expressing satisfaction with a jury only means as it then stands, and does not preclude any peremptory challenge that is unused as against a juror called in to take the place of one challenged off by his adversary. *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093. The practice in Louisiana is that a challenge for cause may come after the peremptory challenge or precede it, as the party chooses. *St. v. Cornelius*, 118 La. 146, 42 South. 754.

⁴¹ *St. v. Potter*, 18 Conn. 166; *Horbach v. St.*, 43 Tex. 242 (overruling on this point *Cooley v. St.*, 38 Tex. 636; *Hubotter v. St.*, 32 Tex. 479); *Com. v. Marrow*, 3 Brewst. (Pa.) 402, 412; *Sparks v. St.*, 59 Ala. 82; *St. v. Cameron*, 2 Chand. (Wis.) 172; *Com. v. Rogers*, 7 Metc. (Mass.) 500; *St. v. Hays*, 23 Mo. 287; *McMillan v. St.*, 7 Tex. App. 142; *Smith v. Brown*, 8 Kan. 609; *St. v. Anderson*, 4 Nev. 265; *St. v. Roderigas*, 7 Nev. 328; *St. v. Schufflin*, 20 Ohio St. 233;

Mitchell v. St., 43 Tex. 512; *Wasson v. St.*, 3 Tex. App. 474; *Taylor v. St.*, 3 Tex. App. 169; *Baker v. St.*, 3 Tex. App. 525; *Drake v. St.*, 5 Tex. App. 649; *Dunn v. Wilmington etc. R. Co.*, 181 N. C. 446, 42 S. E. 862. In New Jersey the practice appears to be that peremptory challenge is made as the juror's name is drawn from the box, and this for cause up to the time of swearing. *Leary v. North Jersey St. Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527.

⁴² *St. v. Potter*, 18 Conn. 166; *Horbach v. St.*, 43 Tex. 242; *Mitchell v. St.*, 43 Tex. 512; *McMillan v. St.*, 7 Tex. App. 142; *Baker v. St.*, 3 Tex. App. 525; *Sparks v. St.*, 59 Ala. 82; *Drake v. St.*, 5 Tex. App. 649. For a modified rule see *Spencer v. DeFrance*, 3 G. Greene (Iowa), 216.

⁴³ *Hooker v. St.*, 4 Ohio, 348, 350; *Beauchamp v. St.*, 6 Blackf. (Ind.) 299, 308; *Munly v. St.*, 7 Blackf. (Ind.) 593; *Morris v. St.*, 7 Blackf. (Ind.) 607; *Wyatt v. Noble*, 8 Blackf. (Ind.) 507; *People v. Reynolds*, 16 Cal. 128; *People v. Ah You*, 47 Cal.

§ 93. **Retraction of Challenge or of Acceptance.**—In strict law a party cannot, after having once taken a peremptory challenge, retract it and accept the juror, so that it shall not be *counted* against him in reducing the number of peremptory challenges which he is allowed.⁴⁴ But this matter in modern practice yields to the *discretion* of the court;⁴⁵ and where the panel has been gone over without procuring a jury, the prisoner has been allowed to retract one of his challenges, in order that the challenged venire-man might be available to complete the jury.⁴⁶ A challenge to the array may be *waived* after allowance, by the challenging party, and he will be bound by such waiver, although the case for trial be a capital one.⁴⁷ But a prisoner having challenged a juror peremptorily, cannot subsequently withdraw the challenge and insist that he shall sit upon the jury, or substitute a challenge for cause, so that the peremptory challenge shall not be counted in reducing his number; although the grounds on which he seeks to challenge for cause may have come to

121; *Edelen v. Gough*, 8 Gill, 87; *Williams v. St.*, 3 Ga. 453, 459; *Drake v. St.*, 51 Ala. 30, and *Bell v. St.*, cited *Ibid.*, p. 31; *Kleinback v. St.*, 2 Speers (S. C.), 418; *Hendrick v. Com.*, 5 Leigh (Va.), 707; *Jackson v. Pittsford*, 8 Blackf. (Ind.) 194; *Hunter v. Parsons*, 22 Mich. 96; *Johns v. People*, 25 Mich. 500; *O'Connor v. St.*, 9 Fla. 215; *St. v. Pritchard*, 15 Nev. 74, 10 Reporter, 273; *Jones v. Vanzandt*, 2 McLean (U. S.), 611; *People v. Kohle*, 4 Cal. 199; *People v. Jenks*, 24 Cal. 11; *People v. McCarty*, 48 Cal. 557; *Lindsley v. People*, 6 Park. Cr. (N. Y.) 233; *Drake v. St.*, 51 Ala. 30. It is a necessary corollary of this rule that the court has a discretion to deny the right of peremptory challenge after the juror has taken his seat, but before the panel is sworn. *Schumacher v. St.*, 5 Wis. 324. Under certain statutory systems the proper practice is for the clerk to draw twelve names from the box; for the court to permit the defendant separately to examine each juror whose name is so drawn, and exhaust his

challenges for cause before challenging any one of the twelve peremptorily. *People v. Scoggins*, 37 Cal. 676; *People v. Russell*, 46 Cal. 121. See also *Com. v. Hartzell*, 40 Pa. St. 462; *Lee v. Peter*, 6 Gill & J. (Md.) 447; *Kurtz v. St.*, 145 Ind. 119, 42 N. E. 1102. This means before the oath is begun to be administered. *St. v. Lyons*, 70 N. J. L. 635, 58 Atl. 398. And the court's discretion has sometimes been held to even pass this point. *St. v. Wren*, 48 La. Ann. 803, 19 South. 745. Contra, *Leary v. North Jersey etc. R. Co.*, 69 N. J. L. 67, 54 Atl. 527. A federal court sitting in a state not recognizing the rule stated in the text, may nevertheless follow it. *U. S. v. Davis*, 103 Fed. 457 (C. C.)

⁴⁴ 2 Dyer, 198 b. pl. 51.

⁴⁵ *Morrison v. Lovejoy*, 6 Minn. 319; *Santry v. St.*, 67 Wis. 65, 30 N. W. 226.

⁴⁶ *U. S. v. Porter*, 2 Dall. (U. S.) 345. See also *Garrison v. Portland*, 2 Ore. 123.

⁴⁷ *Pierson v. People*, 79 N. Y. 424.

his knowledge after the peremptory challenge had been taken.⁴⁸ When a venire-man has been challenged for favor and excluded, the challenging party cannot change his ground and say that he ought not to have been discharged; nor can he thereafter insist upon examining him on oath, to make it appear that he is really indifferent and therefore competent.⁴⁹ In general, it has been observed, permission to withdraw a challenge ought to be given cautiously; otherwise the right to *reject* may be converted into a right to *select*, which is contrary to its meaning and purpose.⁵⁰ It ought not to be permitted where it will operate as a fraud on the other party, who has exhausted his peremptory challenges.⁵¹ On the other hand, it is held that a party may, for a proper reason, retract his acceptance of a juror, and challenge him for cause;⁵² at least, it is within the discretion of the court to allow the party to challenge members of the panel after he has once passed them.⁵³ But if a known objection to a juror be improperly or capriciously kept back, the court may, in its discretion, refuse this right, on the ground that the right of challenge has been waived.⁵⁴

§ 94. **Order of Challenging as between the Parties.**—This, in like manner, seems to be committed to the discretion of the court,

⁴⁸ *St. v. Price*, 10 Rich. L. (S. C.) 351; *St. v. Coleman*, 8 S. C. 237; *Rex v. Parry*, 7 Car. & P. 838; *Furman v. Applegate*, 23 N. J. L. 28. But an abuse of discretion in this respect which works injustice is reviewable. *Colvin v. Com.*, 22 Ky. Law Rep. 1407, 60 S. W. 701.

⁴⁹ *St. v. Creasman*, 10 Ired. L. (N. C.) 395. Nor can he object to a juror being excused upon a challenge and urge the same challenge to said juror on its being overruled as made by opposing party. *Allen v. St.*, 134 Ala. 159, 32 South. 318.

⁵⁰ *Ante*, § 43. But a challenge for cause may be withdrawn, for this is merely waiving a disqualification. After so doing the juror's incompetency cannot be claimed. *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925.

⁵¹ *Com. v. Twitchell*, 1 Brewst. (Pa.) 551.

⁵² *McFadden v. Com.*, 23 Pa. St. 12,

17; *Smith v. St.*, 55 Ala. 1 (overruling *Stalls v. St.*, 28 Ala. 25); *Sparks v. St.*, 59 Ala. 82; *St. v. Adair*, 66 N. C. 298; *St. v. Perkins*, 66 N. C. 126; *St. v. Davis*, 80 N. C. 412; *Scripps v. Reilly*, 38 Mich. 10.

⁵³ *Fountain v. West*, 23 Iowa, 10; *Com. v. Piper*, 120 Mass. 185; *Hubbott v. St.*, 32 Tex. 479; *Williams v. St.*, 3 Ga. 453, 459; *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093. But it is an abuse of discretion to allow the state to retract acceptance after completion and swearing of jury, arraignment of defendant and reading of indictment to jury. *Moving v. St.*, 129 Ala. 66, 29 South. 664.

⁵⁴ *McFadden v. Com.*, 22 Pa. St. 12, 17, per Black, C. J. See also the other authorities cited *supra*. *Radford v. U. S.*, 129 Fed. 49, 63 C. C. A. 491.

which discretion will not be reviewed,⁵⁵ unless it plainly appears that it has been abused to the prejudice of the party complaining.⁵⁶ In the absence of a contrary statute, the court may require the parties to take their peremptory challenges one at a time and alternately.⁵⁷ In such a case, according to some holdings, a failure of a party to challenge when his turn comes, is a *waiver* of his right of challenge at that time, in such a sense that it *counts* against him in reducing the number of peremptory challenges allowed him, as though he had actually made it.⁵⁸ But the waiver of a challenge is

⁵⁵ *Com. v. Piper*, 120 Mass. 185; *Tatum v. Preston*, 53 Miss. 654; *St. v. Pike*, 49 N. H. 406; *Ossipe Man. Co. v. Canney*, 54 N. H. 295; *St. Anthony Falls W. P. Co. v. Eastman*, 20 Minn. 277; *Turpin v. St.* (Sup. Ct. Md., Oct., 1880), 2 Crim. L. Mag. 532; *Nicholson v. People*, 31 Colo. 53, 71 Pac. 377.

⁵⁶ *St. v. Ivey*, 41 Tex. 38; *Dixon v. St.*, 2 Tex. App. 530; *Ray v. St.*, 4 Tex. App. 450; *St. v. Cummings*, 5 La. Ann. 330; *St. v. Florez*, 5 La. Ann. 429; *St. v. Shelledy*, 8 Iowa, 480; *St. v. Pierce*, 8 Iowa, 231; *St. v. Boatwright*, 10 Rich. L. (S. C.) 407; *Schufflin v. St.*, 20 Ohio St. 233; *St. v. Dumphey*, 4 Minn. 438; *Driskell v. Parish*, 10 Law Reporter, 395; *Jones v. St.*, 2 Blackf. (Ind.) 475, 478; *Williams v. St.*, 3 Ga. 453, 459; *Beauchamp v. St.*, 6 Blatchf. (Ind.) 299. However, it has been considered that a departure from a well established practice might afford good cause for granting a new trial. *St. v. Florez*, 5 La. Ann. 429. For illustrations of this, see *St. v. Pierce*, 8 Iowa, 231; *Dixon v. St.*, 2 Tex. App. 529; *St. v. Ivy*, 41 Tex. 35. It has been held no abuse of discretion for the judge to compel either party, upon the full panel of twelve being presented to him, to strike off, then, once for all, every one to whom he has objection, granting him only the opportunity of objecting to new venire-men as fast as they shall be

introduced to supply the places of those challenged off by himself or by his adversary. *Tatum v. Preston*, 53 Miss. 654; *Hotz v. Hotz*, 2 Ash. (Penn.) 245.

⁵⁷ *Driskell v. Parish*, 10 Law Reporter, 395; *St. v. Sloan*, 22 Mont. 293, 56 Pac. 364. In Pennsylvania if a juror is put upon defendant, who examines him and state does not cross-examine and there is no challenge for cause, defendant cannot challenge peremptorily. *Com. v. Evans*, 212 Pa. 369, 61 Atl. 989. It has been held that challenges may be divided equally between three antagonistic interests. *Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242. The alternate rule supposes the challenging to begin with a full panel. *St. v. Sloan*, 22 Mont. 293, 56 Pac. 364. And where accused has double the number given the state the challenges are one by the state and then two by the accused. *St. v. Browne*, 4 Idaho, 723, 44 Pac. 552. Elsewhere it was held accused could be required to exhaust his excess and then the alternation begins. *St. v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458. A waiver by one succeeded by a waiver by the other will close all challenges. *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909. *Contra*, *St. v. Hunter*, 118 Iowa, 686, 92 N. W. 872.

⁵⁸ *Patton v. Ash*, 7 Serg. & R. (Pa.) 116; *Com. v. Frazier*, 2 Brewst. (Pa.)

not to be construed as a waiver of subsequent challenges.⁵⁹ Nor can the court fix up a rule or method of challenging which may operate to deprive the prisoner of his number of peremptory challenges without his consent. Thus, the court cannot, by arranging that the State shall challenge one and the prisoner thereafter two, make the prisoner's right of challenging *contingent* upon the State challenging in the first instance.⁶⁰

§ 95. **Mode of Impaneling.**—At common law, for the purpose of ascertaining whether a full panel was present and of aiding the accused in making his challenges, the court, upon the request of the accused, would order the whole panel to be called over once in his hearing.⁶¹ It is scarcely necessary to say that, under American constitutions, the prisoner is entitled to the assistance of *counsel* in making his challenges. In one American case, a *nisi prius* judge was found so ignorant as to deny this right, but his decision was reversed on appeal.⁶² The right of counsel would obviously be abridged by rulings which would unnecessarily hamper them in

490; *Wenrick v. Hall*, 11 Serg. & R. (Pa.) 153; *Fountain v. West*, 23 Iowa, 9. But see *Schumacher v. St.*, 5 Wis. 324; *Hartzell v. Com.*, 40 Pa. St. 462; *Kleinback v. St.*, 2 Speers (S. C.), 418; *Koch v. St.*, 32 Ohio St. 352; *St. v. Pritchard*, 15 Nev. 74.

⁵⁹ *Kennedy v. Dale*, 4 Watts & S. (Pa.) 176; *Fountain v. West*, 23 Iowa, 9; *St. v. Peel*, 23 Mont. 358, 54 Pac. 169. After each such challenge it is held in Colorado the panel must be filled by another competent juror. *Nicholls v. People*, 18 Colo. 294, 71 Pac. 397. In Alabama this seems not so. *Allen v. St.*, 134 Ala. 159, 32 South. 318. And if a challenge is waived, where such is the rule, the waiver goes merely to those then in the box. *St. v. Vance*, 29 Wash. 435, 70 Pac. 34.

⁶⁰ *Smith v. St.*, 4 Greene (Iowa), 189. See also *St. v. Pritchard*, 15 Nev. 74. Under a statute requiring that the State shall first exhaust its peremptory challenges or waive the same, and the defendant afterwards (*Iowa Rev. 1860*, § 4780), the court

cannot arrange an alternative order of challenging. *St. v. Bowers*, 17 Iowa, 46. On the other hand, under a statute prescribing that "all challenges to an individual juror shall be taken first by the defendant, and then by the State, and each party shall exhaust all his challenges before the other begins" (*G. S. Minn.*, ch. 106, § 32), it has been held erroneous to compel the defendant to exhaust all of his challenges to each and all of the persons upon the panel before the State began. The meaning of the statute was that the defendant should first exhaust all of his challenges to a single juror, who was then to be turned over to the State, if remaining upon the panel. *St. v. Smith*, 20 Minn. 376. Talesmen need not be summoned before peremptory challenges are exercised as to the regular panel. *St. v. Wright*, 15 S. D. 628, 91 N. W. 311.

⁶¹ *Townly's Case*, *Foster C. L.* 7; *Layer's Case*, 16 How. St. Tr. 132.

⁶² *St. v. Cummings*, 5 La. Ann. 330, 332.

discharging their duties toward their client. While a *nisi prius* court has held that counsel will not be permitted to argue before triors the question of the competency of a juror upon a challenge to the favor,⁶³ another has gone so far the other way as to hold that, where there are two counsel the hasty acceptance of a juror by one without consultation with the other, will not conclude the rights of the client, but if the acceptance be at once withdrawn, a peremptory challenge ought to be allowed.⁶⁴ At common-law, jurors were separately accepted and sworn. The venire-man was presented to the accused or to his counsel, that a view of his person might be had. The officer of the court then looked first to the counsel of the prisoner, to know whether he wished to challenge him. He next turned to the counsel of the crown; to know whether the crown desired to offer a challenge; if neither made any objection, the oath was administered.⁶⁵ It seems that this rule of practice is one of those which yield to judicial discretion; though we find that it has been held that, although the practice has been to call a certain number of jurors at a time, for the purpose of putting them upon the parties, the court may call a greater or a less number and require the parties to pass upon them.⁶⁶

⁶³ Joice v. Alexander, 1 Cranch C. (U. S.) 528.

⁶⁴ Clarke v. Goode, 6 J. J. Marsh. (Ky.) 637, 638. Other courts have held the time for accepting or rejecting must not be unduly abridged. St. v. Hedgepeth, 150 Mo. 12, 51 S. W. 483; People v. Owens, 123 Cal. 482; Haggard v. Petterson, 107 Iowa, 417; Jenkins v. St., 99 Tenn. 569.

⁶⁵ Brandreth's Case, 32 How. St. Tr. 755, 771; Laver's Case, 16 How. St. Tr. 135. This has been held to be the proper practice under statutes in Texas (Pasch. Dig. Tex. Stat., § 2034; Tex. Code Cr. Proc., § 556; Horbach v. St., 43 Tex. 242, 260, overruling Cooley v. St., 38 Tex. 633, 639. The case of Horbach v. St., supra, is regarded as settling the practice in Texas. Mitchell v. St., 43 Tex. 512; Wasson v. St., 3 Tex. App. 474, Taylor v. St., 3 Tex. App. 169, 199; Baker v. St., 3 Tex. App. 525; Hardin v. St., 4 Tex. App. 355;

Drake v. St., 5 Tex. App. 649; Ray v. St., 4 Tex. App. 450; Garza v. St., 3 Tex. App. 286. See in this connection Speiden v. St., 3 Tex. App. 156; West v. St., 7 Tex. App. 150; St. v. Ivey, 41 Tex. 35; Griffin v. Stadler, 35 Tex. 695). And so in other States (Smith v. Brown, 8 Kan. 608; St. v. Roderigas, 7 Nev. 328; Schuffin v. St., 20 Ohio St. 233; St. v. Brown, 12 Minn. 538); though it has been disapproved in Wisconsin, on the ground that it would unnecessarily hamper the prisoner's right of peremptory challenge, by depriving him of adequate opportunity for comparison and choice. Lamb v. St., 36 Wis. 424. One State is found which requires jurors to be passed upon and accepted in panels of four, after twelve are in the box. Sterling Bridge Co. v. Pearl, 80 Ill. 250, 254. See Wilson's Penal Code Tex. art. 677.

⁶⁶ Walker v. Collier, 37 Ill. 362;

§ 96. **Impaneling by Lot.**—Under some statutory systems, each jury is selected by lot from the whole number summoned. The names of the *venire-men* are written upon slips of paper, which, after being folded, are placed in a box. When the case is called, the twelve whose names are first drawn from the box, if present, and not challenged or excused, are sworn. This statutory form must be followed,⁶⁷ although slight and immaterial departures will be tolerated.⁶⁸ A juror who does not appear when drawn, may be refused his seat, although he appears and answers before the drawing is completed.⁶⁹ If, in compliance with the statute, his name is returned to the box, neither party can demand that he shall take his place upon the jury.⁷⁰ Unless there be a statute requiring the selection of jurors by lot, a party cannot demand this mode of impaneling.⁷¹ For stronger reasons, if, without a statutory authorization, the clerk takes it upon himself to adopt a fortuitous mode of selection, a party cannot object that a *more* fortuitous mode of selection might have been adopted.⁷²

§ 97. **Challenging the Polls of a Special Jury.**—In some States, challenges may be made at the polls of a panel, arrayed for the purpose of striking a special jury, before the formality of striking be-

Sellers v. St., 52 Ala. 368. In Federal court defendant can be required to challenge both for cause and peremptorily before the prosecution is called upon to challenge. *Dolan v. U. S.*, 116 Fed. 578. By Arkansas statute the practice is precisely the opposite. *Lackey v. St.*, 67 Ark. 416, 55 S. W. 213. In Kentucky it was held error for accused to be called on to accept or reject individual jurors before twelve have been selected and presented. *Smith v. Com. (Ky.)*, 50 S. W. 241 (not reported in state reports). When statute prescribed for calling four at a time, this may be waived and a less number called or singly. *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465. Where the rule is to put upon defendant twelve at a time, this does not apply where challenges have been exhausted. *Smith v. St. (Tex. Cr. R.)*, 75 S. W. 298 (not reported in state reports).

⁶⁷ *Brazier v. St.*, 44 Ala. 387; *Bur-*

roughs v. U. S., 6 Ind. T. 164, 90 S. W. 8. The panel need not be refilled after each successful challenge, but only when accused is required to make his peremptory challenge. *Gammons v. St.*, 85 Miss. 103, 37 South. 609. In Illinois it has been held that it must be refilled, if either party so demands. *Oakwood Stock & Farm Co. v. Rahn*, 106 Ill. App. 269.

⁶⁸ *People v. Rogers*, 13 Abb. Pr. (N. S.) (N. Y.) 370.

⁶⁹ *People v. Vermilyea*, 7 Cow. (N. Y.) 369. Or when he comes in he may be called into the box and put on his voir dire. *Spencer v. St.*, 48 Tex. Cr. R. 580, 90 S. W. 638.

⁷⁰ *People v. Larned*, 7 N. Y. 445.

⁷¹ *Territory v. Doty*, 1 Pinney (Wis.), 396; *St. v. Green*, 20 Iowa, 424.

⁷² *Benoway v. Conyne*, 3 Chand. (Wis.) 214.

gins, on the theory that the parties have a right to a panel of twenty-four impartial men from which to strike such as they will exclude.⁷³ This seems to be the safer and better practice; since the right of peremptory challenge does not exist in the case of a special or struck jury, the striking being substituted for this kind of challenge.⁷⁴ There seems to be no reason, in the nature of things, why the right of striking should displace the right of challenging for cause.

§ 98. Ground of Challenge must be specifically stated.—Much particularity is required in setting out the grounds of challenge.⁷⁵ A challenge to the array must be *in writing*,⁷⁶ but challenges to the polls are taken *orally*. The grounds of all challenges must be specifically stated. To say, "I challenge the array," "I challenge for principal cause," or "I challenge to the favor," is in general not sufficient;⁷⁷ though in one jurisdiction the practice of making the

⁷³ *Melson v. Dickson*, 63 Ga. 682. To test their competency, the jurors may be examined upon the voir dire before the striking begins. *Howell v. Howell*, 59 Ga. 145. This method contemplates a panel with such excess above twelve as will suffice for peremptory challenges. *Kansas City M. & B. R. Co. v. Ferguson*, 143 Ala. 512, 39 South. 348.

⁷⁴ See *Rex v. Despard*, 2 Man. & Ry. 406, 410, sub nom. But see *Bartlett v. Long*, 8 Irish L. 331, 7 Irish L. 439; *O'Connell v. Mansfield*, 9 Irish L. 179; *May v. Hoover* (Ind.), 14 N. E. 472; *Branch v. Dawson* (Minn.), 30 N. W. 545; *Railroad Co. v. Stanley*, 7 Ohio St. 155; *St. v. Moore*, 28 Ohio St. 195; *Thomp. & Mer. Jur.*, § 280; ante, § 7. Compare *Schwenk v. Umstead*, 6 Serg. & R. (Pa.) 351; *McDermott v. Hoffman*, 70 Pa. St. 31.

⁷⁵ *Rex v. Edmunds*, 4 Barn. & Ald. 471; *Carmarthen v. Evans*, 10 Mee. & W. 274; *Brown v. Esmonde*, Irish Rep. 4 Eq. 630; *Reg. v. Hughes*, 1 C. & K. 235; *Pearse v. Rogers*, 2 Fos. & F. 137.

⁷⁶ *People v. Doe*, 1 Mich. 453; *Ryder v. People*, 38 Mich. 269; *St. v.*

Church, 199 Mo. 605, 98 S. W. 16. If statute does not say "in writing," Wisconsin Supreme Court holds the common law rule need not be applied, as the reason therefor ceases with courts conducted as now with stenographers. *Ullman v. St.*, 124 Wis. 602, 103 N. W. 6.

⁷⁷ *Mann v. Glover*, 14 N. J. L. 195, 203. See to this effect: *People v. Reynolds*, 16 Cal. 128; *Freeman v. People*, 4 Den. (N. Y.) 9; *People v. Renfrow*, 41 Cal. 37; *People v. Walsh*, 44 Cal. 440, 1 Green Cr. L. 487; *St. v. Knight*, 43 Me. 11; *Powers v. Presgroves*, 38 Miss. 227; *St. v. Squaires*, 2 Nev. 226; *Paige v. O'Neal*, 12 Cal. 483; *Estes v. Richardson*, 6 Nev. 128; *St. v. Chapman*, 6 Nev. 320; *St. v. Raymond*, 11 Nev. 98; *People v. McGungill*, 41 Cal. 429; *People v. Hardin*, 37 Cal. 258; *People v. Dick*, 37 Cal. 277; *People v. Buckley*, 49 Cal. 241; *Wilson v. People*, 94 Ill. 299; *Cable v. St.*, 8 Blackf. (Ind.) 531; *Conkey v. Northern Bank*, 6 Wis. 447; *People v. Doe*, 1 Mich. 453; *St. v. Dove*, 10 Ired. L. (N. C.) 469; *People v. Ebelt*, 180 N. Y. 470, 73 N. E. 235. Where statute enumerates grounds of challenge or

last kind of challenge by simply saying, "I challenge to the favor," has grown up and has finally been held sufficient.⁷⁸ In challenges to the polls, there is authority to the effect that such general statements of the *grounds* of challenge as that the venire-man "does not stand indifferent between the parties," or "entertains and has manifested a strong bias and prejudice against the defendant,"⁷⁹ or "is a neighbor to the plaintiff,"⁸⁰ or, "I challenge the juror for implied bias,"⁸¹—are not sufficient. The challenge should state facts which if true, show a disqualification.⁸² In ancient times the steps upon a challenge of a venire-man advanced with the regularity of pleadings, demurrers and counter-pleadings;⁸³ but this strictness has been generally relaxed in American courts.

disqualification, the challenge should specify the particular ground according to the statute. *Leigh v. Ter. (Ariz.)*, 85 Pac. 948 (not reported in state reports).

⁷⁸ See *People v. Freeman*, 4 Den. (N. Y.) 9; *People v. Lohman*, 2 Barb. (N. Y.) 216, 1 N. Y. 280; *People v. Honeyman*, 3 Den. (N. Y.) 121; *People v. Bodine*, 1 Den. (N. Y.) 281; *Rogers v. Rogers*, 14 Wend. (N. Y.) 181; *People v. Mather*, 4 Wend. (N. Y.) 229; *Mechanics' etc. Bank v. Smith*, 19 Johns. (N. Y.) 115; *Carnal v. People*, 1 Park. Cr. (N. Y.) 272. It has been held that where the challenge was merely denied, the form of making same was waived. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181.

⁷⁹ *Mann v. Glover*, 14 N. J. L. 195.

⁸⁰ *Jones v. Butterworth*, 3 N. J. L. 345.

⁸¹ *People v. Reynolds*, 16 Cal. 128.

⁸² So a challenge for consanguinity or affinity must state *how* and *to whom* the venire-man is related. *Stephenson v. Stiles*, 3 N. J. L. 43; *St. v. Myers*, 197 Mo. 225, 94 S. W. 242; *Robinson v. Territory*, 16 Okl. 241, 85 Pac. 45; *Cochran v. St.*, 113 Ga. 726, 39 S. E. 332. If the grounds stated depend upon proof dehors the

record, it must be ready, or the challenge will be overruled. *DeKalb etc. R. Co. v. Rowell*, 74 Ill. App. 191. It has been held that a general motion to quash is sufficient when irregularities are apparent on the face of the record. *Jones v. Com.*, 100 Va. 842, 41 S. E. 951. A challenge to a special venire on a return of "not found" as to certain jurors is premature, but a motion for further return as to diligence should be made. *Horn v. St.*, 50 Tex. Cr. R. 404, 97 S. W. 822.

⁸³ *Rex v. Edmunds*, 4 Barn. & Ald. 471, 474; *Alleway v. Rowden*, 2 Show. 422; *Rex v. Worcester*, Skin. 101; *Rich v. Player*, 2 Show. 261; *Carmarthen v. Evans*, 10 Mee. & W. 274. See also *Clark v. Van Vranken*, 20 Barb. (N. Y.) 278, where it was said that a challenge for principal cause was in the nature of a pleading which must be answered by denial or demurrer; also *People v. Stout*, 4 Park. Cr. (N. Y.) 71, 109; *Ex parte Vermilyea*, 6 Cow. (N. Y.) 555. The burden of proof is on challenging party. *Montgomery v. St.*, 53 Fla. 115, 42 South. 894. And his *ex parte* affidavit is not competent evidence to that end. *St. v. Baptiste*, 105 La. 661, 30 South. 147.

§ 99. **Triors of Challenges.**—The common-law practice of appointing triors to try challenges to the favor,⁸⁴ still prevails in some American jurisdictions. In some of these jurisdictions, the determination of the facts, under a challenge for *actual bias*, as contradistinguished from *implied bias*, is assigned to triors;⁸⁵ but, under the statutory systems prevailing in most American jurisdictions, both of these forms of challenge are tried by the court.⁸⁶ Under the old practice the court in the first instance appointed two unexceptionable persons to act as triors.⁸⁷ When one juror had been procured, he, with the two triors who had passed upon his qualifications, or with any other two unexceptionable persons selected by the court, passed upon the qualifications of the next venire-man called.⁸⁸ When two jurors had been procured, they ordinarily acted as triors for the remaining ten.⁸⁹ The triors were sworn thus: "You shall well and truly try whether A. [the venire-man] stands indifferent between the parties to this issue."⁹⁰ As the court is

⁸⁴ Challenges to the *array* and for *principal cause* to the *polls*, were triable by the court. Ante, §§ 40, 52. It was ruled in Illinois that such practice had never been there adopted, and has been characterized as cumbersome and dilatory and without beneficial results. *O'Fallow Coal Co. v. Laquet*, 198 Ill. 125, 64 N. E. 767.

⁸⁵ Comp. L. Nev. 1900, § 3268; Laws Minn. 1905, § 5395; Gen. Laws Ore. 1902, § 128; Laws Utah 1907, § 4839. Where, by consent of the parties the court is substituted for triors upon a challenge for actual bias, its decision will be final. *St. v. Mims*, 26 Minn. 183.

⁸⁶ New York Code Crim. Proc. (Laws 1881, ch. 442), § 376; Ark. Dig. Stat. 1904, § 2430; Bullitt's Ky. Cr. Code, p. 41, § 209. See also Comp. L. Ariz. 1877, ch. 11, § 319.

⁸⁷ Two officers of the court might be appointed. *Rex v. Kirwan*, cited in *Finlay's Irish Dig.*, p. 347.

⁸⁸ *People v. Dewick*, 2 Park. Cr. (N. Y.) 230.

⁸⁹ *Mima Queen v. Hepburn*, 2 Cranch C. C. (U. S.) 3; *U. S. v. Watkins*, 3 Cranch C. C. (U. S.) 443; *Boon v. St.*, 1 Ga. 618; *Copenhagen v. St.*, 15 Ga. 22; *McGuffie v. St.*, 17 Ga. 497; *McCormick v. Brookfield*, 4 N. J. L. 69. There are cases, however, in which all the jurors, sworn up to the time of a juror being challenged to the favor, have acted as triors of the challenge. Thus, in one case, five acted as triors (*Joice v. Alexander*, 1 Cranch C. C. (U. S.) 528); and in another, eight. *Reason v. Bridges*, Id. 478. But this practice has been strongly condemned. *McCormick v. Brookfield*, 4 N. J. L. 69, 72.

⁹⁰ *Anon.*, 1 Salk. 152. In *People v. Bodine*, Edm. Sel. Cas. (N. Y.) 36, 38, the following form was used: "You shall well and truly try whether A. [the venire-man] stands indifferent between the people of New York and Mary Bodine, the prisoner at the bar, and a true verdict render according to the evidence."

the trior of challenges for principal cause, it is obvious, on principle, that the court must decide all questions of fact which arise on the trial of such a challenge. But there is questionable authority to the effect that in such cases disputed questions of facts are submitted to triors.⁹¹ The relation of the court and triors is analogous to that of court and jury. The court, upon a challenge to the favor, decides what evidence is admissible for the consideration of the triors; but its sufficiency or insufficiency as establishing the challenge, is for their determination alone.⁹² The triors decide according to their "discretion and conscience,"⁹³ and their decision is conclusive,⁹⁴ even where a principal cause of challenge is submitted to them (the parties not objecting), which might have been decided by the court. If the triors disagree, what takes place is analogous to a *mistrial*; there must be a *new trial* of the challenges before new triors,—the court appointing for that purpose the third or fourth jurors, if so many have been impaneled, or two unexceptionable bystanders.⁹⁵

§ 100. **The Court as a Substitute for Triors.**—In most American jurisdictions the practice of appointing triors has been discontinued, and the court acts as the trior of all challenges. Moreover, where parties have the right to demand triors, if neither party makes such a demand, and the evidence is submitted to the judge, they cannot afterwards object to his competency to decide the issue.⁹⁶ In such

⁹¹ *People v. Dewick*, 2 Parker Cr. (N. Y.) 230. See also *Solander v. People*, 2 Colo. 48, 58. It is expressly provided by Kentucky statute that "The decisions of the (trial) court upon challenges to the panel for cause * * * shall not be subject to exception." *Alderson v. Com.*, 25 Ky. Law Rep. 32, 74 S. W. 679.

⁹² *Freeman v. People*, 4 Denio (N. Y.), 9, 35; *People v. Honeyman*, 3 Denio (N. Y.), 121; *Smith v. Floyd*, 18 Barb. (N. Y.) 522.

⁹³ *Co. Litt.* 156a.

⁹⁴ *People v. Dewick*, 2 Parker Cr. (N. Y.) 130; *St. v. Benton*, 2 Dev. & B. (N. C.) 196; *St. v. Ellington*, 7 Ired. L. (N. C.) 61; *St. v. Dove*, 10 Ired. L. (N. C.) 469; *Ex parte Vermilyea*, 6 Cow. (N. Y.) 559; *Free-*

man v. People, 4 Den. (N. Y.) 33; *Schoeffler v. St.*, 3 Wis. 828.

⁹⁵ *People v. Dewick*, 2 Park. Cr. (N. Y.) 230. See also *People v. Bodine*, Edm. Sel. Cas. 38, 39. In the view of other courts, where the triors cannot agree, the challenge is not made out, and the venire-man must be sworn as a juror. *U. S. v. Watkins*, 3 Cranch C. C. (U. S.) 443, 579; *Com. v. Fitzpatrick*, 3 Clark (Penn.), 520. This is in conformity with the principle that a venire-man is *presumed* to be qualified and impartial until the contrary is shown, and that the burden of proving the challenge rests upon the party making it. *Reynolds v. U. S.*, 98 U. S. 145, 157; *Holt v. People*, 13 Mich. 224.

⁹⁶ *Ex parte Vermilyea*, 6 Cow. (N.

cases, the determination by the court of the questions of fact submitted to it is equally final with that of triors; it cannot be excepted to or reviewed upon error.⁹⁷ It has been held⁹⁸ and denied⁹⁹ that, where the judge acts as the trior, his rejection of testimony offered in support of the charge is immaterial, and not subject to review. Where he thus acts, it is immaterial upon what *form* of challenge venire-men are set aside, provided they are incompetent. A judgment will not be reversed because a challenge, good for the favor, was sustained in form for principal cause.¹

§ 101. **Examination of the Venire-man on the Voir Dire.**—Venire-men are examined one by one, and not by squads or platoons.² A *challenge* assigning some specific ground of disqualification, which ground is denied by the opposite party, must *precede*

Y.) 555; *People v. Mather*, 4 Wend. (N. Y.) 229, 240; *People v. Rathbun*, 21 Wend. (N. Y.) 509; *O'Brien v. People*, 36 N. Y. 276; *Stout v. People*, 4 Parker Cr. (N. Y.) 132; *People v. Doe*, 1 Mich. 451; *Wirebach v. First Nat. Bank*, 12 Reporter, 571. In Illinois it was held the court could refuse such demand and determine this question for itself subject to review on appeal. *O'Fallon Coal Co. v. Laquet*, 198 Ill. 125, 64 N. E. 767.

⁹⁷ *Stout v. People*, 4 Parker Cr. (N. Y.) 132; *Sanchez v. People*, 22 N. Y. 147; *People v. Bodine*, 1 Denio (N. Y.), 281, 309; *St. v. Wincroft*, 76 N. C. 38; *Dew v. McDivitt*, 17 Am. L. Reg. 623, 31 Ohio St. 139; *Morrison v. Lovejoy*, 6 Minn. 319; *People v. Tweed*, 11 Hun (N. Y.), 195; *U. S. v. McHenry*, 6 Blatchf. (U. S.) 503; *Union Gold M. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Stewart v. St.*, 13 Ark. 720. Unless there is a clear abuse of discretion. *Wilburn v. Ter.*, 10 N. M. 402, 62 Pac. 968. Unless the voir dire examination show disqualification as a matter of law. *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618.

⁹⁸ *Costigan v. Cuyler*, 21 N. Y. 134.

⁹⁹ *Sehorn v. Williams*, 6 Jones, L. (N. C.) 575; *People v. Cotta*, 49 Cal. 166. There must be objections and exceptions to rulings on testimony the same as in the case of testimony to sustain or overcome the case. *People v. Tesbara*, 134 Cal. 542, 66 Pac. 798. Utah statute provides for review where a question is one of bias, witnesses being summoned and examined according to the ordinary rules of evidence. *St. v. Morgan*, 23 Utah, 212, 64 Pac. 356. The burden of proof is on the challenger. *St. v. Jones*, 32 Mont. 442, 80 Pac. 1095. It is a matter for summary determination and evidence is submitted when necessary. *Ullman v. St.*, 124 Wis. 602, 103 N. W. 6. The trend of decision is that the court's rejection of evidence which reasonably tends to show bias or prejudice is reviewable. *St. v. Stentz*, 30 Wash. 134, 63 L. R. A. 80. Where a proper inquiry is disallowed there should be an offer of proof. *Com. v. Trefethen*, 157 Mass. 180, 18 N. E. 961.

¹ *Reynolds v. U. S.*, 98 U. S. 145.

² *Chit. Cr. L.* 547; *Arch. Cr. Pl. & Pr.* 162; *Williams v. St.*, 60 Ga. 367, 372; *Driskell v. Parish*, 10 Law Reporter, 395.

any examination of the venire-man; for, until this is made there is no issue for the decision of the triors or the court.³ As a general rule, a party has no right to examine the venire-man by way of *fishing* for some ground of challenge,⁴ but this rule should be accepted with caution.⁵ In some States, a motion or request of a party that the venire-man be put to answer is understood to be in itself a challenge.⁶ Within reasonable limits, each party has a right to put pertinent questions to show, not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not he will exercise his right of peremptory challenge.⁷ There is much authority for the conclusion that the trial judge has a discretion, either to examine the juror without putting him upon oath, and to reject him if he finds him disqualified, although no challenge has been made,⁸ or to allow either party to

³ 1 Chitty C. L. 546; *St. v. Creasman*, 10 Ired. L. (N. C.) 395, per Ruffin, C. J.; *U. S. v. Johnson*, 1 Cranch C. C. (U. S.) 371; *Matilda v. Mason*, 2 Cranch C. C. (U. S.) 343; *Lord v. Brown*, 5 Den. (N. Y.) 345; *Trullinger v. Webb*, 3 Ind. 198; *Powers v. Presgrove*, 38 Miss. 227; *Reg. v. Stewart*, 1 Cox C. C. 174; *Com. v. Thrasher*, 11 Gray (Mass.), 55; *St. v. Flower, Walker* (Miss.), 319; *King v. St.*, 5 How. (Miss.) 730; *St. v. Zellers*, 7 N. J. L. 220; and note by the reporter, *Ibid.* 223; *Crew v. St.*, 113 Ga. 645, 38 S. E. 941.

⁴ *Reg. v. Dowling*, 3 Cox C. C. 509; *Bales v. St.*, 63 Ala. 30, 38; *Ryder v. St.*, 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 241. The court may refuse to allow the juror to be cross-examined as rigidly as a witness. *St. v. Cornelius*, 118 La. 146, 42 South. 754.

⁵ *People v. Brown* (Cal.), 14 Pac. 90; *People v. Hamilton*, 62 Cal. 377. Re-examination may be refused where no ground therefor is stated in support of the request. *Schissler v. St.*, 122 Wis. 365, 99 N. W. 593.

⁶ *Howell v. Howell*, 59 Ga. 145; *Temple v. Sumner, Smith* (N. H.), 226, 234; *People v. Backus*, 5 Cal. 275, 277.

⁷ *Watson v. Whitney*, 23 Cal. 375; *St. v. Godfrey, Brayt.* (Vt.) 170; *Tarpey v. Madsen*, 26 Utah, 294, 73 Pac. 411; *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312. It is error to refuse a question, the answer to which may show good cause for challenge. *St. v. King*, 174 Mo. 647, 74 S. W. 627. It is generally regarded as a right for veniremen to be questioned in aid of the proper exercise of the right of peremptory challenge and as showing the kinds of questions along this line. *Howgate v. U. S.*, 7 App. D. C. 217; *Faber v. C. Reiss C. Co.*, 124 Wis. 554, 102 N. W. 1049; *American Bridge Works v. Pereira*, 79 Ill. App. 90. In Maryland this was deemed merely permissible, in the court's discretion. *Handy v. St.*, 101 Md. 39, 60 Atl. 452. Where it was claimed that questions relating to an indemnity company in a personal injury suit were for the purpose merely of prejudicing the jury, counsel may offer proof of his good faith in asking them. *Vion v. Brooks-Scanlon Lumber Co.*, 99 Minn. 97, 108 N. W. 891.

⁸ *U. S. v. Cornell*, 2 Mason (U. S.), 91. Where the statute provides for the judge examining the juror, it is

interrogate him without first interposing a challenge; and this seems to be the general practice of the courts.⁹ The challenge may be tried by the examination of the venire-man himself on the *voir dire*, or by the testimony of witnesses, or both.¹⁰ It is a general rule that the challenged venire-man may be sworn as a witness to state or explain any facts which do not impeach his character or his motives;¹¹ but the parties may *waive* the administration of the oath, and if a party permits him to be examined without oath, making no objection thereto, his consent will be implied.¹² Upon this examination, the venire-man, like any other witness in a judicial investigation, answers under the risk of an indictment for perjury;¹³ and he therefore may, as other witnesses may, *correct* any error in his previous statements on a re-examination.¹⁴ As already seen,¹⁵ the grounds of a challenge must ordinarily be stated when the challenge is made. If the challenged venire-man *admits* the truth of the grounds, he will not be examined on his *voir dire*, but the court

mandatory that he should interrogate, on request, as to a particular disqualification. *Robinson v. Howell*, 66 S. C. 326, 44 S. E. 931.

⁹ *St. v. Lautenschlager*, 22 Minn. 514; *Carnal v. People*, 1 Park. Cr. (N. Y.) 272, 282; *Jarvis v. St.*, 136 Ala. 17, 34 South. 1025. If questions are addressed to the panel, individual replies give right to challenge for cause and further proceedings are then had as to each of such challenges. *Jackson v. St.*, 103 Ga. 417, 30 S. E. 251.

¹⁰ In an early case in Ohio, the rule was laid down that the party challenging a venire-man "on suspicion of bias or partiality" might examine him, or call witnesses, but that he could not do both. *St. v. Ankrum*, Tappan (Ohio), 80. But this conception was plainly erroneous, and is universally discarded. *Keeler v. St.*, 73 Neb. 441, 103 N. W. 64.

¹¹ 1 Chitty Cr. L. 550; *Ogden v. Parks*, 16 Johns. (N. Y.) 180; *Fenwick v. Parker*, 3 Code Rep. 254; *People v. Fuller*, 2 Parker Cr. (N. Y.) 16. Compare *Joice v. Alexander*,

1 Cranch C. C. (U. S.) 528, a hasty nisi prius decision. In Connecticut, the practice has been to examine the challenged venire-man without putting him under oath, though it has been said that the court may, in its discretion, cause him to be sworn upon request, and that this will be done in cases of very grave importance. *St. v. Hoyt*, 47 Conn. 518; *Sanders v. St.*, 118 Ga. 443, 45 S. E. 602.

¹² *Lord v. Brown*, 5 Den. (N. Y.) 345, 348; *Carnal v. People*, 1 Park. Cr. (N. Y.) 272, 282; *Trullinger v. Webb*, 3 Ind. 198. But see *St. v. Flower*, *Walker* (Miss.), 318; *King v. St.*, 5 How. (Miss.) 730.

¹³ *St. v. Howard*, 63 Ind. 502.

¹⁴ *Hendrick v. Com.*, 12 Leigh (Va.), 708. An obvious mistake is not taken into account. *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 349. If corrections from incompetency to competency are the result of threats by the court to punish juror, he should not be considered competent. *St. v. Fourchy*, 51 La. Ann. 228, 25 South. 109.

¹⁵ Ante, § 101.

will determine their sufficiency as matter of law.¹⁶ So, whenever a good cause of challenge is interposed by one party and admitted by the other, there is nothing to try, and the venire-man must stand aside.¹⁷ The court may conduct the examination for its own information,¹⁸ though this cannot be done so as to deprive a party of his right to re-examination.¹⁹ The court may exercise a sound legal discretion in respect of the pertinency of the questions put and the limits to which the examination shall be extended. The questions must be pertinent and of a nature to show that the venire-man is not sufficiently free from bias to sit as an impartial juror.²⁰

§ 102. What Questions may be put to a Venire-man.—Questions tending to *degrade* the venire-man,²¹ or to show him guilty of crime,²² cannot be put. Anciently in England a venire-man could not be asked whether he had expressed a belief that the accused was guilty, would be hanged, or the like; since to prejudge a man of a heinous

¹⁶ Morrison v. Lovejoy, 6 Minn. 319; South Compton etc. Co. v. Weber, 26 Ky. Law Rep. 922, 82 S. W. 986.

¹⁷ St. v. Lautenschlager, 22 Minn. 514.

¹⁸ St. v. Ludwig, 70 Mo. 412.

¹⁹ Stephens v. People, 38 Mich. 739. An exception taken to the refusal of the court to permit a certain question to be put to a venire-man on the voir dire, may be waived by counsel omitting again to insist upon the exception when the court propounds a substitute. Loeffler v. Keokuk Packet Co., 7 Mo. App. 185.

²⁰ St. v. Coleman, 8 S. C. 237; Reg. v. Lacey, 3 Cox C. C. 517. See as to the mode of conducting such an examination, the judicious observations of Winkler, J., in Stager v. St., 9 Tex. App. 440; Funk v. U. S., 16 App. D. C. 478; Gillespie v. St., 92 Md. 171, 48 Atl. 32. Questions by state tending to prejudice should not be permitted. St. v. Meysenberg, 171 Mo. 1, 71 S. W. 229.

²¹ Anon., 1 Salk. 153; Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115; Hudson v. St., 1 Blackf. (Ind.)

317; St. v. Mann, 83 Mo. 590. Though, if the juror chooses to answer such questions, it is only a *waiver* of his *privilege* of refusal, and gives the prisoner no right to complain. Spruce v. Com., 2 Va. Cas. 375. It has even been held that a juror cannot be asked whether he has *subscribed money* towards carrying on the prosecution in a criminal case. Reg. v. Fitzpatrick, Crawf. & D. (Irish) 513. Contra, that he may be asked whether he belongs to an association for the prosecution of crime. St. v. Mann, 82 Mo. 590. See ante, § 66.

²² As, for instance, whether he had aided or abetted the late *rebellion* against the United States. Burt v. Panjaud, 99 U. S. 180. And so, a juror might refuse to take the *test oath* prescribed by § 821 of the Revised Statutes of the United States, designed to purge the panel of such jurors as had voluntarily engaged in the late rebellion. Atwood v. Weems, 99 U. S. 183. Compare U. S. v. Blodgett, 35 Ga. 336; U. S. v. Reynolds, 1 Utah, 319.

matter was scandalous, and such a question tended to degrade the venire-man.²³ This rule, which was more tender to the feelings of the venire-man than to the rights of the accused, has been unwisely adopted to some extent in this country;²⁴ but, as it was founded on a principle of the common law which has not been generally admitted with us, namely, that the expression of an opinion unaccompanied with personal ill-will is no ground of challenge,²⁵ it has not generally been followed in this country.²⁶ In civil cases venire-men may be questioned on their oath as to whether or not they have formed or expressed an opinion in reference to the case,²⁷ or whether they have "made up their minds" about the case.²⁸ *Hypothetical questions*, that is, questions as to what the juror *would* or would not decide in a supposed state of the evidence,—are not

²³ *Cook's Case*, 13 How. St. Tr. 334; *Rex v. Edmunds*, 4 Barn. & Ald. 471, 492; *Rex v. Kerwan*, cited in *Finlay's Irish Dig.*, p. 347; *Reg. v. Hughes*, 2 Craw. & Dix, Irish Cir. 396.

²⁴ *St. v. Baldwin*, 1 Const. Rep. (S. C.) 289, 293; *St. v. Sims*, 2 Bailey (S. C.), 29; *St. v. Spencer*, 21 N. J. L. 197; *St. v. Fox*, 25 N. J. L. 566.

²⁵ *Ante*, § 77; 2 Hawk. P. C., ch. 43, § 28. If the court's questions are framed so as pointedly to refer to one side rather than the other, for example, asking the jury if any of them are acquainted with "defending" counsel, this may constitute reversible error. *Hubbard v. St.*, 37 Fla. 156, 20 South. 235.

²⁶ *People v. Vermilyea*, 7 Cow. (N. Y.) 108, 125; *U. S. v. Fries*, Whart. St. Tr. 610, 614; *U. S. v. Callender*, Whart. St. Tr. 688, 696; 1 Burr's Tr. 426, et passim. In a modern English case, the venire-man was thus questioned by counsel for the accused without opposition. *Reg. v. Lacey*, 3 Cox, C. C. 517.

²⁷ *Spear v. Spencer*, 1 G. Greene (Iowa), 535. See also *Dew v. McDivitt*, 31 Ohio St. 139, 17 Am. L. Reg. 621; *Williams v. Godfrey*, 1

Heisk. (Tenn.) 299. Compare, as to the ancient, restricted and obsolete practice, *Anon.*, 1 Salk. 153; *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *St. v. Cleary*, 97 Iowa, 413, 66 N. W. 724. In Virginia it has been held that the examination may be confined to questions of absolute disqualification. *Richardson v. Planters Bank*, 94 Va. 130, 26 S. E. 413.

²⁸ *Houston v. Terrell (Tex.)*, 7 S. W. 670; *Ryder v. St.*, 100 Ga. 528, 28 S. E. 246, 38 L. R. R. 721. Or questions tending to insult, e. g., whether he wanted to "sit on this jury." *Abby v. Woods*, 43 Wash. 379, 86 Pac. 558.

Questions as to partiality may be confined to the case on trial and to the parties thereto. *Sullivan v. Padrosa*, 127 Ga. 338, 50 S. E. 142.

Where jury has been accepted and impanelled and counsel is first informed that juror has expressed an opinion, it is not error to allow him to be questioned in the presence of the other members of the panel. *Galveston etc. Ry. Co. v. Paschall*, 41 Tex. Civ. App. 357, 92 S. W. 446; *Com. v. Van Horn*, 188 Pa. 143, 41 Atl. 469; *St. v. Smith*, 72 Vt. 366, 48 Atl. 647; *St. v. Perrioux*, 107 La. 601, 30 South. 1016; *People v. War-*

allowed.²⁹ The court may restrict the form of the questions, so that they shall not be unnecessarily *prolix* or minute in their details.³⁰ Where the statute prescribes the questions which shall be put, it rests in the *discretion* of the court to allow *other questions* to be propounded or to allow other evidence to be adduced; though authority is not quite harmonious on this point.³¹ But it should be remem-

ner, 147 Cal. 546, 82 Pac. 196. He may not be asked what he would do in respect to matters as to which the court will direct him by its instructions. *St. v. Royse*, 24 Wash. 440, 64 Pac. 742; *Ryan v. St.*, 115 Wis. 488, 92 N. W. 271. Where questions are asked as to matters expected to be developed by the testimony there is a wide discretion reposed. *Jones v. People*, 23 Colo. 76, 47 Pac. 275; *Hughes v. St.*, 109 Wis. 397, 85 N. W. 333. Court may refuse to allow juror to be asked whether failure by defendant to testify would create presumption against him. *Com. v. Wireback*, 190 Pa. 138, 42 Atl. 542.

²⁹ *Woolen v. Wire* (Ind.), 11 N. E. 236; *St. v. Arnold*, 12 Iowa, 479; *St. v. Davis*, 14 Nev. 439; *St. v. Leicht*, 17 Iowa, 28; *St. v. Ward*, 14 La. Ann. 673; *St. v. Bennett*, 14 La. Ann. 651; *St. v. Bell*, 15 La. Ann. 114. But see *Chicago etc. R. Co. v. Adler*, 56 Ill. 344; *Chicago etc. R. Co. v. Buttolf*, 66 Ill. 347; *Galena etc. R. Co. v. Haslam*, 73 Ill. 494; *Richmond v. Roberts*, 98 Ill. 472. In these cases it was held that the representative of the railroad company had a right to ask jurors this question: "If upon hearing the testimony, they should find it evenly balanced, which way they would be inclined to decide the case?" Nor may he be asked questions showing his knowledge or ignorance of law. *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624.

³⁰ Thus, it is sufficient, on a trial for murder, to ask the *venire-man*

whether he has formed or expressed the opinion that the prisoner is guilty, without extending it to the different grades of homicide. *St. v. Matthews*, 80 N. C. 417. See also *Burr's Tr.* 418; *U. S. v. Callender*, *Whart. St. Tr.* 688; *Com. v. Surles*, 165 Mass. 213, 42 N. E. 502; *St. v. Pereira*, 51 La. Ann. 1194, 25 South. 984. May prevent the introduction thereby of extraneous matter prejudicial in its nature. *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271. And prevent wrong assumptions as based on answers to prior questions. *People v. Radley*, 127 Mich. 627, 86 N. W. 1029.

³¹ *Com. v. Gee*, 6 Cush. (Mass.) 174, 177, per Dewey, J.; *Com. v. Thrasher*, 11 Gray (Mass.), 55, 56; *Pierce v. St.*, 13 N. H. 536; *Jones v. St.*, 2 Blackf. (Ind.) 475, 478. *Contra*, *Williams v. St.*, 3 Ga. 453, where Lumpkin, J., delivering the opinion of the court, held it to be improper to ask any other questions of a juror than those authorized by statute, with a view to ascertaining whether he is objectionable for favor. See also *King v. St.*, 21 Ga. 220; *Pines v. St.*, 21 Ga. 227; *Monday v. St.*, 32 Ga. 672; *Bishop v. St.*, 9 Ga. 121; *Dumas v. St.*, 63 Ga. 600. Compare *St. v. Wilson*, 7 Iowa, 407. The statutory form of questions may be varied, in order to make their import clear to the juror. *Mitchell v. St.*, 22 Ga. 211; *Henry v. St.*, 33 Ga. 441; *Carte v. St.*, 56 Ga. 463; *Com. v. Warner*, 173 Mass. 541, 54 N. E. 353; *Jackson v. St.*, 103 Ga. 417. But those prescribed

bered in this connection that, according to the prevailing view, the causes of challenge prescribed by statutes are *not exclusive* of others.³² Where a venire-man is challenged on the ground of bias, prejudice or opinion, a very wide range of inquiry is permissible, for the purpose of ascertaining the real extent to which his mind is affected for or against either party. Circumstances may be gone into, including those which relate to a period subsequent to his coming to court;³³ but *irrelevant questions*,—as whether the venire-man believes in a future state of rewards and punishments,³⁴ or whether he has formed or expressed an opinion as to the credibility of a particular witness,³⁵ are not allowed.

§ 103. [Continued.] **Questions touching Religious or Political Opinions, Affiliations, etc.**—Questions touching the *scruples* of the venire-man, whether religious or otherwise, if the answers would probably disclose facts affecting his impartiality as a juror, ought to be put.³⁶ So, on the trial of certain *foreigners*, it was held proper

must be asked. *Robinson & Allen v. Howell*, 66 S. C. 326, 44 S. E. 931.

³² *Block v. St.*, 100 Ind. 357; *Lester v. St.*, 2 Tex. App. 433; *Williams v. St.*, 44 Tex. 34; *Caldwell v. St.*, 41 Tex. 86; *Etheridge v. St.*, 8 Tex. App. 133. Compare *Jones v. St.*, 8 Tex. App. 648; *Hanks v. St.*, 21 Tex. 526. A statute which prescribes that on giving an affirmative answer to a prescribed question, the venire-man "shall be discharged," is mandatory, and no further examination or explanation is permissible. *Stagner v. St.*, 9 Tex. App. 440.

³³ See, for statements and illustrations of this doctrine, *People v. Bodine*, Edm. Sel. Cas. 36, 77, 1 Denio (N. Y.), 281; *People v. Honeyman*, 3 Denio (N. Y.), 121, 124; *Freeman v. People*, 4 Denio (N. Y.), 9, 35; *Smith v. Floyd*, 8 Barb. (N. Y.) 522; *Thompson v. People*, 3 Park. Cr. (N. Y.) 467.

³⁴ *St. v. Hamilton*, 27 La. Ann. 45a; *Sullivan v. Padrosa*, 127 Ga. 338, 50 S. E. 142; *Wells v. St.*, 139 Ala. 16, 36 South. 1012. And questions as to meaning of various legal

terms expected to be used in the course of the trial. *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624.

³⁵ *Com. v. Porter*, 4 Gray (Mass.), 423. Where the issue to be tried, under an indictment for murder, arose on a special plea of former acquittal, it was held that the venire-man could not be asked whether he had formed or expressed an opinion as to the guilt or innocence of the accused as charged in the indictment. *Josephine v. St.*, 39 Miss. 613; *People v. Brittan*, 118 Cal. 409, 50 Pac. 664. In Michigan it was held proper to disallow the question where the witness testified in another case in the trial of which the juror served, as thus his verdict might thereby be impeached. *People v. Albers*, 137 Mich. 678, 100 N. W. 908.

³⁶ *Jones v. St.*, 3 Blackf. (Ind.) 475, 478. See also *Driskell v. Parish*, 10 Law Reporter, 395. *Contra*, *Reason v. Bridges*, 1 Cranch C. C. (U. S.) 477, where on the trial of a petition for freedom, the court refused to allow a juror to be exam-

to ask the venire-man, suspected of belonging to the so-called *Know-Nothing* organization, whether he had taken an oath or obligation of such a character as caused a prejudice in his mind against foreigners;³⁷ and, on the trial of persons engaged in a riot between *foreign Roman Catholics* and *native Americans*, it was held that a venire-man could not refuse, on the ground that it would disgrace him, to answer whether he had any bias against Roman Catholics, or whether he belonged to the order of United Americans.³⁸ On the other hand, it has been held that, on a trial for participating in the destruction of a convent by mob violence (many of the witnesses being Roman Catholics), a venire-man could not be asked whether he entertained the opinion that a Roman Catholic was not to be believed on oath; whether the destruction of the building under certain circumstances constituted a crime; or whether such an offense ought to be punished by law, or in the same measure prescribed by law for other offenses of the same kind.³⁹ So, on the trial of one charged with being engaged in an illegal calling, a venire-man cannot be asked whether he would give less credit to the testimony of one proved to be engaged in such calling than to that of other persons.⁴⁰ But it has been held proper, on the trial of a white man for the murder of a negro, to ask venire-men whether

ined as to whether he was not a *Methodist*, and whether the Methodists had religious scruples touching the legality of slavery. But this, like many other cases in those reports, is of slight authority. *Hardy v. U. S.*, 186 U. S. 224, 46 L. Ed. 1137. Also to inquire as to their prejudices in local option liquor cases, so as to aid in peremptory challenges. *Drye v. St.* (Tex. Cr. R.), 55 S. W. 65 (not reported in state reports). It has been ruled he cannot be asked if he is prejudiced against corporations. *Atlantic & P. Ry. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590. May be asked, if he is opposed to inflicting punitive damages. *Yazoo & M. V. R. Co. v. Roberts*, 88 Miss. 80, 40 South. 481. Membership in a society may be inquired about as tending to show bias. *St. v. Tighe*, 27 Mont. 327, 71 Pac. 3.

³⁷ *People v. Keyes*, 5 Cal. 347.

³⁸ *People v. Christie*, 2 Abb. Pr. (N. Y.) 256, 2 Park. Cr. (N. Y.) 579. But it has been held that a venire-man in a prosecution for counterfeiting, cannot be asked whether he has not taken an oath to acquit all persons of counterfeiting, and that he may properly decline to answer. *Fletcher v. St.*, 6 Humph. (Tenn.) 249.

³⁹ *Com. v. Buzzell*, 6 Pick. (Mass.) 153; *Kohler v. Railroad Co.*, 99 Wis. 33.

⁴⁰ *U. S. v. Duff*, 6 Fed. 45, 48. But see ante, § 73. It was held proper to interrogate whether testimony in favor of a street car company would be looked on with same favor as that against it. *Chicago City Ry. Co. v. Fetzner*, 113 Ill. App. 280.

they could, upon the same evidence, return the same verdict against a *white man* for killing a *negro* as for killing another white man.⁴¹ In California, upon the trial of a *Chinaman* for a criminal offense, the following questions may be put to a venire-man: "Other things being equal, would you take the word of a Chinaman as soon as you would that of a white man?" "If the defendant, a Chinaman, should be sworn as a witness in his own behalf, would you give his testimony the same credit that you would give to the story told by a white person under the same circumstances?"⁴²

§ 104. **Swearing Singly or in a Body.**—Some writers cast doubt upon the question,⁴³ yet the common-law practice clearly was to swear each juror as soon as he was accepted.⁴⁴ By the American practice, the jurors are not generally sworn until a full jury is completed, and then they are sworn in a body.⁴⁵ But this practice is so far flexible that, unless a different rule is prescribed by statute, each juror may be sworn as he is accepted, or the administration of the oath may be delayed until the jury is completed.⁴⁶ But, since in either case the parties must exercise their right of peremptory challenge before the jurors are sworn, it has been considered the better practice in criminal cases to have the jury full before any

⁴¹ *Lester v. St.*, 2 Tex. App. 432. See also *St. v. McAfee*, 64 N. C. 339. *Polygamist* not disqualified under Act of Cong. of March 22, 1882. *People v. Hoyt*, 3 Utah, 396. Also it has been held proper to ask whether they believe a man has the right to take the law into his own hands and thereby commit a crime. *People v. Plyer*, 126 Cal. 379, 58 Pac. 904. Or in a case where a negro killed a white man for insulting the negro's wife, whether the juror would look at the matter the same were conditions reversed. *Frederick v. St.*, 39 Tex. Cr. R. 147, 45 S. W. 589.

⁴² *People v. Gar Soy*, 57 Cal. 102, 23 Alb. L. J. 418.

⁴³ 1 Chit. Cr. L. 551; 2 Hale P. C. 293.

⁴⁴ *Trials per Pais* (ed. 1725), pp. 143, 150, 152; *Joy on Confessions and Challenges*, 220; 1 Chit. Cr. L.

54, 77; *Count Conigsmark's Case*, 9 How. St. Tr. 12; *Cook's Case*, 13 How. St. Tr. 318; *Laver's Case*, 16 How. St. Tr. 135, and especially the remarks of Mr. Justice Abbot in *Brandreth's Case*, 32 How. St. Tr. 694; *St. v. Potter*, 18 Conn. 166, 176, per Williams, C. J.; *Lamb v. St.*, 36 Wis. 424, 428, per Ryan, C. J.

⁴⁵ Ante, § 92. As to whether or not a reluctant juror was duly sworn. See *St. v. Nelson*, 166 Mo. 191, 65 S. W. 749.

⁴⁶ *People v. Reynolds*, 16 Cal. 128; *O'Connor v. St.*, 9 Fla. 215, 226. And then it need not be immediately done. Thus where a jury was completed one day and the court adjourned to the following morning and the jury were in charge of an officer in the meanwhile. *St. v. Armstrong*, 167 Mo. 257, 66 S. W. 961.

of them are sworn, so as to give the parties the benefit of their peremptory challenges down to the latest possible point of time.⁴⁷

§ 105. **Time of Swearing.**—In a civil case, the jury cannot be properly sworn until a plea has been filed and an *issue joined* thereon,⁴⁸ nor before the suit has been called for trial;⁴⁹ nor in a criminal case, before the accused has pleaded to the indictment.⁵⁰ And if the whole or a portion of them have been sworn before his arraignment, he may ask that they be resworn, though he *waives* the irregularity by not preferring the request.⁵¹

§ 106. **Reswearing the Jury.**—Where, upon the trial of two persons jointly indicted, there is a *severance* after the jury and witnesses have been sworn, both the jury and the witnesses must be sworn again.⁵² The better opinion,⁵³ though denied by one court,⁵⁴ is that, if the issue is changed by an *amendment* of the pleadings during the progress of the trial, a failure to reswear the jury will not be error, at least unless the complaining party requests that this be done, which request is refused. But if the amendment does not *change the issues*, it is not necessary to reswear the jury.⁵⁵

⁴⁷ St. v. Anderson, 4 Nev. 265; O'Connor v. St., 9 Fla. 215. Unless prescribed by statute, there is no rule of practice requiring *four* jurors to be called at a time, for the purpose of being sworn. According to that opinion, a greater or less number may be called at any one time, and the parties may be required to pass upon them. Walker v. Collier, 37 Ill. 362.

⁴⁸ Everhart v. Hickman, 4 Bibb (Ky.), 341; Clagget v. Force, 1 Dana (Ky.), 429; Shain v. Markham, 4 J. J. Marsh. (Ky.) 580; Hopkins v. Preston, 2 A. K. Marsh. (Ky.) 64; Miles v. Rose, Hemp. C. C. (U. S.) 37; Baltimore etc. R. Co. v. Christie, 5 W. Va. 325; Brown v. Warner, 2 J. J. Marsh. (Ky.) 39. As showing the practice on this subject see Rogers v. St., 89 Md. 424, 43 Atl. 922; Wiggins v. Com., 104 Ky. 765, 47 S. W. 1073; Dolan v. U. S., 116 Fed. 528. See also § 96, n. 2, and Ca. Cl.

Where the defendant's true name is not given in the indictment and he corrects this on arraignment, it is not necessary that the jury be resworn. Clark v. St., 45 Tex. Cr. R. 456, 76 S. W. 573.

⁴⁹ Marshall v. Krugg, 2 A. K. Marsh. (Ky.) 36.

⁵⁰ Vezain v. People, 40 Ill. 397.

⁵¹ Ibid.

⁵² Babcock v. People, 15 Hun (N. Y.), 347.

⁵³ Williams v. Miller, 10 Iowa, 344 (overruling Cole v. Swan, 4 G. Greene, 32); Arnold v. Arnold, 20 Iowa, 273; Hinkle v. Davenport, 38 Iowa, 355.

⁵⁴ Kerschbaugher v. Slusser, 12 Ind. 453; Hoot v. Spade, 20 Ind. 326. But the evidence need not be repeated but is applied by the jury to the changed issue. Smith & Stoughton Corporation v. Byers, 20 Ind. App. 51, 49 N. E. 177.

⁵⁵ Knowles v. Rexroth, 67 Ind. 59;

§ 107. **Swearing for the Term.**—There is some loose opinion to the effect that, where all the jurors selected and drawn are sworn at the commencement of the term, to try the several issues upon which they may sit as jurors during the term, this will be sufficient,⁵⁶ at least unless the complaining party insisted upon having the jury which was impaneled sworn in the particular case.⁵⁷ But this is clearly contrary to the course of the common law; and the better opinion is that, where a different practice is not prescribed by statute, it lacks the necessary solemnity, and each jury should be sworn to try the issues in each particular case.⁵⁸

§ 108. **Form of the Oath.**—Where the form of the oath is prescribed by statute, none other can be administered. The oath used at common law, as well as that prescribed by statute in *criminal cases*, is essentially different from that used in *civil cases*, and the better opinion therefore is that it is error in a criminal case to use that prescribed for civil cases,⁵⁹ though an objection for such an irregularity will not be available if taken *after verdict*.⁶⁰ There-

Merrill v. St. Louis, 83 Mo. 244, aff'd, 12 Mo. App. 466.

⁵⁶ People v. Albany, 6 Wend. (N. Y.) 548.

⁵⁷ Hardenburgh v. Crary, 15 How. Pr. (N. Y.) 307.

⁵⁸ Barney v. People, 22 Ill. 160. This too much resembles the practice of the economical deacon who blessed the pork barrel instead of asking a blessing at each meal. Where jurors are sworn for the term as to civil issues, talesmen called in a criminal case need not take this oath. Taylor v. St., 121 Ga. 348, 49 S. E. 303.

⁵⁹ St. v. Rollins, 22 N. H. 528; Sutton v. St., 41 Tex. 513; Bray v. St., 41 Tex. 560. Where two oaths are prescribed by statute, one to be administered to jurors on the trial of "any civil action or proceeding," the other in criminal trials, the former oath must be used in a bastardy proceeding. "The use of the latter is confined exclusively to the trial of cases wholly and essentially

criminal in their nature and character. The former is applicable, not only to the trial of civil actions, properly so called, but to all such other actions and special proceedings as, strictly speaking, are neither civil nor criminal actions, and hence cannot properly be classified under either head." State v. Worthingham, 23 Minn. 528, 537. See also St. v. Pate, Busb. 244.

⁶⁰ St. v. Robinson, 36 La. Ann. 873; Seymour v. Parnell (Fla.), 2 South. 312; St. v. Wilson, 36 La. Ann. 864. See also Harriman v. St., 2 G. Greene (Iowa), 285; Wrockledge v. St., 1 Clarke (Iowa), 167; Candler v. Hammond, 23 Ga. 493; Looper v. Bell, 1 Head (Tenn.), 373; St. v. Council, 129 N. C. 511, 39 S. E. 814; Baldwin v. Kansas, 129 U. S. 52, 32 L. Ed. 193; Preston v. St., 115 Tenn. 343, 90 S. W. 856. And in a civil case, if they were not sworn at all. Cahill v. Delaney, 68 N. Y. S. 842. Contra in criminal case. Slaughter v. St., 100 Ga. 323, 28

fore, although the oath which was administered may not have conformed to the statutory form, yet it will be sufficient that the *record* states that the jury *were duly* sworn, and a party will not be permitted to contradict it.⁶¹ In *civil cases*, the common-law form is: "You solemnly swear that you shall well and truly try the issues joined between A. B., plaintiff, and C. D., defendant, and a true verdict give according to the evidence."⁶² Under many American State constitutions, as hereafter seen,⁶³ *jurors* in criminal cases are *judges of the law*, as well as of the fact. There is hence some opinion that it is necessary in a criminal case to swear the jury a true verdict to render *according to the law* and the evidence.⁶⁴ But it should be said that no authoritative common-law precedent sanctions such a form;⁶⁵ and as, in most of the American States, the jurors are bound to take the law from the court, it is apprehended that in most such jurisdictions, the common-law form need not be varied in this particular.⁶⁶

S. E. 159. An oath, the truth to speak upon the issues joined in this case has been held sufficient after verdict, though the statute presented the additional words "according to the evidence." Wells v. Smith, 49 W. Va. 78, 38 S. E. 547.

⁶¹ Candler v. Hammond, 23 Ga. 493; Cornelius v. Boucher, 1 Ill. 12; Applegate v. Boyles, 10 Ind. 435; Looper v. Bell, 1 Head (Tenn.), 373. In any case, if a party would object to the form of the oath as actually administered, he must incorporate it into his bill of exceptions, in order that a court of error may see whether the form used was proper or not. Bartlett v. St., 28 Ohio St. 669, 672; Preston v. St., 8 Tex. App. 30; Dyson v. St., 26 Miss. 362; Barfield v. Impson, 1 Sm. & M. (Miss.) 326; Cato v. St., 9 Fla. 163; Wellborn v. Spears, 32 Miss. 139.

⁶² 3 Bl. Comm. 365. It is sufficient if the jury are sworn "well and truly to try, and the truth to speak upon the issues joined." Burk v. Clark, 8 Fla. 9. Where a jury is

sworn to try *the issue*" in a case presenting several issues, the word "issue" will be taken collectively, all the issues being considered as one. Hatcher v. Fowler, 1 Bibb (Ky.), 337; Bate v. Lewis, 1 J. J. Marsh. (Ky.) 316; Pointer v. Thompson, 7 Humph. (Tenn.) 532. But see Adams v. State, 11 Ark. 466. The practitioner should be cautioned that this form may be modified by statute in his jurisdiction, and he should look to that. Where statute gives a form to be substantially followed, swearing the jury to try the case instead of "the issue" etc. is an immaterial departure. Young v. Com. (Ky.), 42 S. W. 1141 (not reported in state reports).

⁶³ Post, §§ 2140, et seq.

⁶⁴ Patterson v. St., 7 Ark. 59; Sandford v. St., 11 Ark. 328; Bell v. St., 10 Ark. 536; Bivens v. St., 11 Ark. 455.

⁶⁵ See Trials per Pais (1725), pp. 192, 193.

⁶⁶ O'Connor v. St., 9 Fla. 215; St. v. Jones, 5 Ala. 666.

§ 109. [Continued.] In Particular Cases.—On an inquiry of damages, or, to use the ancient form of expression, a *writ of inquiry*, after a judgment by default, the jurors are sworn not “to try the issues,” but “to assess the plaintiff’s damages,” though an irregularity in this particular, will not reverse the judgment.⁶⁷ But where an issue has been joined, to swear a jury to inquire of damages, will be reversible error; since, in such a case, they are clearly not sworn to try the contested issues of fact.⁶⁸ The practice of swearing the jury, as well to try the issue of fact, as to inquire of the damages, on an issue of law previously found for the plaintiff, obtains only where the decision of the issue of law entitles the plaintiff to damages without regard to the trial of the issue of fact.⁶⁹ In suits on *penal bonds*, where breaches have been assigned, swearing the jury to inquire into the truth of the breaches, is equivalent to swearing them to try the issues.⁷⁰ And so, swearing them to try the issues joined, is equivalent to swearing them to inquire into the truth of the breaches; although strict practice would require them to be sworn to inquire into the truth of the breaches and to assess the damages as to the party in default, as well as to try the issues, and assess the damages as to the defendants who have pleaded to the action.⁷¹

ARTICLE II.—OBJECTIONS AND THE WAIVER AND REVIEW OF THE SAME.

SECTION

113. Time of taking Objections to Irregularities.

114. Waiver of Causes of Challenge.

115. Waiver of Exceptions for Disallowance of Challenges.

116. Objections to Incompetency after Verdict.

117. Evidence in Support of such Objections.

⁶⁷ *Colorado Springs v. Hewitt*, 3 Colo. 275; *Denny v. Hutcheson*, 1 Bibb (Ky.), 576; *Roberts v. Swearingen*, Hard. (Ky.) 121.

⁶⁸ *Williams v. Norris*, 2 Litt. 157; *Townsend v. Jeffries*, 17 Ala. 276; *Adams v. St.*, 6 Ark. 497, 505. But see *Caldwell v. Irvine*, 4 J. J. Marsh. (Ky.) 108. Where an action sounds in damages and there has been an order at rules for an entry of damages, an issuable plea at term annuls it, and the jury should be sworn to try the issues. *Peters v.*

Johnson, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428.

⁶⁹ *Swann v. Rary*, 3 Blackf. (Ind.) 298, 300; *Vaden v. Ellis*, 18 Ark. 355. In Tennessee it has been held that, though the question is merely the assessment of damages, a jury is properly sworn to try the issues between the parties, as the amount of the damages is an issue between them. *South. Queen Mfg. Co. v. Morris*, 105 Tenn. 654, 58 S. W. 651.

⁷⁰ *McCoy v. St.*, 22 Ark. 308.

⁷¹ *St. v. Gibson*, 21 Ark. 140.

118. Question, how viewed on Error or Appeal.
119. What the Record must show.
120. No Vested Right in a particular Juror.
121. Juror no Vested Right to serve.

§ 113. **Time of taking Objections to Irregularities.**—Irregularities in selecting the general jury list, in drawing the panel, and in summoning those whose names have been drawn, as already seen,⁷² are properly objected to by a *challenge to the array*. Such an objection ought not to be listened to after trial begun, except for cogent reasons and upon a clear showing that it could not have been made sooner; though there is no doubt that the court may entertain it in its *discretion*.⁷³ As already seen,⁷⁴ in many jurisdictions the statutes governing these steps in the selection of a jury, are regarded as *directory* merely. In these and in other jurisdictions, the analogous doctrine exists that informalities of this kind will not be permitted to vitiate a verdict, although they did not sooner come to the knowledge of the complaining party, unless positive injury is shown to have accrued therefrom.⁷⁵ In like manner, a *known* or *obvious*

⁷² Ante, §§ 31, et seq.

⁷³ Dovey v. Hobson, 2 Marsh. 154, 6 Taunt. 460; St. v. Stephens, 11 S. C. 319; Steele v. Malony, 1 Minn. 347; Longmire v. St., 130 Ala. 66, 30 South. 413; St. Louis & O. Ry. Co. v. Union Trust Bank, 209 Ill. 457, 70 N. E. 651; St. v. Gatlin, 170 Mo. 354, 70 S. W. 885. By statute in Pennsylvania a plea of not guilty or the general issue waives all such irregularities. Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433. A mere suggestion of bias made on information without a clear showing of fact does not call for exercise of such discretion.

⁷⁴ Ante, §§ 33, 34.

⁷⁵ Doolittle v. St., 93 Ind. 272; Buford v. McGetchie, 60 Iowa, 298; Caldwell v. St., 12 Tex. App. 358; Page v. Danvers, 7 Metc. (Mass.) 326, 327. See also Reed v. St., 1 Tex. App. 1; Mikell v. St., 62 Ga. 368. The same rule was applied in the following cases where objection was made, after verdict, to the legal-

ity of the drawing. Ray v. St., 4 Tex. App. 450; Amherst v. Hadley, 1 Pick. (Mass.) 38; St. v. Hascall, 6 N. H. 352; Bodge v. Foss, 39 N. H. 406; Pittsfield v. Barnstead, 40 N. H. 477; Wilcox v. School Dist., 26 N. H. 303; Gormley v. Laramore, 40 Ga. 253; Wentworth v. Farmington, 51 N. H. 128, 135; Hasselmeyer v. St., 1 Tex. App. 690; St. v. Williams, 2 Hill (S. C.), 381; St. v. Douglass, 63 N. C. 500; Anderson v. St., 5 Ark. 445; Walker v. Boston etc. R. Co., 3 Cush. (Mass.) 1, 19; St. v. Beasley, 32 La. Ann. 1162; New York v. Mason, 4 E. D. Smith (N. Y.), 142; St. v. Underwood, 6 Ired. L. (N. C.) 96; St. v. Courtney, 28 La. Ann. 794; St. v. Rigg, 10 Nev. 284; Com. v. Sallager, 3 Clark (Penn.), 127; People v. Cummings, 3 Park. C. (N. Y.) 343. And so with respect to objections affecting the validity of the summons. Bennett v. Matthews, 40 How. Pr. (N. Y.) 428; Vidal v. Thompson, 11 Mart. (La.) 23; Kennedy v. Com., 14 Bush (Ky.), 340;

irregularity in the process of impaneling must be objected to at the time when it is committed; it will be too late to make the objection for the first time on a motion for new trial⁷⁶ or in arrest of judgment.⁷⁷

Daniel v. Frost, 62 Ga. 697; *Stone v. People*, 3 Ill. 326; *St. v. Boon*, 80 N. C. 461; *Bronson v. People*, 32 Mich. 34; *Fowler v. Middlesex*, 6 Allen (Mass.), 92; *Solander v. People*, 2 Colo. 48; *New York v. Mason*, 4 E. D. Smith (N. Y.), 142; *Dayharsh v. Enos*, 5 N. Y. 581; *Green v. St.*, 17 Fla. 669; *Brunskill v. Giles*, 9 Bing. 13; *Rector v. Hudson*, 20 Tex. 234; *Jameson v. Androscoggin R. Co.*, 52 Me. 412. A statute of Louisiana requires all objections to the manner of drawing juries, or to any defect or irregularity that can be pleaded against any array or venire, to be urged on the first day of the term; otherwise such objections are considered as waived. *St. v. Thomas*, 32 La. Ann. 349; *St. v. Given*, 32 La. Ann. 782; *St. v. Harris*, 30 La. Ann. 90. A statute of South Carolina provides that "no irregularity in any writ of venire facias, or in the drawings, summoning, returning or impaneling of jurors, shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict." See *St. v. Coleman*, 8 S. C. 237. Similar statutes are found in other States. See *Purdue's Pa. Dig.* 1903, p. 5025, § 1; *Code Va.* 1904, § 3156; *Code W. Va.* 1906, § 3719; *R. S. Wis.* 1898, § 2881; *G. S. Fla.* 1906, § 4006; *R. L. Mass.* 1902, p. 1591, § 32; *R. S. Me.* 1903, p. 751, § 103. That the name of the same juror appeared twice upon the venire, without any collusion or improper design, is no ground of error. *McCarty v. St.*, 26 Miss. 302. Nor is it that

the name of one of the jurors, who sat upon the trial of the case, was not upon the venire returned by the sheriff, where it appears that he had been summoned at the commencement of the term, and his name entered on the minutes and drawn from the box, like those of the other jurors. *Thrall v. Smiley*, 9 Cal. 529; *Queenan v. Oklahoma*, 190 U. S. 548, 47 L. Ed. 1175; *St. v. Howard*, 64 S. C. 344, 42 S. E. 123; *Ullman v. St.*, 124 Wis. 602, 103 N. W. 6.

⁷⁶ *Com. v. Stowell*, 9 Metc. (Mass.) 572; *Bristow's Case*, 15 Gratt. (Va.) 634; *Hardenburgh v. Crary*, 15 How. Pr. (N. Y.) 307; *St. v. Slack*, 1 Bailey (S. C.), 330; *Clough v. St.*, 7 Neb. 320; *Gardenhire v. St.*, 6 Tex. App. 147, 151; *Munroe v. Brigham*, 19 Pick. (Mass.) 368; *Boyd v. St.*, 17 Ga. 194; *St. v. Ward*, 2 Hawks (N. C.), 443; *St. v. Belcher*, 13 S. C. 459; *Ray v. St.*, 4 Tex. App. 450; *St. v. Boon*, 80 N. C. 461, 82 N. C. 637; *Dayharsh v. Enos*, 5 N. Y. 531; *St. v. Turner*, 25 La. Ann. 573; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Grant v. St.*, 3 Tex. App. 1; *People v. Ransom*, 7 Wend. (N. Y.) 417; *Cole v. Perry*, 6 Cow. (N. Y.) 584; *Grant v. St.*, 3 Tex. App. 1; *St. v. Brown*, 12 Minn. 538; *Williams v. St. (Ala.)*, 1 South. 179; *Brown v. Autrey (Ga.)*, 3 S. E. 669. It has been so held in a case of a talesman, summoned to complete a particular panel, being sworn for the term and allowed to sit in other cases (*Howland v. Gifford*, 1 Pick. (Mass.) 43, note). Where the judge, during the process of impaneling the jury, permits those who have been selected

§ 114. **Waiver of Causes of Challenge.**—A party is entitled to waive a cause of challenge which he may have against a juror, and suffer the juror to sit in the case,⁷⁸ and the other party can derive no advantage from such waiver.⁷⁹ So, if one party waive a cause which disqualifies the *venire-man* as against him, the other party cannot make the disqualification a ground of challenge.⁸⁰ If both the prisoner and the State's counsel waive an objection for bias, the judge cannot reject the *venire-man*, *sua sponte*.⁸¹ As already seen, the right to challenge the array is *waived* by a challenge to the polls.⁸² So, a right of challenge for cause, or what is in substance the same, an exception to the overruling of such a challenge, is waived by a peremptory challenge of the same juror.⁸³ But, if a

to go at liberty and mingle with the crowd, during a delay in the proceedings resulting from the summoning of talesmen, it is the duty of a party, having objections to such action of the court, to make them known at the time, or at least before the selection of jurors from the talesmen begins. Such objections will not avail, if held back until after the jury are sworn. *James v. St.*, 53 Ala. 380; *Robbins v. St.*, 49 Ala. 394. But see *Grissom v. St.*, 4 Tex. App. 374. Allowing the jurors impaneled, but not sworn, to separate for the night is not an irregularity in civil cases. *Miller v. Wilson*, 24 Pa. St. 114; *Spencer v. DeFrance*, 3 G. Greene (Iowa), 216; *Cochran v. St.*, 113 Ga. 736, 39 S. E. 337; *St. v. Jones*, 52 La. Ann. 211, 26 South. 782.

⁷⁷ *St. v. White*, 35 La. Ann. 96; *Black v. St.*, 46 Tex. Cr. R. 590, 81 S. W. 302.

⁷⁸ *People v. Mather*, 4 Wend. (N. Y.) 229, 246. Compare the old cases of *Knyaston v. Shrewsbury*, Andrews, 85; *Anon.*, Anderson, 272; *Alleway v. Rowden*, 2 Show. 423; *St. v. Pickett*, 103 Iowa, 714, 73 N. W. 346.

⁷⁹ Thus, if the State have a cause of challenge, because the *venire-man* has a fixed opinion against capital

or penitentiary punishment, it is a matter of choice with the prosecuting counsel whether he will challenge for this cause. *Murphy v. St.*, 37 Ala. 142.

⁸⁰ Such as consanguinity or affinity. *St. v. Ketchey*, 70 N. C. 621. Or successfully object to the ground of a challenge and then urge a like ground in his own behalf. *Allen v. St.*, 134 Ala. 159, 32 South. 318.

⁸¹ *Greer v. St.*, 14 Tex. App. 179.

⁸² Ante, § 91; *Co. Litt.* 158a; *Watkins v. Weaver*, 10 Johns. 107; *Tallman v. Woodworth*, 2 Johns. 385. After a failure to make such a challenge at the proper time, any objection to the legality of subsequent proceedings must be addressed to the discretion of the court, which will not be exercised to the relief of the party complaining, in the absence of evidence showing some positive injury to have been suffered. *Barton v. Quinn*, Batty (Irish Rep.), 552. When a challenge to the array is made, the challenger must stand ready with his proof to support same, and it is too late to offer same after the jury has been sworn and the trial begun. *DeKalb etc. Ry. Co. v. Rowell*, 74 Ill. App. 91.

⁸³ *Ford v. Umatilla Co. (Ore.)*, 16 Pac. 33; *Minich v. St.*, 8 Colo. 440.

challenge to the array has been once taken, an exception to the overruling of it is not *waived* by an effort to secure an impartial jury by challenges to the polls.⁸⁴ A *known* cause of challenge is always waived by withholding it, and raising it as an objection after verdict; since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice.⁸⁵ Therefore, in order to make an objection to a juror

Or by waiver of his peremptory challenge. *Morgan v. St.*, 51 Neb. 672, 71 N. W. 788.

⁸⁴ *Clinton v. Englebrecht*, 13 Wall. 434. An exception, formally taken to the decision of the court in disallowing challenge, is not waived by a negative answer to the inquiry of the court, at the conclusion of the impaneling, as to whether the parties have any objection to the jurors as they stand. *Hathaway v. Helmer*, 25 Barb. (N. Y.) 29. Or by using peremptory challenges. *St. v. Barber*, 13 Idaho, 65, 88 Pac. 418. Nor by failure to object to the panel as finally constituted. *St. v. Hammond*, 14 S. D. 545, 186 N. W. 627. Contra, *Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304. Challenge, however, to the entire array is not necessary, but merely to the panel. *Ullman v. St.*, 124 Wis. 602, 103 N. W. 6.

⁸⁵ *Dent v. Hartford*, 2 Salk. 645; *Fox v. Hazelton*, 10 Pick. (Mass.) 275, 278, opinion by Shaw, C. J.; *Hallock v. Franklin*, 2 Metc. (Mass.) 558; *Lady Herbert v. Shaw*, 11 Mod. 118; *Falmouth v. Roberts*, 9 Mee. & W. 469; *Carew v. Howard*, 1 Root, 323; *Lisle v. St.*, 6 Mo. 426; *Bell v. Howard*, 4 Litt. 117; *Craig v. Eliott*, 4 Bibb, 272; *Jordan v. Meredith*, 1 Binn. (Pa.) 27; *McCorkle v. Binns*, 5 Binn. (Pa.) 340; *Bellows v. Gallup*, *Kirby* (Conn.), 166; *Williams v. Poppleton*, 3 Ore. 139; *Tomer v. Densmore*, 8 Neb. 384; *Selleck v. Sugar Hollow Tp. Co.*, 13 Conn. 453; *Bailey v. Trumbull*, 31

Conn. 581; *Brown v. St.*, 52 Ala. 345; *People v. Stonecipher*, 6 Cal. 405; *People v. Sandford*, 43 Cal. 29; *Eakman v. Sheaffer*, 48 Pa. St. 176; *Parmele v. Guthery*, 2 Root (Conn.), 185; *Woodruff v. Richardson*, 20 Conn. 238; *Lane v. Scoville*, 16 Kan. 402; *St. v. Shay*, 30 La. Ann. 114; *Hussey v. Allen*, 59 Me. 269; *Dolloff v. Stimpson*, 33 Me. 546; *Werner v. St.*, 44 Ark. 122; *St. v. Anderson*, 4 Nev. 265; *Lowe v. McCorkle*, 8 West. L. J. 64; *U. S. v. Smith*, 1 Sawyer (U. S.), 277; *Bronson v. People*, 32 Mich. 34; *People v. Scott*, 56 Mich. 154; *St. v. Benton*, 2 Dev. & Bat. (N. C.) 196; *St. v. Groome*, 10 Iowa, 308. If any objection exists to the competency of a *trior*, it should be made at the time of his appointment, when, if overruled, an exception may be reserved. It cannot for the first time be made upon a motion for a new trial. *People v. Voll*, 43 Cal. 166. This rule is also applicable to objections affecting the impartiality of *referees*. *Ipswich v. Essex*, 10 Pick. (Mass.) 519; *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Cote v. Grand Trunk Ry. Co.*, 70 N. H. 620, 49 Atl. 567; *Coil v. St.*, 62 Neb. 15, 86 N. W. 925. Where counsel is asked if he accepts the jury and replies that two disqualified themselves and the court said, "if challenge is made it will be sustained," counsel must challenge and have his challenge overruled and except or waiver results. *West v. St.*, 80 Miss. 710, 32 South. 298.

available after verdict, the objecting party must *prove* that it was unknown to him, and that it would not have been disclosed to him by a proper inquiry before the jury was sworn.⁸⁶ For the purposes of this rule, the *knowledge* of the *attorney* is the knowledge of his *client*.⁸⁷ Hence, an *affidavit* in support of a motion for a *new trial* upon the ground of the disqualification of a juror, should unequivocally allege that the moving party and his attorneys were themselves ignorant of the matter affecting the juror's competency, so that the objection could not be seasonably made.⁸⁸ After a party has announced that he has no challenges to make, he cannot resume the right of challenge merely because the other party has exercised

⁸⁶ Seal v. St., 13 Smed. & M. (Miss.) 286; Roseborough v. St., 43 Tex. 570; Brill v. St., 1 Tex. App. 572; Manion v. Flynn, 39 Conn. 330; Bradshaw v. Hubbard, 6 Ill. 390; Jameson v. Androscoggin R. Co., 52 Me. 412; Tilton v. Kimball, 52 Me. 500; Goodwin v. Cloudman, 43 Me. 577; Powell v. Haley, 28 Tex. 52; Falmouth v. Roberts, 9 Mee. & W. 469, 1 Dowl. (N. S.) 633; Stewart v. Ewbank, 3 Iowa, 191. Knowledge that a juror is a man of intemperate habits does not include knowledge of the fact that he is subject to *delirium tremens*. Hogshead v. St., 6 Humph. (Tenn.) 59; Dent v. Hartford, 2 Salk. 645. Judgment was arrested, where it appeared that a juror who had been challenged and withdrawn was brought in on a *tales*, and sat upon the trial of the cause. Hungate v. Hamond, Cro. Eliz. 188. But see Koenig v. Bauer, 1 Brewst. (Pa.) 304; Turley v. St., 74 Neb. 471, 104 N. W. 934. And has opportunity to object before verdict is rendered. Queenan v. Oklahoma, 190 U. S. 548, 47 L. Ed. 1175. Being chargeable with knowledge is the equivalent of having it. Sapp v. St., 116 Ga. 182, 42 S. E. 410.

⁸⁷ Russell v. Quinn, 114 Mass. 103; Kent v. Charlestown, 2 Gray (Mass.), 281; Orrok v. Com. Ins. Co., 21 Pick.

(Mass.) 456, 471; Parks v. St., 4 Ohio St. 234; Eastman v. Wight, 4 Ohio St. 156, 160; St. v. Tuller, 34 Conn. 294; Falmouth v. Roberts, 9 Mee. & W. 469; Clough v. St., 7 Neb. 324; Anderson v. St., 14 Ga. 709; Parker v. St., 55 Miss. 414; Jameson v. Androscoggin R. Co., 52 Me. 412; Goodwin v. Cloudman, 43 Me. 577; St. v. Bowden, 71 Me. 89; Powell v. Haley, 28 Tex. 52; Pryme v. Titchmarsh, 10 Mee. & W. 605; Trueblood v. St., 1 Tex. App. 650; Scott v. Moore, 41 Vt. 205. In one case, the knowledge of the attorney's clerk seems to have been imputed to the client. Falmouth v. Roberts, 9 Mee. & W. 469, 1 Dowl. (N. S.) 63.

⁸⁸ Achey v. St., 64 Ind. 56; Rooby v. St., 4 Yerg. (Tenn.) 111; St. v. Tuller, 34 Conn. 280; Clough v. St., 7 Neb. 324; Morrison v. McKinnon, 12 Fla. 552. A new trial will not be granted upon the sole affidavit of a stranger to the case, who deposes to a positive expression of opinion against the defendant by one of the jurors, previous to the trial; and further, that he did not inform the attorneys of the defendant of this fact until the trial was concluded. Non constat, but that the defendant and his attorneys were also aware of the juror's prejudice. Achey v. St., 64 Ind. 56.

the right;⁸⁹ though the court may, in its *discretion*, allow him to do so. For counsel to sit in silence when the court is embarrassed in the process of impaneling a jury, declining to take action upon the suggestions of the court, and answering that they have nothing to say, and then raising the proper objection in case the verdict goes against them,—is a trifling with the court and with the administration of justice, which will not be tolerated on the trial of the gravest offenses.⁹⁰ After a juror is once *sworn*, objections to his competency which might have been taken by challenge are addressed to the *discretion* of the court.⁹¹

§ 115. **Waiver of Exceptions for Disallowance of Challenge.**—The sound and prevailing view is that a party cannot, on error or appeal, complain of a ruling of the trial court in overruling his challenge for cause, where it does not appear that, when the jury had been completed, his *peremptory challenges were exhausted*; since he might have excluded the obnoxious juror by a peremptory challenge, and therefore the error is to be deemed an error without

⁸⁹ Ward v. Railway Co., 19 S. C. 521.

⁹⁰ Norfleet v. St., 4 Sneed (Tenn.), 340, 343. See also Com. v. Gross, 1 Ashmead (Pa.), 281, 286; St. v. Coleman, 8 S. C. 237; Com. v. Marrow, 3 Brewst. (Pa.) 402; Gardiner v. People, 6 Park. Cr. (N. Y.) 155; Malone v. St., 8 Ga. 408; Ham v. Lasher, 24 Up. Can. Q. B. 533, note; Widder v. Buffalo etc. R. Co., 24 Up. Can. Q. B. 534; People v. Doe, 1 Mich. 451; Livingston v. Heerman, 9 Martin (La.), 656; Stewart v. St., 15 Ohio St. 155. See also St. v. Allen, 46 Conn. 531, 10 Reporter, 107; Reg. v. Coulter, 13 Up. Can. (C. P.) 299. The result would have been otherwise, if the prisoner had made no objection to proceeding with the jury as constituted. In such a case the court cannot, without the consent of the prisoner, and of its own will, *withdraw* a juror. Such action operates as a *discharge* of the jury, and an *acquittal*. O'Brian v. Com., 9 Bush (Ky.), 333. Compare Coch-

ran v. St., 62 Ga. 731; Cox v. People, 19 Hun (N. Y.), 430, 80 N. Y. 500.

⁹¹ Henry v. St., 77 Ala. 75. See also Simmons v. St., 73 Ga. 609. So also where court refuses to allow peremptory challenge, no reason being shown. Allen v. St., 70 Ark. 22, 68 S. W. 28. It was held reversible error, in a murder case, not to allow a challenge for relationship to deceased, which was not discovered until the jury had been sworn, especially where two challenges for relationship to accused had been allowed to the state. Garner v. St., 76 Miss. 515, 25 South. 363.

⁹² St. v. Elliott, 45 Iowa, 486; St. v. Davis, 41 Iowa, 311; Barnes v. Newton, 46 Iowa, 567; St. Louis etc. R. Co. v. Lux, 63 Ill. 523; Tuttle v. St., 6 Tex. App. 556; Sharp v. St., 6 Tex. App. 650; McKinney v. St., 8 Tex. App. 626; Tooney v. St., 8 Tex. App. 452; Krebs v. St., 8 Tex. App. 1; Palmer v. People, 4 Neb. 68; St. v. Gill, 14 S. C. 410;

injury.⁹² For the same reason, if the court erroneously overrules a challenge for cause, and thereafter the challenging party excludes the obnoxious juror by a peremptory challenge, he cannot assign the ruling of the court for error,⁹³ unless it appear that, before the jury was sworn his quiver of peremptory challenges was exhausted;⁹⁴

Preswood v. St., 3 Heisk. (Tenn.) 468. There is some slight and ill-considered authority to the effect that no obligation rests upon a party to make use of his peremptory challenges, for the purpose of excluding a juror, unsuccessfully challenged for cause, but that he has a right to accede to the decision of the court upon such a challenge, which, if erroneous, must be corrected by awarding him a new trial. *People v. Bodine*, Edm. Sel. Cas. (N. Y.) 36, 78, 1 Den. (N. Y.) 281; *Freeman v. People*, 4 Den. (N. Y.) 9, 31; *Brown v. St.*, 57 Miss. 424, 10 Cent. L. J. 376; *People v. Stewart*, 7 Cal. 140; *Sampson v. Schaffer*, 3 Cal. 107; *Klyce v. St.*, 79 Miss. 652, 31 South. 339; *Chicago, B. & Q. R. Co. v. Kraysenbuhl*, 70 Neb. 766, 98 N. W. 44; *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018. Where adversary is allowed more challenges than he is entitled to, this does not tend to show any prejudice, if he only uses what he legally was entitled to. *Conn. M. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 47 L. Ed. 208; *Matthews v. Grange*, 196 Ill. 164, 63 N. E. 658; *St. v. McCoy*, 109 La. 682, 33 South. 630.

⁹² *Schoeffler v. St.*, 3 Wis. 823, 836; *Burt v. Panjaud*, 99 U. S. 180, 18 Am. L. Reg. 660; *Freeman v. People*, 4 Denio (N. Y.), 9; *Stewart v. St.*, 13 Ark. 720; *Benton v. St.*, 30 Ark. 328; *Friery v. People*, 2 Abb. App. (N. Y.) Dec. 215, 2 Keyes (N. Y.), 424; 54 Barb. 319; *Ferri-day v. Selser*, 4 How. (Miss.) 506; *People v. Knickerbocker*, 1 Park.

Cr. (N. Y.) 302; *Whelan v. Reg.*, 28 Up. Can. Q. B. 2, 108; *St. v. Raymond*, 11 Nev. 98; *St. v. Davis*, 41 Iowa, 311; *Morton v. St.*, 1 Kan. 468; *Wiley v. Keokuk*, 6 Kan. 95; *People v. Stonecifer*, 6 Cal. 405; *Robinson v. Randall*, 82 Ill. 522; *Wilson v. People*, 94 Ill. 299; *Carter v. St.*, 8 Tex. App. 372; *Conway v. Clinton*, 1 Utah, 215; *Krebs v. St.*, 8 Tex. App. 1; *Brown v. St.*, 57 Miss. 424; *St. v. Cockman*, 2 Winst. (N. C.) 95; *Mimms v. St.*, 16 Ohio St. 221; *Erwin v. St.*, 29 Ohio St. 186; *St. v. Hamilton*, 27 La. Ann. 400; *Bejarano v. St.*, 6 Tex. App. 265. *Contra*, *Lithgow v. Com.*, 2 Va. Cas. 297; *Sprouce v. Com.*, 2 Va. Cas. 375; *Dowds v. Com.*, 9 Gratt. (Va.) 727; *Birdsong v. St.*, 47 Ala. 68; *Iverson v. St.*, 52 Ala. 170, 174; *Brown v. St.*, 70 Ind. 576; *St. v. Harris*, 107 La. 196, 31 South. 646; *St. v. Champoux*, 33 Wash. 339, 74 Pac. 557. All errors of this kind are cured, if accused is tendered a sufficient number of additional challenges. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

⁹⁴ *McGowan v. St.*, 9 Yerg. (Tenn.) 184; *Burrell v. St.*, 18 Tex. 713; *Johnson v. St.*, 27 Tex. 764; *Bowman v. St.*, 41 Tex. 417; *Lester v. St.*, 2 Tex. App. 432, 443; *Carroll v. St.*, 3 Humph. (Tenn.) 315; *Robinson v. Randall*, 82 Ill. 521; *People v. Gaunt*, 23 Cal. 156; *People v. Gatewood*, 20 Cal. 146; *Wiley v. Keokuk*, 6 Kan. 94; *Morton v. St.*, 1 Kan. 468; *People v. McGungill*, 41 Cal. 429; *Stout v. Hyatt*, 13 Kan. 232; *St. v. McQuaige*, 5 S. C. 429; *Tuttle v. St.*, 6 Tex. App. 556; *Ogle*

in which case there is room for the inference that the erroneous ruling of the court may have resulted in leaving upon the panel *other* obnoxious jurors whom the party might, but for the ruling, have excluded by peremptory challenge. Some courts, therefore, hold that it is enough, in such a juncture, to show that his peremptory challenges were exhausted before the jury was sworn.⁹⁵ But others take what seems to be the better view, that it must *also* appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place on the jury, who otherwise would have been excluded by a peremptory challenge.⁹⁶

v. St., 33 Miss. 383; *Brown v. St.*, 57 Miss. 424; *Mimms v. St.*, 16 Ohio St. 221; *Erwin v. St.*, 29 Ohio St. 186; *St. v. Bungler*, 14 La. Ann. 461; *St. v. Caulfield*, 23 La. Ann. 148; *St. v. Lartigue*, 29 La. Ann. 642, 646; *St. v. Hoyt*, 47 Conn. 518.

⁹⁵ *People v. Weil*, 40 Cal. 268; *Trenor v. Central Pacific R. Co.*, 50 Cal. 222, 226; *Hubbard v. Rutledge*, 57 Miss. 7; *St. v. Brown*, 15 Kan. 400; *Dunn v. Wilmington & W. R. Co.*, 131 N. C. 446, 42 S. E. 462; *St. v. Stentz*, 30 Wash. 134, 70 Pac. 241. If counsel says jury is satisfactory, but he wishes to challenge to save the point, this strips erroneous ruling of prejudice. *Endowment Rank K. P. v. Steele*, 108 Tenn. 624, 69 S. W. 336. Peremptory challenges need not be confined to disqualified jurors, but this right, even if used against qualified jurors, is deemed to have been exercised to the challenging party's best advantage. *Hawkins v. U. S.*, 116 Fed. 569.

⁹⁶ *Fleeson v. Savage*, S. M. Co., 3 Nev. 157, 163; *St. v. Raymond*, 11 Nev. 98; *Rothschild v. St.*, 7 Tex. App. 519; *Grissom v. St.*, 8 Tex. App. 386; *Hollis v. St.*, 8 Tex. App. 620; *Cock v. St.*, 8 Tex. App. 659; *Tooney v. St.*, 8 Tex. App. 452; *Cotton v. St.*, 32 Tex. 614; *Myers v. St.*, 7 Tex. App. 641; *Holt v. St.*, 9 Tex. App. 571; *Loggins v. St.*, 12 Tex.

App. 65; *Balding v. St. (Tex.)*, 4 S. W. 579; *Meaux v. Whitehall*, 8 Bradw. (Ill.) 173. In *Whelan v. Reg.*, 28 Up. Can. Q. B. 2, the Canadian courts, certain judges dissenting, held that, even under the circumstances stated in the text, a prejudice to the challenging party would not be presumed. In considering this case, it is to be remembered that the prisoner was a member of the Fenian organization so obnoxious to the Canadian people; that the crime for which he was tried was the assassination of the Hon. Thomas D'Arcy McGee, a member of the Canadian Parliament; and that he had been fairly convicted upon the evidence, as he himself admitted at the close of the trial. See 28 Up. Can. (Q. B.) p. 141. It is not, therefore, surprising that the majority in both the appellate courts were inclined to find from the record that the prisoner had suffered in no respect from the error of the court in disallowing a legal cause of challenge. *Nowotny v. Blair*, 32 Neb. 175, 49 N. W. 357; *Galveston etc. R. Co. v. Mauns*, 37 Tex. Civ. App. 356, 84 S. W. 254. The objectionable substitute must be such propter affectum. *Carter v. St.*, 45 Tex. Cr. R. 430, 76 S. W. 437; *Good v. St.*, 106 Tenn. 175, 61 S. W. 79.

§ 116. [Continued.] **Objections to Incompetency after Verdict.**—Although there is considerable American authority, following in the wake of a leading case in Maryland, in favor of the rule that the discovery that a disqualified person sat on the jury gives to the unsuccessful party the same right of new trial, as the right which he would have had to challenge the juror, if the discovery had been made before the jury were sworn, on the ground that such a person is no juror at all,—a *non-juror*,—and that the presence of a non-juror vitiates the whole panel;⁹⁷ yet the mass of American authority, grounded upon considerations of convenience and public policy, is opposed to this strict rule. It has been repeatedly held that a cause of challenge not discovered until after verdict, whether the case be civil or criminal,—as that some of the jurors were *aliens*;⁹⁸ or *not* of the jury list as *selected* by the county authori-

⁹⁷ *Shane v. Clarke*, 3 Har. & McH. (Md.) 101, 103. It was so held where one of the jurors was an alien. *Quinn v. Halbert*, 52 Vt. 353; *Guykowski v. People*, 2 Ill. 476 (overruled in *Chase v. People*, 40 Ill. 352, 358); was lacking in statutory qualifications. *Briggs v. Georgia*, 15 Vt. 61; *St. v. Babcock*, 1 Conn. 401; *Mann v. Fairlee*, 44 Vt. 673; *Eastman v. Wright*, 4 Ohio St. 156; *St. v. Groome*, 10 Iowa, 315; was connected with one of the parties by relationship within the degree constituting a cause of challenge. *Hardy v. Sproule*, 32 Me. 310; *Lane v. Goodwin*, 47 Me. 593; *Brown v. St.*, 28 Ga. 439; *Georgia R. Co. v. Hart*, 60 Ga. 550; *Woodbridge v. Raymond*, Kirby (Conn.), 280; had expressed his opinion upon the issue to be tried, or upon the guilt of the defendant in a criminal case. *McKinley v. Smith*, Hard. (Ky.) 167; *U. S. v. Fries*, 3 Dall. (U. S.) 515; *St. v. Hopkins*, 1 Bay (S. C.), 372; *Tenney v. Evans*, 13 N. H. 462; *Monroe v. St.*, 5 Ga. 85; *Wade v. St.*, 12 Ga. 25; *Ray v. St.*, 15 Ga. 223; *Moncrief v. St.*, 59 Ga. 470; *Pierce v. Bush*, 3 Bibb (Ky.), 347; *French v. Smith*, 4 Vt. 363;

Vance v. Haslett, 4 Bibb (Ky.), 191; *Herndon v. Bradshaw*, 4 Bibb (Ky.), 45; *Tweedy v. Brush*, Kirby (Conn.), 13; *Deming v. Hurlburt*, 2 D. Chip. (Vt.) 45; or was interested in the event of the suit. *Page v. Contoocook etc. R. Co.*, 21 N. H. 438. But an objection to a juror, which is not good as a principal cause of challenge, is no ground for setting aside the verdict. *Chapman v. Welles*, Kirby (Conn.), 132; *Walton v. Augusta Canal Co.*, 54 Ga. 245. But see *Cain v. Ingham*, 7 Cow. (N. Y.) 478; *Bussy v. St.*, 85 Md. 115, 36 Atl. 257. Also in South Carolina, because of a constitutional, instead of a statutory, disqualification. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341.

⁹⁸ *Rex v. Sutton*, 8 Barn. & Cress. 417, 15 Eng. C. L. 252; *Hollingsworth v. Duane*, 4 Dall. (U. S.) 353; *St. v. Quarrel*, 2 Bay (S. C.), 150; *Com. v. Thompson*, 4 Phila. (Pa.) 215; *Brown v. La Crosse Gas Co.*, 21 Wis. 51; *Presbury v. Com.*, 9 Dana (Ky.), 203; *St. v. Lopher*, 35 La. Ann. 975; *Turner v. Hahn*, 1 Colo. 23; *Jones v. People*, 2 Colo. 351; *Chase v. People*, 40 Ill. 352; *Bennett v. Matthews*, 40 How. Pr. (N. Y.)

ties;⁹⁹ or *non-residents*, or not citizens of the county or State;¹ or not possessed of the statutory qualifications,² as for instance less than *twenty-one*³ or more than sixty,⁴ years of age; or *related* to the

428; Ripley v. Coolidge, Minor (Ala.), 11; St. v. McDonald, 8 Ore. 113; Kennedy v. Com., 14 Bush (Ky.), 340; Major v. Pulliam, 3 Dana (Ky.), 583; Mt. Desert v. Cranberry Isles, 46 Me. 411; Hull v. Albro, 2 Disney (Ohio), 147; Thompson v. Paige, 16 Cal. 78; Territory v. Baker (N. Mex.), 13 Pac. 31; Schwantes v. St., 127 Wis. 160, 106 N. W. 237. For a state to make alienage merely a ground of challenge, and what negligence or want of knowledge shall operate as waiver thereof presents no federal question. Kohl v. Lahlbach, 160 U. S. 390.

⁹⁹ Gormley v. Laramore, 40 Ga. 253; Edwards v. St., 53 Ga. 428; Urquhart v. Powell, 59 Ga. 721; Osgood v. St., 63 Ga. 791; Morgan v. St., 43 Tex. Cr. R. 543, 67 S. W. 420.

¹ Roseborough v. St., 43 Tex. 570; O'Mealy v. St., 1 Tex. App. 180; Clarke v. Territory, 1 Wash. (Terr.) 82; St. v. Kennedy, 8 Rob. (La.) 590; Costly v. St., 19 Ga. 614; Zickefoose v. Kuykendall, 12 W. Va. 23; Major v. Pulliam, 3 Dana (Ky.), 583; Mt. Desert v. Cranberry Isles, 46 Me. 411; Hull v. Albro, 2 Disney, 147; Thompson v. Paige, 16 Cal. 78; People v. Evans, 124 Cal. 206, 56 Pac. 1024.

² Ex parte Phillips, 10 Exch. 731, 1 Jur. (N. S.) 143, 24 L. J. Exch. 79; St. v. Patrick, 3 Jones L. (N. C.) 443; St. v. White, 68 N. C. 158; Tweedy v. Briggs, 31 Tex. 74; Thompson v. Com., 8 Gratt. (Va.) 637; Gilbert v. Rider, Kirby (Conn.) 180, 184; Orcutt v. Carpenter, 1 Tyler (Vt.), 250; People v. Jewett, 6 Wend. (N. Y.) 386; Finley v. Hayden, 3 A. K. Marsh. (Ky.) 330;

Bratton v. Ryan, 1 A. K. Marsh. (Ky.) 212; Rennick v. Walthall, 2 A. K. Marsh. (Ky.) 23; St. v. Fisher, 2 Nott & McC. (S. C.) 261; People v. Sandford, 43 Cal. 29, 1 Green C. L. 682; Steele v. Malony, 1 Min. 347; Clark v. Van Vrancken, 20 Barb. (N. Y.) 278; Estep v. Waterous, 45 Ind. 140; Croy v. St., 32 Ind. 384; Pickens v. Hobbs, 42 Ind. 270; St. v. McLean, 21 La. Ann. 546; Gillooley v. St., 58 Ind. 182; Kingen v. St., 46 Ind. 132; Whitehead v. Wells, 29 Ark. 99; Watts v. Ruth, 30 Ohio St. 32; St. v. Bunger, 14 La. Ann. 461; St. v. Parks, 21 La. Ann. 251; Kenrick v. Repard, 23 Ohio St. 333; St. v. Madoil, 12 Fla. 151; Mansfield etc. R. Co. v. Clark, 23 Mich. 519; Patterson v. St., 70 Ind. 341; Buie v. St., 1 Tex. App. 453; Yanez v. St., 6 Tex. App. 429; Coil v. St., 62 Neb. 15, 86 N. W. 725; Goad v. St., 106 Tenn. 175, 61 S. W. 79; Farris v. St., 125 Ga. 777, 54 S. E. 751. If the venire-man gives false answers on voir dire where the disqualification is merely propter defectum, this may not vary the rule. International & G. N. R. Co. v. Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051.

³ Trueblood v. St., 1 Tex. App. 650; Wassum v. Feeney, 121 Mass. 93; Brewer v. Jacobs, 22 Fed. 217; John v. Hodges, 60 Md. 215, 45 Am. Rep. 722; St. v. Button, 50 La. Ann. 1071, 23 South. 868.

⁴ Williams v. St., 37 Miss. 407; Monroe v. Brigham, 19 Pick. (Mass.) 368; Davis v. People, 19 Ill. 74; Seacord v. Burling, 1 How. Pr. (N. Y.) 175; Cohron v. St., 20 Ga. 753; Hite v. Com., 96 Va. 489, 31 S. E. 895.

opposite party within the disqualifying degrees;⁵ or *interested* in the event of the suit;⁶ or shown to have *expressed disqualifying opinions* as to the subject matter of the trial;⁷ or otherwise subject to challenge;⁸ is not, *per se*, a ground of new trial, though it may

⁵ Quinebaug Bank v. Leavans, 20 Conn. 87; Eggleston v. Smiley, 17 Johns. (N. Y.) 133; Hayes v. Thompson, 15 Abb. Pr. (N. Y.) (N. S.) 220; McLellan v. Crofton, 6 Me. 307; Tidewater Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Orme v. Pratt, 4 Cranch C. C. (U. S.) 124; Smith v. Earle, 118 Mass. 531; Baker v. St., 4 Tex. App. 223; Wickersham v. People, 2 Ill. 128; Downing v. St., 114 Ga. 30, 39 S. E. 927; People v. Mack, 54 N. Y. S. 698, 35 App. Div. 114. Nor where the relationship is to both parties. Northcutt v. Jewett (Ky.), 36 S. W. 179 (not reported in state reports).

⁶ Williams v. Great W. R. Co., 3 Hurl. & N. 869, 28 L. J. (Exch.) 2 (compare Bailey v. Macaulay, 13 Q. B. 815); Glover v. Woolsey, Dudley (Ga.), 85; Josey v. Wilmington etc. R. Co., 12 Rich. L. 134; Boland v. Greenville etc. R. Co., 12 Rich. L. 368; Magness v. Stewart, 2 Coldw. 309; Pearson v. Wightman, 1 Mills Const. Rep. 336; Billis v. St., 2 McCord (S. C.), 12. But see Talmadge v. Northrop, 1 Root (Conn.), 454. But if the court refused to inquire as to interest or relationship, injury is presumed, unless it affirmatively appear none of the panel were thus disqualified. Kansas City etc. R. Co. v. Ferguson, 143 Ala. 512, 39 South. 348.

⁷ Taylor v. Greely, 3 Me. 204; Briggs v. Byrd, 12 Ired. L. (N. C.) 377; Byars v. Mt. Vernon, 77 Ill. 467; Kennedy v. Com., 14 Bush (Ky.), 340; Romaine v. St., 7 Ind. 63; Keener v. St., 18 Ga. 194; Alexander v. Dunn, 5 Ind. 122; Fitzpatrick v. Harris, 16 B. Mon. (Ky.)

561; Tidewater Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Simpson v. Pittman, 13 Ohio, 365; Com. v. Flanagan, 7 Watts & S. (Pa.) 415; Collier v. St., 20 Ark. 36; Meyer v. St., 19 Ark. 156; Daniel v. Guy, 23 Ark. 50; St. v. Howard, 17 N. H. 171, 198; St. v. Shelledy, 8 Iowa, 477; St. v. Strauder, 11 W. V. 745; Brill v. St., 1 Tex. App. 572; Clough v. St., 7 Neb. 324; St. v. Funck, 17 Iowa, 365; McKinney v. Simpson, 51 Iowa, 662; McDonald v. Beall, 55 Ga. 288; Stewart v. Ewbank, 3 Iowa, 191; Gregory v. Wells, Smith (N. H.), 239, n; Porter v. Greenough, Smith (N. H.), 238, n; Caldwell v. Caldwell, Smith (N. H.), 239. Unless he imposed himself upon the jury by concealment or prevarication. Casat v. St., 40 Ark. 511. More recent cases have held that the objection that one of the jury was a member of the grand jury finding the indictment cannot be raised the first time after verdict. Britt v. St., 112 Ga. 583, 37 S. E. 886; St. v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; St. v. McCarthy, 44 La. Ann. 323, 10 South. 673.

⁸ St. v. Davis, 80 N. C. 412; Amherst v. Hadley, 1 Pick. (Mass.) 38; Wilder v. St., 25 Ohio St. 555; Hogan v. St., 36 Wis. 226; Meeks v. St., 57 Ga. 329; Walker v. Green, 3 Me. 215; Howland v. Gifford, 1 Pick. (Mass.) 43, note; Fellows' Case, 5 Me. 383; Cook v. Castner, 9 Cush. (Mass.) 266; Bloodworth v. St., 6 Baxt. (Tenn.) 614; Shobe v. Bell, 1 Rand. (Va.) 39; Hardenburgh v. Crary, 15 How. Pr. (N. Y.) 307, 309; St. v. Harris, 30 La. Ann. 90; U. S.

be such in the *discretion* of the court.⁹ In the exercise of such a discretion, an essential inquiry will be whether the objecting party exercised reasonable *diligence* in ascertaining the qualifications of the obnoxious juror.¹⁰ Was he questioned on the *voir dire* as to the

v. Baker, 3 Bened. (U. S.) 68; St. v. Powers, 10 Ore. 145, 45 Am. Rep. 138; Paulitsch v. Railroad Co., 50 N. Y. Super. (J. & S.) 241; St. v. Thomas, 35 La. Ann. 24; St. v. Aspara, 113 La. 940, 37 South. 883.

⁹ Woodward v. Dean, 113 Mass. 297, 298. See also Kinnicutt v. Stockwell, 8 Cush. (Mass.) 73; Davis v. Allen, 11 Pick. (Mass.) 466; Eggleston v. Smiley, 17 Johns. (N. Y.) 133; Meyer v. St., 19 Ark. 156; St. v. McDonald, 8 Ore. 113; Seymour v. Deyo, 5 Cow. (N. Y.) 289; St. v. Davis, 80 N. C. 412, 414; St. v. Boon, 80 N. C. 461; Clough v. St., 7 Neb. 351; Shea v. Lawrence, 1 Allen (Mass.), 167; St. v. Madoil, 12 Fla. 151; St. v. Howard, 17 N. H. 171; Cain v. Cain, 1 B. Mon. (Ky.) 213; Temple v. Summer, Smith (N. H.), 226; St. v. Pike, 20 N. H. 344; St. v. Lambert, 93 N. C. 618. On a motion in arrest of judgment, or for a new trial, it is plain that a party cannot be heard to allege partiality on the part of certain jurors, which, if existing at all, was in favor of the party complaining. Carew v. Howard, 1 Root (Conn.), 323. In an early criminal case in Massachusetts, the court granted a new trial where it appeared after verdict that two of the trial jurors had been members of the grand jury which found the indictment. Com. v. Hussey, 13 Mass. 221. See also Hawkins v. Andrews, 39 Ga. 118. But in other cases this reason has been held to be insufficient. St. v. Turner, 6 La. Ann. 309; Beck v. St., 20 Ohio St. 228; Franklin v. St., 2 Tex. App. 8; St. v. McDonald, 9 W. Va. 456. It has been considered that

a new trial should be awarded, where one of the jurors previous to the trial had made a trifling *wager* upon the result. Essex v. McPherson, 64 Ill. 349. But see McCausland v. McCausland, 1 Yeates (Pa.), 372; Booby v. St., 4 Yerg. (Tenn.) 111. It is evident that an objection made to a juror during the course of the trial is entitled to greater consideration than if postponed until after verdict. Dilworth v. Com., 12 Gratt. (Va.) 689; Henry v. Cu villier, 3 Mart. (La.) (N. s.) 524; Cannon v. Ottawa Elec. R. Co., 32 Ont. 24; Com. v. Wong Chung, 186 Mass. 231, 71 N. E. 292. The accompanying circumstance of failure to disclose on proper *voir dire* examination, of a disqualification, especially if it be propter affectum, would seem generally sufficient to secure a new trial. St. v. Mott, 29 Mont. 292, 74 Pac. 728. If the undisclosed disqualification be merely propter defectum, generally, the verdict will not be disturbed. Jordan v. St., 119 Ga. 443, 46 S. E. 679; Queenan v. Oklahoma, 190 U. S. 548, 47 L. Ed. 1175.

¹⁰ Roseborough v. St., 43 Tex. 570; Quinebaug Bank v. Leavens, 20 Conn. 87; Brown v. La Crosse Gas Co., 21 Wis. 51; Steele v. Malony, 1 Minn. 341; Mt. Desert v. Cranberry Isles, 46 Me. 411; Patterson v. St., 70 Ind. 341; Vennum v. Harwood, 6 Ill. 659; Swarnes v. Sitton, 58 Ill. 155; Walker v. Green, 3 Me. 215; Glover v. Woolsey, Dudley (Ga.), 85; Fitzpatrick v. Harris, 16 B. Mon. (Ky.) 561; Franklin v. St., 2 Tex. App. 8; McDonald v. Beall, 55 Ga. 288; Koenig v. Bauer, 1 Brewst.

cause of challenge now alleged? If not, there has been a lack of diligence on the part of the complaining party,¹¹ which amounts to

(Pa.) 304. In one case the court awarded a new trial, where a juror appeared to have been strongly biased against the defendant, because the facts of the case did not show "gross" negligence on the part of the defendant in not ascertaining this cause of objection to the juror before trial. *Hanks v. St.*, 21 Tex. 526. In *Lafayette etc. R. Co. v. New Albany etc. R. Co.*, 13 Ind. 90, the motion for a new trial was founded upon the incapacity of a juror to understand the English language. This the court granted, the juror's ignorance being unknown to the party against whom the verdict was rendered, until after the trial. "The party," said Perkins, J., "might well presume that the officer had called a juror competent in this particular." But see *Yanez v. St.*, 6 Tex. App. 429; *St. v. Harris*, 30 La. Ann. 90; *U. S. v. Baker*, 3 Bened. (U. S.) 68; *St. v. Snyder*, 182 Mo. 462, 82 S. W. 12. Not examining as to competency is a waiver of incompetency. *St. v. Carpenter*, 124 Iowa, 5, 98 N. W. 775.

¹¹ *Jeffries v. Randall*, 14 Mass. 205; *St. v. Patrick*, 3 Jones L. (N. C.) 443; *Tweedy v. Briggs*, 31 Tex. 74; *St. v. Quarrel*, 2 Bay (S. C.), 150; *Gilbert v. Rider, Kirby* (Conn.), 180, 184; *Taylor v. Greely*, 3 Me. 204; *Turner v. Hahn*, 1 Colo. 43; *Chase v. People*, 40 Ill. 352; *Estep v. Watrous*, 45 Ind. 140; *Alexander v. Dunn*, 5 Ind. 122; *Croy v. St.*, 32 Ind. 384; *Kingen v. St.*, 46 Ind. 132; *Gillooley v. St.*, 58 Ind. 182; *St. v. McLean*, 21 La. Ann. 546; *St. v. Parks*, 21 La. Ann. 251; *St. v. Kennedy*, 8 Rob. (La.) 590; *Simpson v. Pitman*, 13 Ohio, 365; *Watts v. Ruth*, 30 Ohio St. 32; *Beck v. St.*, 20 Ohio

St. 228; *Wilder v. St.*, 25 Ohio St. 555; *Kenrick v. Reppard*, 23 Ohio St. 333; *Byars v. Mt. Vernon*, 77 Ill. 467; *Keener v. St.*, 18 Ga. 194; *Collier v. St.*, 20 Ark. 36; *Daniel v. Guy*, 23 Ark. 50; *St. v. Shelledy*, 8 Iowa, 477; *Buie v. St.*, 1 Tex. App. 453; *Yanez v. St.*, 6 Tex. App. 429; *Clough v. St.*, 7 Neb. 324; *St. v. Funck*, 17 Iowa, 365; *McKinney v. Simpson*, 51 Iowa, 662; *Stewart v. Ewbank*, 3 Iowa, 191. Whether the juror was thus examined upon the voir dire, is a matter to be shown by the record. The affidavit of the party moving for the new trial is not sufficient to establish this fact. *Stewart v. Ewbank*, 3 Iowa, 191; *St. v. Shelledy*, 8 Iowa, 447; *Shaw v. St.*, 27 Tex. 750. If the juror answers untruthfully, for the purpose of avoiding a challenge, it is generally proper for the court to grant a new trial, upon the discovery of the *deception* after verdict. *Sellers v. People*, 4 Ill. 412; *Howerton v. St.*, Meigs (Tenn.), 262; *Vennum v. Harwood*, 6 Ill. 659; *Essex v. McPherson*, 64 Ill. 349; *Jeffries v. Randall*, 14 Mass. 205; *Cody v. St.*, 3 How. (Miss.) 27; *Troxdale v. St.*, 9 Humph. (Tenn.) 411; *Sam v. St.*, 31 Miss. 480; *Busick v. St.*, 19 Ohio, 198; *Rice v. St.*, 16 Ind. 298; *St. v. Kennedy*, 8 Rob. (La.) 590; *Smith v. Ward*, 2 Root (Conn.), 302; *Lane v. Scoville*, 16 Kan. 402; *St. v. Shelledy*, 8 Iowa, 477; *Lamphier v. St.*, 70 Ind. 317; *Watts v. Ruth*, 30 Ohio St. 32; *Bales v. St.*, 63 Ala. 30; *Cannon v. St.*, 57 Miss. 147; *McGuffie v. St.*, 17 Ga. 497; *Childress v. Ford*, 10 Smed. & M. (Miss.) 25. Mr. Justice Crompton was of opinion that, even if a prisoner had been *purposely misled*

a *waiver* of the cause of challenge. Moreover, it should appear by affidavit that both the *prisoner* and his *counsel* had no knowledge of

as to a cause of challenge, this would not vitiate the verdict in point of law, "though it would be matter for the consideration of a court in a civil case, in exercising their discretion as to granting a new trial under all the circumstances of the case, or for the advisers of the Crown in the exercise of the prerogative of mercy." Reg. v. Mellor, Dears. & Bell C. C. 468, 509, 4 Jur. (N. S.) 214; 7 Cox C. C. 454; 27 L. J. (M. C.) 121. See also Temple v. Sumner, Smith (N. H.), 226; Schmidt v. Rose, 6 Mo. App. 587, 588; St. v. McDonald, 9 W. Va. 456; Brennan v. St., 33 Tex. 266; Frank v. St., 39 Miss. 705. But if, at the time of the examination, one of the parties or his counsel is aware that the juror has testified falsely, and makes no objection to the juror until after verdict, this circumstance cannot be relied upon as ground for a new trial. Parker v. St., 55 Miss. 414. Jurors are not required to know or to surmise that something more is intended than is fairly expressed by the terms of the questions put to them. Missouri etc. R. Co. v. Munckers, 11 Kan. 223; Moore v. Cass, 10 Kan. 288; U. S. v. Smith, 1 Sawyer (U. S.), 277, 282; Swarnes v. Sitton, 58 Ill. 155. It seems to make no difference whether the answers of the jurors are made to questions by the court, or by the party subsequently alleging their falsity. Hudspeth v. Herston, 64 Ind. 133; Wiggin v. Plummer, 31 N. H. 251. It has been held that, if it appear after verdict that a juror testified falsely upon the voir dire, he does not restore his competency by making an *affidavit* that he was really impartial in the case, and

that he unwittingly testified to the contrary of the facts. Territory v. Kennedy, 3 Mont. 520; U. S. v. Upham, 2 Mont. 170; Hudspeth v. Herston, 64 Ind. 133. But the soundness of this view may be doubted. The Supreme Court of *Michigan* has taken the view that the conception of *waiver* embodied in the above text is applicable only in *civil cases*, and has no application in *criminal cases*, where every step against the accused is taken in invitum. Hill v. People, 16 Mich. 351, 357; Johr v. People, 26 Mich. 427. See also Smith v. School District, 40 Mich. 143. The Supreme Court of *Wisconsin*, on the other hand, has regarded this theory of waiver to be applicable in all criminal cases *not capital*. St. v. Vogel, 22 Wis. 471; Schumacker v. St., 5 Wis. 324. The *Illinois* court took this view in two early cases. See Nomaque v. People, 1 Ill. 109; Guykowski v. People, 2 Ill. 476. But it was later abandoned. See People v. Scates, 4 Ill. 351, 353; Chase v. People, 40 Ill. 352. There seems to be no sound view for such a distinction in capital cases, since here the temptation to perjury is even greater than in non-capital felonies. See for example, St. v. Hopkins, 1 Bay (S. C.), 372. In such a case, a judge has "no right to be tender and humane at the expense of the law." Crowder, J., in Reg. v. Mellor, Dears. & Bell C. C. 468, 517. Most courts seem to apply the principle of the text alike in all causes, civil and criminal, *non-capital* and *capital*. Ex parte Phillips, 10 Exch. 731, 732; Amherst v. Hadley, 1 Pick. (Mass.) 38, 40; Wassum v. Feeney, 121 Mass. 93; Davis v. People, 19

the disqualifying fact when the juror was accepted.¹² In England, and in many American jurisdictions, a paramount inquiry upon such an objection is, whether it has resulted in an *unjust verdict*; if not, the objecting party has sustained no injury, and a new trial will not be granted in order that public and private time may be consumed, and the dangers of other irregularities incurred, when the same result must, on a just view of the evidence, be reached.¹³

Ill. 74; Chase v. People, 40 Ill. 352; Gillooley v. St., 58 Ind. 182; Kingen v. St., 46 Ind. 132; Costly v. St., 19 Ga. 614; Davison v. People, 90 Ill. 221. The argument, frequently raised, that the party cannot waive what he does not know (Vyvyan v. Vyvyan, 30 Beav. 65, 74, per Lord Romilly, M. R.; Bristow's Case, 15 Gratt. (Va.) 648), is more specious than sound; since it is met by another principle, which is, that *negligent ignorance* operates against a party the same as actual knowledge; and therefore he ought not to be permitted to destroy a verdict by urging a ground of challenge which, but for his negligence, he might have discovered and urged at the proper time. Note the language of Lord Tenterden in Rex v. Sutton, 8 Barn. & Cres. 417, 419. See also Whelan v. Reg., 28 Up. Can. Q. B. 2, 63, 177, 178; Reg. v. Mellor, Dears. & Bell C. C. 468, 517, per Willes, J.; Ibid., p. 523, per Byles, J.; Sommers v. St., 116 Ga. 535, 42 S. E. 779; St. v. Matthewson, 130 Iowa, 440, 103 N. W. 137; St. v. Clarke, 34 Wash. 485, 76 Pac. 98. The rule of diligence does not require, however, that inquiry on voir dire should be of the nature of cross-examination, where a juror's answers show him apparently competent. Hughes v. St. (Tex. Cr. R.), 60 S. W. 562 (not reported in state reports). Thus it was no lack of diligence not to ask a venire-man whether he was a deputy sheriff, as

it was wholly improbable that such a one would be summoned as a talesman. Graff v. St., 155 Ind. 277, 58 N. E. 74. Where examination disclosed the juror sat in a companion case, it was lack of diligence to probe carefully as to his bias or preconceived opinion. Russell v. St., 44 Tex. Cr. R. 465, 72 S. W. 190.

¹² Brown v. St., 60 Miss. 447. The mere fact, in a criminal case, that the *prisoner* had no *knowledge* of the grounds of challenge so as to interpose it at the proper time, counts for little; since, as well suggested by Catron, J., how can the court know this after verdict except by the affidavits of a convicted felon—proof always to be had when necessary? McClure v. St., 1 Yerg. (Tenn.) 206, 219. See also Gillespie v. St., 8 Yerg. (Tenn.) 507; Calhoun v. St., 4 Humph. (Tenn.) 477; Meyer v. St., 19 Ark. 156; Langan v. People, 32 Colo. 414, 76 Pac. 1048; Webster v. St., 47 Fla. 108, 36 South. 584; Hadden v. Thompson, 118 Ga. 207, 44 S. E. 1001; St. v. Morrison, 67 Kan. 144, 72 Pac. 554; Fulcher v. St., 82 Miss. 630, 35 South. 170; Robinson v. Territory, 16 Okl. 241, 85 Pac. 451. See sec. 114 and note 1, p. 113, showing that the rule is even more stringent.

¹³ Rex v. Hunt, 4 Barn. & Ald. 430, 432; Williams v. Great Western R. Co., 3 Hurl. & N. 869, 870, 28 L. J. (Exch.) 2; Trueblood v. St., 1 Tex. App. 650; O'Mealy v. St., 1 Tex. App. 180; Whitner v. Hamlin, 12

Unless there is plain evidence of injustice done to the party complaining, the verdict should be allowed to stand.¹⁴

§ 117. **Evidence in Support of such Objections.**—Such objections, then, are to be received with *great caution*, as tending to perjury and to the defrauding of public justice;¹⁵ otherwise, as soon

Fla. 21; Finley v. Hayden, 3 A. K. Marsh. (Ky.) 330; Bennett v. Matthews, 40 How. Pr. (N. Y.) 428; Zickefoose v. Kuykendall, 12 W. Va. 23; St. v. Madoil, 12 Fla. 151; Hull v. Albro, 2 Disney (Ohio), 147; Romaine v. St., 7 Ind. 63; Eggleston v. Smiley, 17 Johns. (N. Y.) 133; Cain v. Ingham, 7 Cow. (N. Y.) 478; Hayes v. Thompson, 15 Abb. Pr. N. Y.) (n. s.) 220; St. v. Turner, 6 La. Ann. 309; McLellan v. Crofton, 6 Me. 307; Tidewater Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Com. v. Flanagan, 7 Watts & S. (Pa.) 415; St. v. Howard, 17 N. H. 171, 198; St. v. Strauder, 11 W. Va. 745; Brill v. St., 1 Tex. App. 572; Orme v. Pratt, 4 Cranch C. C. (U. S.) 124; Magness v. St., 2 Coldw. (Tenn.) 309; Hardenburgh v. Crary, 15 How. Pr. (N. Y.) 307, 309; Bristow's Case, 15 Gratt. (Va.) 648; Com. v. Jones, 1 Leigh (Va.), 598; Curran's Case, 7 Gratt. (Va.) 619; Greenup v. Stoker, 8 Ill. 202; Seymour v. Deyo, 5 Cow. (N. Y.) 289; Heath v. Com., 1 Rob. (Va.) 735; Wickersham v. People, 2 Ill. 129; Presbury v. Com., 9 Dana (Ky.), 203; Com. v. Johnson, 213 Pa. 432, 62 Atl. 1064. Burden is on movant to show injury. Oates v. Union R. Co., 27 R. I. 499, 63 Atl. 675. Showing that juror is not impartial has been held to suffice. Hughes v. St. (Tex. Cr. R.) 60 S. W. 562 (not reported in state reports). But where a juror of the same name took the place of one who was summoned and there was no fraudulent conduct connected with the act no injury was shown,

and a new trial was denied in a capital case. James v. St., 68 Ark. 464, 60 S. W. 29. So, in a capital case, where the coroner was ordered to summon the jury and they were summoned by the sheriff, counsel admitting they were otherwise not objectionable. Boykin v. People, 22 Colo. 496, 45 Pac. 419. In the last case there was challenge to the array, the admission being made at the time of its being made.

¹⁴ Ramadge v. Ryan, 9 Bing. 333; Davison v. People, 90 Ill. 221; St. v. Hayden, 51 Vt. 296; Mitchum v. St., 11 Ga. 615; Anderson v. St., 14 Ga. 709; Ray v. St., 15 Ga. 223; Mercer v. St., 17 Ga. 146; Curran's Case, 7 Gratt. (Va.) 619; Ash v. St., 56 Ga. 583; Moughon v. St., 59 Ga. 308; Lovett v. St., 60 Ga. 257; Morrison v. McKinnon, 12 Fla. 552; Re Bowman, 7 Mo. App. 568; Schmidt v. Rose, 6 Mo. App. 587, 588; Meyer v. St., 19 Ark. 156; Lawrence v. Collier, 1 Cal. 37; People v. Plummer, 9 Cal. 298; St. v. Shay, 30 La. Ann. 114; Wallace v. Columbia, 48 Me. 436; Stewart v. St., 58 Ga. 577; Simms v. St., 8 Tex. App. 230; Thrall v. Lincoln, 28 Vt. 356; Parkinson v. Parker, 48 Iowa, 667; Nadenbousch v. Sharer, 4 W. Va. 203; O'Shields v. State, 55 Ga. 696; Mitchell v. St., 22 Ga. 211; Brinkley v. St., 58 Ga. 296; St. v. Dumphrey, 4 Minn. 438; Stewart v. Ewbank, 3 Iowa, 191; St. v. Pike, 20 N. H. 344; St. v. Ayer, 23 N. H. 301; Dole v. Erskine, 37 N. H. 317; Dumas v. St., 63 Ga. 600. Thus, where the juror has expressed the opinion that the

as a verdict is rendered, another trial, to wit, that of the jurors, will begin.¹⁶ It follows that the *evidence* in support of such objections will be closely scrutinized, and if *conflicting*, the decision of the trial court, refusing a new trial, will not be disturbed on appeal.¹⁷ If such an objection assails the impartiality of a juror, it is due to him and to justice that he be furnished with the charge, and that his affidavit be taken, denying it if he can;¹⁸ and although such affidavit be not taken, a new trial will not necessarily follow, if the affidavit in support of the objection conflicts with his testimony on the *voir dire*, since it will still be merely the case of oath against oath.¹⁹

defendant killed the deceased, and this indisputably appears, but self-defense was set up as a justification, no injury was shown. *St. v. Wells*, 28 Kan. 321; *Lazenby v. St.* (Tex. Cr. R.), 73 S. W. 1051 (not reported in state reports). But an apparently wilful false answer on *voir dire*, especially in a question of bias, is taken as such plain evidence. *Davis v. Searcy*, 79 Miss. 292, 30 South. 823; *Ellis v. Territory*, 13 Okl. 633, 76 Pac. 159.

¹⁵ Per Tilghman, C. J., in *Moore v. Philadelphia Bank*, 5 Serg. & R. (Pa.) 41, 42. And must be supported otherwise than by the juror in impeachment of his own verdict. *St. v. Whitesides*, 49 La. Ann. 352, 21 South. 540.

¹⁶ Per Rogers, J., in *Com. v. Flanagan*, 7 Watts & S. (Pa.) 415, 422.

¹⁷ *Miami Valley Furniture Co. v. Wesler*, 47 Ind. 65; *Clem v. St.*, 33 Ind. 418; *Harding v. Whitney*, 40 Ind. 379; *Holloway v. St.*, 53 Ind. 554; *Romaine v. St.*, 7 Ind. 63; *St. v. Bancroft*, 22 Kan. 170; *Epps v. St.*, 19 Ga. 102, 122; *Costly v. St.*, 19 Ga. 614; *The Anarchists' Case*, *Spies v. People*, 122 Ill. 1, 12 N. E. 867, 992, 993; *Hughes v. People*, 116 Ill. 331, 337, 6 N. E. 55; *St. v. Brooks* (Mo.), 5 S. W. 258, 271; *Perry v. St.*, 117 Ga. 719, 45 S. E. 77; *St. v. May*, 172

Mo. 630, 72 S. W. 918; *St. v. Vick*, 132 N. C. 995, 42 S. E. 626; *Bliss v. St.*, 117 Wis. 596, 94 N. W. 325. If there is any evidence to sustain the court's conclusion the verdict will not be disturbed. *St. v. Williamson*, 65 S. C. 242, 43 S. E. 671.

¹⁸ *Anderson v. St.*, 14 Ga. 709; *Taylor v. Greely*, 3 Me. 204; *St. v. Kingsbury*, 58 Me. 238; *Nash v. St.*, 2 Tex. App. 362; *Davison v. People*, 90 Ill. 221; *Columbus v. Goetchius*, 7 Ga. 139; *Re Bowman*, 7 Mo. App. 568; *St. v. McDonald*, 9 W. Va. 456, 466; *Tenney v. Evans*, 13 N. H. 462; *Woodward v. Leavitt*, 107 Mass. 453; *Ray v. St.*, 15 Ga. 223; *Moncrief v. St.*, 59 Ga. 470; *Brinkley v. St.*, 58 Ga. 296; *St. v. Dumphey*, 4 Minn. 439; *St. v. Ayer*, 23 N. H. 301. *Contra*, *Vance v. Haslett*, 4 Bibb (Ky.), 191; *Collins v. People*, 194 Ill. 506, 62 N. E. 902.

¹⁹ *Nash v. St.*, 2 Tex. App. 362; *St. v. McDonald*, 9 W. Va. 456; *Hudgins v. St.*, 61 Ga. 182; *West v. St.*, 79 Ga. 773, 4 S. E. 325; *Dumas v. St.*, 63 Ga. 601; *Com. v. Hughes*, 11 Phila. 430. But see *Reddle v. St.*, 3 Heisk. (Tenn.) 401; *Henrie v. St.*, 41 Tex. 573; *Fitzgerald v. People*, 1 Colo. 56. In the *Anarchists' Case* it is said by the Supreme Court of Illinois: "It is a dangerous practice to allow verdicts to be set aside upon ex parte affidavits as to what

§ 118. Question how viewed on Error or Appeal.—Here, as in all other cases where the rulings of the trial court are questioned on error or appeal, those rulings are *presumed* to be correct until the contrary is shown;²⁰ it will, therefore, be presumed, until the contrary appears by the record, that the jurors who tried the case, were possessed of the qualifications required by law.²¹ The dis-

jurors are claimed to have said before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination, and the correctness of their statement is subject to no test whatever." *Spies v. People* (Ill.), 12 N. E. 867, 992, 993, 122 Ill. 1; reaffirmed by the Supreme Court of Kansas in *St. v. Peterson* (Kan.), 16 Pac. 263. Whether or not a juror has falsely stated on his examination that he had not formed or expressed any opinion of the guilt or innocence is a question of fact for the trial court to determine and the appellate court must be convinced of a clear abuse of discretion before it will interfere. The state also has the right both to offer evidence of the bad character of affidants who say the juror had expressed such opinion, and of the good character of the juror. *St. v. Brooks*, 202 Mo. 106, 100 S. W. 416.

²⁰ *Mansell v. Reg.*, 8 El. & Bl. 54, *Dears. & B.* 375; *Strong v. Kean*, 13 Irish L. 93; *DeBardelaben v. St.*, 50 Ala. 179; *St. v. Monk*, 3 Ala. 415, 417; *Chesapeake etc. R. Co. v. Patton*, 9 W. Va. 648; *Campbell v. Strong, Hemp. C. C.* (U. S.) 265; *Dutton v. Tracy*, 4 Conn. 93, 94; *Clark v. Collins*, 15 N. J. L. 473; *St. v. Marshall*, 36 Mo. 400; *Potsdamer v. St.*, 17 Fla. 895; *Com. v. Stephen*, 4 Leigh (Va.), 679; *Burfey v. St.*, 3 Tex. App. 519; *Pauska v. Daus*, 31 Tex. 72; *St. v. Jones*, 61 Mo. 232; *Montgomery v. St.*, 3 Kan. 263; *Green v. St.*, 17 Fla. 669, 679;

Handline v. St., 6 Tex. App. 347; *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158. To review which exception must be taken and preserved. *Sylvester v. St.*, 46 Fla. 166, 35 South. 142.

²¹ *Mansell v. Reg.*, *supra*; *Chesapeake etc. R. Co. v. Patton*, 9 W. Va. 648; *Shoemaker v. St.*, 12 Ohio, 43; *Isham v. St.*, 1 Sneed (Tenn.), 111; *Turner v. St.*, 9 Humph. (Tenn.) 119; *McClure v. St.*, 1 Yerg. (Tenn.) 215, per Catron, J.; *Keenan v. St.*, 8 Wis. 132; *St. v. Roderigas*, 7 Nev. 328. The bill of exceptions must contain a statement of the facts upon which the challenge disallowed is based; otherwise it cannot be considered by an appellate court. *St. v. Shaw*, 5 La. Ann. 342; *St. v. Brington*, 22 La. Ann. 9; *Ripley v. Coolidge, Minor* (Ala.), 11. This statement must be in itself sufficient to support a challenge. *St. v. Millain*, 3 Nev. 409; *Jones v. Lossiter*, 29 Ky. Law Rep. 514, 93 S. W. 657; *McKnight v. City of Seattle*, 39 Wash. 516, 81 Pac. 928. Though a challenge to the array be disallowed, erroneously, this will be deemed harmless, if there is no claim that the jurors were not qualified and impartial. *Hartshorne v. Ill. Valley R. Co.*, 216 Ill. 392, 75 N. E. 122. And prejudice is not shown in the erroneous disallowance of certain questions, unless the transcript shows the entire voir dire examination, as such questions will be presumed to have been cov-

allowance of a statutory or principal cause of challenge is ground of a *venire de novo*, as contradistinguished from a new trial; it is a denial of a legal right, and not the erroneous exercise of a discretion; it is therefore subject to review by writ of error, or upon a statutory appeal in the nature of a writ of error;²² and so (under the old system) the refusal to appoint triors,²³ the rejection of competent evidence,²⁴ the admission of incompetent evidence,²⁵ or a misdirection to the triors in point of law,²⁶ might be corrected, on error or statutory appeal, by a bill of exceptions in the usual way. In the view of some courts, where the trial of challenges is devolved by statute upon the court, unless the statute so provides, the decision of the court upon a challenge *to the favor* cannot be reviewed;²⁷ but other courts take the view that an appellate court ought to review the action of the trial court on all questions touching the competency of jurors.²⁸ A statute which grants an excep-

ered by others and answers thereto. *Heiple v. City of Washington*, 219 Ill. 604, 76 N. E. 854. A jury was presumed to be impanelled properly where verdict was signed by "R. L. Alexander" and the list showed "R. L. Lawrence," the court assuming the latter to be a clerical error. *Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117.

²² *Rex v. Edmunds*, 4 Barn. & Ald. 471, 473; *Vicars v. Langham*, Hob. 235; *Knyaston v. Shrewsbury*, Andrews, 85, 89; *Hesketh v. Braddock*, 3 Burr. 1847; *Reg. v. Gray*, 6 Irish C. L. 259, 267; *Hutton v. Hun*, Cro. Eliz. 849; *Ex parte Vermilyea*, 6 Cow. (N. Y.) 555; *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *Mann v. Glover*, 14 N. J. L. 205; *St. v. Shaw*, 3 Ired. L. (N. C.) 532; *St. v. Davis*, 80 N. C. 412, 414.

²³ *People v. Rathbun*, 21 Wend. (N. Y.) 509; *People v. Bodine*, 1 Den. (N. Y.) 218, 308; *Baker v. Harris*, 1 Winst. (N. C.) 277.

²⁴ *Mechanics' Bank v. Smith*, 19 Johns. (N. Y.) 115.

²⁵ *Sanchez v. People*, 22 N. Y. 147, 151.

²⁶ *St. v. Benton*, 2 Dev. & Bat. (N. C.) 196, 222; *People v. Bodine*, 1 Denio (N. Y.), 281, 308.

²⁷ *Solander v. People*, 2 Colo. 48, 62; *Jones v. People*, 2 Colo. 351, Licett v. St., 23 Ga. 57; *Galloway v. St.*, 25 Ga. 596; *Eberhart v. St.*, 47 Ga. 598; *Barnes v. Com.*, 24 Ky. Law Rep. 1143, 70 S. W. 827; *St. v. Register*, 133 N. C. 746, 46 S. E. 21.

²⁸ *Winnesheik Ins. Co. v. Schueler*, 60 Ill. 465; *Montague v. Com.*, 10 Gratt. 767; *Holt v. People*, 13 Mich. 224; *Stevens v. People*, 38 Mich. 739; *St. v. Pike*, 49 N. H. 399, 407. The statute of *Kentucky* provides that all challenges are tried by the court, and that its decision in no case is subject to exceptions. *Carroll's Ky. Cr. Code*, 1906, § 212; *Terrell v. Com.*, 13 Bush, 246; *Rutherford v. Com.*, 13 Bush (Ky.), 608; *Morgan v. Com.*, 14 Bush (Ky.), 106. A statute of *New York* contains a similar provision, but allows an exception to the determination of the challenge and a review by writ of error or certiorari. *Stover's Ann. Code*, N. Y. 1902, § 1180; *Thomas v. People*, 67 N. Y. 218, 222,

tion where the court *disallows* a challenge, does not authorize it where the challenge is *allowed*; since the right of challenge, as already seen,²⁹ is the right to *reject*, and not the right to *select*, and neither party has the right to have a particular juror sit on the trial of the case.³⁰ As the question of the competency of a juror is a *mixed question of law and fact*,³¹ and as the reviewing court has not the opportunity of observing the demeanor of the venireman who is challenged, or of the witnesses whose testimony is weighed, it will defer to the decision of the trial court and will exercise its power of setting aside that decision with caution and hesitancy.³² In order to have the erroneous disallowance of a challenge reviewed on error or appeal, the *record* must not only distinctly set out the grounds of the challenge,³³ but also the testimony which was adduced for and against it.³⁴

opinion by Earl. See also Greenfield v. People, 74 N. Y. 277. So held in Washington because of constitutional guaranty of an impartial jury. St. v. Stentz, 30 Wash. 134, 63 L. R. A. 807.

²⁹ Ante, § 43.

³⁰ People v. Murphy, 45 Cal. 137, overruling People v. Stewart, 7 Cal. 140. See also St. v. Larkin, 11 Nev. 314; People v. Brotherton, 43 Cal. 530; People v. Colson, 49 Cal. 679; People v. Atherton, 51 Cal. 495; St. v. Brock, 61 S. C. 141, 39 S. E. 359.

³¹ McCarthy v. Railway Co. (Mo.), 4 S. W. 516. See also St. v. Chat-ham Nat. Bank, 80 Mo. 626; Montgomery v. Railroad Co. (Mo.), 2 S. W. 409. All answers on voir dire are to be taken together and considered in connection with each other as a whole. St. v. Dougherty, 63 Kan. 473, 65 Pac. 695.

³² People v. Stout, 4 Parker, Cr. (N. Y.) 71, 124, opinion by E. Darwin Smith, J. See also Thomas v. People, 67 N. Y. 218, 222, per Earl, J.; St. v. Tom, 8 Ore. 177; Jordan v. St., 22 Ga. 545; Bradford v. St., 15 Ind. 347; March v. Portsmouth etc. R. Co., 19 N. H. 372; People v. Henderson, 28 Cal. 466; Campbell v. Com., 84 Pa. St. 187;

May v. Elam, 27 Iowa, 365; Davenport Gas Co. v. Davenport, 13 Iowa, 229; Coryell v. Stone, 62 Ind. 307; St. v. Saunders (Ore.), 12 Pac. 441; Reynolds v. U. S., 98 U. S. 145. See also Trenor v. Central Pacific R. Co., 50 Cal. 222; Swiss v. Stockstill, 30 Ohio St. 418; Dew v. McDivitt, 31 Ohio St. 139, 17 Am. L. Reg. 623; St. v. Dodson, 16 S. C. 453. Contra, Montague v. Com., 10 Gratt. (Va.) 767; St. v. Mayfield, 104 La. 173, 28 South. 997; St. v. Jackson, 167 Mo. 291, 66 S. W. 938.

³³ Ripley v. Coolidge, Minor (Ala.), 11; Rash v. St., 61 Ala. 89; Fillion v. St., 5 Neb. 351; St. v. Bullock, 63 N. C. 570; St. v. Ellington, 7 Ired. L. (N. C.) 61; People v. Bodine, 1 Den. (N. Y.) 281, 308; Baker v. Harris, 1 Winst. N. C. 277; St. v. Benton, 2 Dev. & Bat. (N. C.) 196, 217. It was held insufficient as raising the question of the validity of a panel, that it was alleged that the statute under which the jurors were drawn was unconstitutional, where no specific act of the legislature was pointed out, as that under which they were drawn. Larimore v. Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430.

§ 119. What the Record must show.—Here, as in other cases of appellate procedure, and especially in criminal cases, much attention must be given to the question, what errors or irregularities must be affirmatively exhibited by the record, in order to be available for reversing the judgment. A general statement of principle would be, that those steps in the procedure which are matters of vital or constitutional right to the accused in a criminal case, must affirmatively appear by the record, though not necessarily in the form of specific recitals; and that, in respect of matters of minor importance, the presumption spoken of in the last section will support the judgment. In general, it must affirmatively appear from the record, that the jury were *sworn*;³⁵ though, in those jurisdictions where the jury is not sworn in each case, but the entire panel is sworn at the beginning of the term once for all, this recital is regarded as no essential part of the history of the case.³⁶ But

³⁴ *St. v. Tom*, 8 Ore. 177; *Hayden v. Long*, 8 Ore. 244; *St. v. Rigg*, 10 Nev. 284.

³⁵ *Kitter v. People*, 25 Ill. 42; *Nels v. St.*, 2 Tex. 280; *Cannon v. St.*, 5 Tex. App. 34; *Kennon v. St.*, 7 Tex. App. 326; *St. v. Gates*, 9 La. Ann. 94; *St. v. Douglass*, 28 La. Ann. 425; *St. v. King*, 28 La. Ann. 425; *St. v. Phillips*, 28 La. Ann. 387; *Botsford v. Yates*, 25 Ark. 282; *Lacey v. St.*, 58 Ala. 385; *Baird v. St.*, 38 Tex. 599; *St. v. Calvert*, 32 La. Ann. 224; *St. v. Reid*, 28 La. Ann. 387. It is doubtless true that it seldom happens, as a matter of fact, that a jury is not sworn, although the record omits to state the swearing. An attempt was lately made in a Louisiana case to break in upon the well established rule that the record must show the fact of swearing. Although unsuccessful, the result was a divided court. *Ludeling, C. J.*, one of the dissenting judges, held that, upon the principle that courts generally will not listen to objections to the qualifications of jurors unless taken at the proper time, before trial, a prisoner should be presumed to

have waived such an informality if it actually occurred. But, said he: "It is morally certain that the jury is sworn in all cases. This results from the manner in which the jurors are selected and sworn in courts, and I cannot perceive how it is possible to fail to swear a jury in any case." *St. v. Reid*, 28 La. Ann. 387, 388. See also *Hardenburgh v. Crary*, 15 How. Pr. 307, where a verdict rendered by a jury, one of the twelve being unsworn, was upheld. Before a new trial will be granted in such a case, it must be demonstrated to the satisfaction of the court, that the party complaining and his attorneys were ignorant of the fact, until after verdict, that the juror was unsworn. *Scott v. Moore*, 41 Vt. 205; *Slaughter v. St.*, 100 Ga. 323, 28 S. E. 159.

³⁶ *Waddell v. Magee*, 53 Miss. 687 (probably overruling *Wolfe v. Martin*, 1 How. (Miss.) 30; *Beall v. Campbell*, 1 How. (Miss.) 24; *Irwin v. Jones*, 1 How. (Miss.) 497); *Clark v. Davis*, 7 Tex. 556; *Drake v. Brander*, 8 Tex. 351; *Pierce v. Tate*, 27 Miss. 283; *Furniss v. Meredith*, 43 Miss. 302; *Hewett v. Cobb*,

it is sufficient that this appear by a fair interpretation of the record, although the fact be not expressly stated.³⁷ According to one conception, where some of the jurors *affirm*, the record ought to show that they were conscientiously scrupulous of taking an oath;³⁸ but this conclusion is doubtful,³⁹ and by an English statute,⁴⁰ it is unnecessary.

§ 120. **No Vested Right in a Particular Juror.**—As already pointed out,⁴¹ the right to *reject* is not a right to select. No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn.⁴² It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting *others* not qualified has been purposely created.⁴³ Thus, in the process of impaneling, no party is entitled, as of right, to have the *first juror* sit who has the statutory qualifications;⁴⁴ though

40 Miss. 61. But see *Buck v. Malory*, 24 Miss. 170. See also *Goyne v. Howell, Minor* (Ala.), 62; *Perdue v. Burnett, Minor* (Ala.), 138.

³⁷ *Christ v. St.*, 21 Ala. 37. For example, see *St. v. Christian*, 30 La. Ann. 367. For cases where the record was held, on an interpretation, *not* to show the fact, see *Bass v. St.*, 6 Baxter (Tenn.), 579, 586; *St. v. Potter*, 18 Conn. 166, 175; *Rich v. St.*, 1 Tex. App. 206.

³⁸ *St. v. Putnam*, 1 N. J. L. 260; *St. v. Sharp*, cited by Kinsey, C. J., in *St. v. Rockafellow*, 6 N. J. L. 332, 341. See also *St. v. Fox*, 9 N. J. L. 244; *St. v. Harris*, 7 N. J. L. 361. That they were accepted will be inferred from the fact of their being sworn. *People v. Truck*, 170 N. Y. 203, 63 N. E. 281.

³⁹ *Clark v. Collins*, 15 N. J. L. 473.

⁴⁰ 6 and 7 Vict., ch. 85, § 2.

⁴¹ *Ante*, § 43.

⁴² *Mansell v. Reg.*, 8 El. & Bl. 54, 79; *St. v. Reynolds*, 171 Mo. 552, 72 S. W. 39; *St. v. Thompson*, 116 La.

829, 41 South. 107; *St. v. Croney*, 31 Wash. 122, 71 Pac. 783. Where a juror was in fact disqualified, but the challenge puts disqualification on wrong ground, there was no error in excluding him. *St. v. Prins*, 113 Iowa, 72, 84 N. W. 980. A greater discretion is given in the rejection than in the acceptance of a juror, and if the court be in doubt, the juror should be rejected on challenge. *St. v. Burolli*, 27 Nev. 41, 71 Pac. 532.

⁴³ *Tatum v. Young*, 1 Porter (Ala.), 298; *Bibb v. Reid*, 3 Ala. 88; *People v. Arceo*, 32 Cal. 40; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Carpenter v. Dame*, 10 Ind. 125; *Heaston v. Cincinnati etc. R. Co.*, 16 Ind. 275, 279. *Contra*, *Hildreth v. Troy*, 101 N. Y. 234, 54 Am. Rep. 686.

⁴⁴ *People v. Arceo*, 32 Cal. 40, 44; *St. v. Pritchard*, 15 Nev. 74; *St. v. Arthur*, 2 Dev. (N. C.) 217; *St. v. Benton*, 2 Dev. & B. (N. C.) 196, 222; *Smith v. Clayton*, 29 N. J. L.

there are authorities to the contrary, chiefly based on exaggerated views of the rights of the accused in criminal trials.⁴⁵ But this is on principle quite untenable; since, if the prisoner has been tried by an impartial jury, it would be nonsense to grant a new trial or a *venire de novo* upon this ground, in order that he might be again tried by another impartial jury.⁴⁶ A consequence of this rule is, that when the name of a juror is drawn and called in court, the accused in a criminal case cannot demand that the juror shall be *called* at the door of the court house, or that an attachment shall issue to bring him in, or that an officer shall be dispatched for him; ⁴⁷ though, if a juror absent himself after he has been sworn, the court may either compel his attendance or dismiss the jury and impanel another.⁴⁸ Finally, it is a rule of paramount importance that errors

357; Phelps v. Hall, 2 Tyler (Vt.), 401; John v. St., 16 Fla. 554; St. v. Marshall, 8 Ala. 302; Watson v. St., 63 Ind. 548; Hurley v. St., 29 Ark. 17, 22; St. v. Lovenstein, 9 La. Ann. 313; St. v. Wilson, 48 N. H. 398; Foster's Case, 13 Abb. Pr. (N. Y.) (N. Y.) 372, n; Silvis v. Ely, 3 Watts & S. (Pa.) 420; Citizens' Bank v. Strauss, 26 La. Ann. 736; St. v. Lewis, 28 La. Ann. 84; Clifton v. St., 53 Ga. 241; Pannell v. St., 29 Ga. 681; Henry v. St., 4 Humph. (Tenn.) 270; St. v. Shelledy, 8 Iowa, 477; O'Brien v. Vulcan Iron Works, 7 Mo. App. 257; Territory v. Shankland, 3 Ariz. 403, 77 Pac. 492; Decker v. Lane, 74 Ark. 286, 85 S. W. 425; Horton v. U. S., 15 App. D. C. 310; Graff v. People, 208 Ill. 312, 70 N. E. 299; Stowell v. Standard Oil Co., 139 Mich. 18, 102 N. W. 227.

⁴⁵ Boles v. St., 13 Smed. & M. (Miss.) 398; Williams v. St., 32 Miss. 390; Smith v. St., 55 Miss. 410; Finn v. St., 5 Ind. 400; Meyers v. St., 20 Ind. 511. (But see Coryell v. Stone, 62 Ind. 307.) Van Blaricum v. People, 16 Ill. 364; Greer v. Norvill, 3 Hill (S. C.), 262. See also remarks of Lord Tenterden, ante, § 250. Danzey v.

St., 126 Ala. 15, 28 South. 697; St. v. Register, 133 N. C. 746, 46 S. E. 21. If additional challenges are tendered and refused this cures error. St. v. La Croix, 8 S. D. 369, 66 N. W. 944. Where, however, a party has remaining only two challenges, and four disqualified jurors are taken over objection and challenge on the jury, there is no waiver in failure to use same. Martin v. Farmers Mut. Fire Ins. Co., 139 Mich. 148, 102 N. W. 656.

⁴⁶ Henry v. St., 4 Humph. (Tenn.) 270; Grisson v. St., 8 Tex. App. 386, 398; St. v. Raymond, 11 Nev. 98; Woodard v. St., 9 Tex. App. 412. But, in the view of some courts, this rule does not permit the trial judge to exclude competent jurors arbitrarily and unreasonably; but an abuse of discretion in this regard may be ground of new trial.

⁴⁷ U. S. v. Byrne (U. S. Cir. Ct. S. D. N. Y., May, 1881), 7 Fed. 455; Waller v. St., 40 Ala. 325; Bill v. St., 29 Ala. 34; Stewart v. St., 13 Ark. 721, 737; Hall v. St., 51 Ala. 9; People v. Larned, 7 N. Y. 445; People v. Vermilyea, 7 Cow. (N. Y.) 369, 382; Johnson v. St., 47 Ala. 9; St. v. Lovenstein, 9 La. Ann. 313; Foster's Case, 13 Abb. Pr. (N. Y.)

committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had *exhausted his peremptory challenges*; ⁴⁹ if his peremptory challenges remained unexhausted, so that he might have excluded the objectionable juror by that means, he has no ground of complaint.⁵⁰

§ 121. Juror no Vested Right to Serve.—A single decision is found upholding the idea that a citizen has a vested right to serve as a juror when drawn; ⁵¹ but the idea is too fantastic for serious discussion..

(N. S.) 372, n; Boles v. St., 24 Miss. 445; St. v. Breaux, 32 La. Ann. 222; St. v. Belcher, 13 S. C. 459. But see Johnson v. St., 47 Ala. 9; St. v. Ross, 30 La. Ann. 1154.

⁴⁸ Pennell v. Percival, 13 Pa. St. 197.

⁴⁹ The Anarchists' Case, Spies v. People, 122 Ill. 1, 12 N. E. 867, 989; Holt v. St., 9 Tex. App. 571; Lagins v. St., 12 Tex. App. 65. But see Wade v. St., 12 Tex. App. 358.

⁵⁰ U. S. v. Neverson, 1 Mackey (D. C.), 152.

⁵¹ Greer v. Norvill, 3 Hill (S. C.), 262. On this theory it was held that conviction of felony, prior to adoption of constitution prescribing such as disqualification, was within the prohibition against competency. Garrett v. Weinberg, 54 S. C. 127, 31 S. E. 341.

TITLE II.

CONTROL AND REGULATION OF THE TRIAL.

CHAPTER V.—OF THE PRESERVATION OF ORDER AND THE PUNISHMENT OF CONTEMPTS.

CHAPTER VI.—OF COMPULSORY PROCESS AGAINST WITNESSES.

CHAPTER VII.—ENFORCING THE STIPULATIONS AND ADMISSIONS OF COUNSEL.

CHAPTER VIII.—OF OTHER SUBJECTS OF JUDICIAL CONDUCT AND CONTROL.

CHAPTER V.

OF THE PRESERVATION OF ORDER AND THE PUNISHMENT OF CONTEMPTS.

SECTION

124. Extent of the Power to Punish Contempts.
125. Power of Legislature to Limit this Power of Courts.
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147. Injunction, Prohibition, Mandamus.
148. Action for False Imprisonment.
149. Executive Pardon.
150. Application to the Judge who has Imposed the Punishment.

§ 124. **Extent of the Power to Punish Contempts.**—It is necessary to the due exercise of the functions of a judicial court that the judge should possess the power to preserve order while conducting judicial proceedings, to enforce obedience to the lawful orders and process of the court, and consequently to punish disobedience of the same. It is therefore a general principle of the common-law, subject to statutory limitations in this country: (1) that every superior court of record has the inherent power to punish contempts committed in its presence and against its authority; (2) that every such court is the exclusive judge of such contempts.¹ The result of this doctrine is that superior courts of record are not bound to certify upon their record the facts of which a contempt

¹ Wilson's Case, 7 Q. B. 984, 9 Jur. 393, 14 L. J. Q. B. 105, 201; Ex parte Edwards, 11 Fla. 174; St. v. Gallaway, 5 Coldw. (Tenn.) 326; Re Andrews, 4 C. B. 226; Ex parte Hardy (Ala.), 13 Cent. L. J. 50; Re Cooper, 32 Vt. 253; People v. Sturtevant, 9 N. Y. 263; Ex parte Adams, 25 Miss. 883; Ex parte Sam, 51 Ala. 34; Re Millington, 24 Kan. 214; Crosby's Case, 3 Wils. 188; Wicker v. Dresser, 13 How. Pr. (N. Y.) 331; Whitcomb's Case, 120 Mass. 118, 120, per Gray, C. J.; Cartwright's Case, 114 Mass. 230; St. v. Matthews, 37 N. H. 450; Mariner v. Dyer, 2 Me. 165, 172; Tenney's Case, 23 N. H. 162; Spalding v. People, 7 Hill (N. Y.), 301 (affirming 10 Paige (N. Y.), 284); St. v. White, R. M. Charlt. (Ga.) 136; Lyon v. Lyon, 21 Conn. 18, 185, 196; Johnson v. Commonwealth, 1 Bibb (Ky.), 598; Morrison v. McDonald, 21 Me. 550; Passmore Williamson's Case,

26 Pa. St. 9, 18; Ex parte Smith, 28 Ind. 47; St. v. Tipton, 1 Blackf. (Ind.) 166; St. v. Doty, 32 N. J. L. 403; The Bark Laurens, 1 Abb. Adm. 508, 513; Watson v. Williams, 36 Miss. 331; Hollingsworth v. Duane, Wall. La. (U. S.) 77; St. v. Morrill, 16 Ark. 384; Lining v. Bentham, 2 Bay (S. C.), 1, 7; St. v. Johnson, Id. 385; People v. Fancher, 4 Thomp. & C. (N. Y.) 467; Sanders v. Metcalf, 1 Tenn. Ch. 419, 428; People v. Wilson, 64 Ill. 195; Middlebrook v. St., 43 Conn. 257, 268; Shattuck v. St., 51 Miss. 50; La Fontaine v. Southern Underwriters, 83 N. C. 132; St. v. Harper's Ferry Bridge Co., 16 W. Va. 864, 876; In re Debs, 158 U. S. 562; In re Nevitt, 117 Fed. 448, 64 C. C. A. 622; Swedish etc. Telephone Co. v. Fidelity etc. Co., 208 Ill. 562, 70 N. E. 768; St. v. Peralta, 115 La. 530, 39 South. 550; St. v. Willis, 61 Minn. 120, 63 N. W. 169; St. etc. v.

consists, but that every other court or judge, where the validity of a commitment for contempt by such a court is drawn in question, is bound to presume that the facts were sufficient to warrant it.

§ 125. Power of Legislature to limit this Power of Courts.—

This power being inherent in courts of justice, and necessary to enable them to preserve their dignity and enforce their process, and so to attain the ends of their creation, the power of the legislature to regulate the same, except where such power is conferred by the constitution, may well be doubted.² If the court is created by the constitution, it is clear, upon principle, that the legislature has no such power, unless such power is conferred upon it by the constitution; and it has been so held.³

Ryan, 182 Mo. 349, 81 S. W. 435; *Harley v. Com.*, 188 Mass. 443, 74 N. E. 677. Contempts are divided into criminal and civil, the former to vindicate the court's dignity and the latter to enforce rights of private persons. *Gorham v. City of New Haven*, 82 Conn. 153, 72 Atl. 1012; *People v. News-Times Pub. Co.* (Colo.), 84 Pac. 912; *Hale v. St.*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254; *In re Clark*, 126 Mo. App. 391, 103 S. W. 1105. The rule therefore seems to be that regulation by statute is allowable so it does not go to the extent of seriously impairing or restricting the power. Thus in Virginia it was held that a statute providing for jury trial was unconstitutional as depriving the court of the right to punish summarily. *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 780. Limited restriction by statute, however, seems permissible. *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957; *Mahoney v. St.*, 33 Ind. App. 655, 72 N. E. 151. This seems especially true as to contempts which, though constructive, yet are punishable as against the dignity of the court and the majesty of the law. *Walker v. Kennedy*, 133 Iowa. 284, 110 N. W. 581. In *French v.*

Com., 30 Ky. Law Rep. 98, 97 S. W. 427, a jury trial is held allowable under a statute, where the power of punishment being limited, when inflicted summarily by the court, was enlarged, if the contempt is tried by jury, the court having the option to resort to either method. For an exhaustive discussion of distinctions in proceedings for civil and criminal contempt, see *Gompers v. Buck Stove and Range Co.*, — U. S. —. 31 Sup. Ct. 492.

² See *Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480; *Ex parte Robinson*, 19 Wall. (U. S.) 510; *Re Wolley*, 11 Bush (Ky.), 95, 111.

³ *St. v. Morrill*, 16 Ark. 384. The Kentucky court, while asserting this principle in general terms, was disposed to consider that the legislature might impose reasonable checks upon the mere arbitrary exercise of a discretion in this regard. *Re Wolley*, 11 Bush (Ky.), 95, 111; *St. v. Clancy*, 30 Mont. 193, 76 Pac. 10; *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957. This principle applies to a territorial court created by organic act, which stands to a territory as a constitution to a state. *Smith v. Speed*, 11 Okl. 95, 66 Pac. 511, 55 L. R. A. 402.

§ 126. **Statutory Affirmations of this Power.**—Statutory affirmations of this power exist in several States. Where the power is conferred in general terms by an affirmative statute upon a superior

And to courts established by appropriate legislation carrying a constitutional provision into effect, such as our national courts. In *re Debs*, *supra*. Taking it that the view is that regulation is strictly limited as above stated, the views of courts are less variant on this subject than upon the question of what constitutes constructive criminal contempt directed against the authority and dignity of courts and the majesty of the law. This variance has appeared in cases of publications reflecting upon courts and judges. A few cases hold, that merely scandalizing a court by defamatory aspersion upon judges constitutes such criminal contempt, independently of reference to a pending cause, where the administration of justice is intended to, or might, be affected. Thus it has been so held in *St. v. Monill*, 16 Ark. 384; *St. etc. v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251. To the contrary is the weight of American authority, holding that such publications must refer to a pending cause. *Fishback v. St.*, 131 Ind. 304, 30 N. E. 1088; *St. v. Bee* Pub. Co., 60 Neb. 282, 83 N. W. 204, 50 L. R. A. 195, 83 Am. St. Rep. 531; *Fellman v. Mercantile etc. Ins. Co.*, 116 La. 723, 41 South. 49; *St. v. Circuit Court*, 97 Wis. 1, 72 N. W. 193, 38 L. R. A. 554, 68 Am. St. Rep. 90; *St. v. Edwards*, 15 S. D. 383, 89 N. W. 1011; *St. v. Kaiser*, 20 Ore. 50, 23 Pac. 964, 8 L. R. A. 584; *Ex parte Green*, 46 Tex. Cr. R. 576, 81 S. W. 723, 66 L. R. A. 727; *St. v. Tugwell*, 19 Wash. 238,

52 Pac. 1056, 43 L. R. A. 787; *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696; 39 L. R. A. 691. These courts would, upon the reasoning employed, probably accept the extension expressed by the federal and Massachusetts Supreme Courts, that such publication would be contempt, where intended or fairly tending to affect judicial conclusion in a particular case, whether made in advance of a cause pending or while it is pending, the test being that it relate to a particular cause. *Patterson v. Colorado*, 205 U. S. 454; *Com. v. Globe Newspaper Co.*, 188 Mass. 449, 74 N. E. 682. Under the last case, however, it would seem the publication need not be defamatory, the contempt being a tendency to interfere with the administration of justice in a particular matter. The question of the particular cause being unconcluded has been ruled strictly against an alleged contemnor, to the end that the principle of this jurisdiction shall be regarded as wholly inviolable, and the orderly procedure of courts be not only not interfered with, but also be beyond a suspicion of influence in interference. Thus in *People v. News-Times Pub. Co.*, *supra*, affirmed *sub nom. Patterson v. Colorado*, *supra*, a cause was held pending, where a petition for rehearing was undisposed of. And so even afterwards, if there remained time to apply for a modification of an opinion or judgment. See *St. v. Tugwell*, *supra*. Contra, if there was time to amend after demurrer to petition has been sustained. *Ex parte Barry*, 85 Cal.

court of record, it is regarded as being merely declaratory of the common law,⁴ not as creating a power, but simply as re-affirming a pre-existing power; and it leaves the court to follow the principles of the common law in determining what constitutes a contempt.⁵ Accordingly, a statute conferring this power upon superior courts of record, in general terms, is held to embrace both direct and constructive contempts, because both of these were contempts at common law.⁶ Even a statute requiring a judge issuing a writ of *habeas corpus* to remand a prisoner, if it appear that he is detained in custody for a contempt specially and plainly charged in the commitment, by some court having authority to commit for the con-

603, 25 Pac. 256, 20 Am. St. Rep. 248. Or if remittitur has not been entered. *St. v. Faulds*, 17 Mont. 142, 42 Pac. 285. Therefore it would not be improbable to suppose that it may yet be held, so far as jurisdiction to punish criminal contempt in reference to a pending cause is concerned, that a cause is pending, until it has passed beyond a court's jurisdiction or control. Later English decision, whatever may be thought to have been the ancient rule at common law (as to which also, there seems, in American decision, to be some diversity of view) appears to be as held in Massachusetts. Thus, lately, it was ruled that matter published in a newspaper constituted contempt, as tending to interfere with the trial of an indictable offense, though at the time of publication the accused had not yet been committed for trial. *Rex v. Parke*, 72 Law J. K. R. 839, 2 K. B. 432, 89 Law T. 439. An English court has, also, held that committal for contempt is only authorized in the interest of the administration of justice and not for the vindication of the judge, as a person, who, like others, must seek his remedy by an action for libel or criminal information. *McLeod v. St. Aubyn*, 68 Law J. P. C.

137, 81 Law T. 158. As to the Missouri case, *supra*, another departure from the weight of authority may be noticed in its holding, that the truth would justify in a publication of what would otherwise be libellous in procedure for criminal contempt. As to this position, it is believed the Missouri court stands alone, and the case itself shows how groundless is such a holding. Thus the contemnor was challenged by the attorney general to produce his proof, that the judges assailed were corrupt, and, had he offered evidence on this subject, the judges charged with being corrupt would have been called on to decide whether or not they were proven so to be. Such emergency would have carried to its utmost verge the principle laid down by the federal Supreme Court, that in contempt a judge is not trying his own case, but acts impersonally. *Patterson v. Colorado*, *supra*.

⁴ *Middlebrook v. St.*, 43 Conn. 257, 267.

⁵ *People v. Wilson*, 64 Ill. 195.

⁶ *Whittem v. St.*, 36 Ind. 196, 212.

⁷ *Davison's Case*, 13 Abb. Pr. (N. Y.) 129, 138. But a reading of the English decisions will show that this supposition is erroneous.

tempt charged, has been supposed not to work a substantial alteration of the rule of the common law on the subject.⁷ A statute which merely purports to limit the power, in this regard, of judges in vacation and at chambers, does not, of course, operate to curtail the power possessed by the courts.⁸

§ 127. **Immaterial that the Offense is Indictable.**—The power of the courts in this regard, being founded in the principle of self-preservation, it does not at all go to deprive them of it, that the law has provided some other mode for punishing the offender; it is quite immaterial that the offense is indictable.⁹ Courts are not obliged to trust the preservation of their dignity and authority to such weak agencies as information, indictment, and trial by jury, it may be before some other tribunal, where the success of the prosecution and the conviction of the offender may depend upon the zeal of a prosecuting witness, of the States's attorney, or upon circumstances purely accidental. Besides, the exigencies may not admit of so tardy a remedy. In cases of inferior courts, such as justices of the peace, even the remedy by indictment may not exist, unless the words are such that they would be indictable when spoken of a private person;¹⁰ but they might afford ground for binding the party

⁸ *Re Milington*, 24 Kan. 214.

⁹ *Rex v. Lord Ossulston*, 2 Strange, 1107 (sub nom. *King v. Pierson*, Andrews, 310); *Spaulding v. People*, 7 Hill (N. Y.), 301, 302; *St. v. Williams*, 3 Speers (S. C.), 26; *Contra, St. v. Blackwell*, 10 S. C. 35, 38; *In re Debs*, supra; *Ex parte Savin*, 131 U. S. 267, 33 L. Ed. 150; *Ex parte Delgado*, 140 U. S. 586, 35 L. Ed. 578; *O'Neill v. People*, 113 Ill. App. 195; *In re Young*, 137 N. C. 552, 50 S. E. 220; *Ex parte Bergman*, 3 Wyo. 396, 26 Pac. 914. In civil contempt the fact that the person injured thereby has an adequate remedy by action against the contemnor does not take from the court the right to punish the contempt. *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148; *Rowley v. Feldman*, 82 N. Y. S. 679, 84 App. Div. 400. And, though the violation is of an order to secure the

rights and remedies of a party, it is not material that such contempt produces no actual loss or injury. *Emerson v. Huss*, 127 Wis. 215, 106 N. W. 518.

¹⁰ Thus, in an old case, an indictment for saying of Sir Rowland Gwyn, who was a justice of the peace, in a discourse concerning a warrant made by him, "Sir Rowland Gwyn is a fool, an ass and a coxcomb for making such a warrant, and he knows no more than a slickhill," was held naught, on demurrer, though it was a breach of good manners, and might afford ground for binding the party over for good behavior. "Et per Holt, C. J.: 'To say a justice is a fool, or an ass, or a coxcomb, or a block-head, or a buffe-head, is not indictable.'" *Reg. v. Wrightson*, 2 Salk. 698. But in a rambling report in the Modern Reports, the court is

over to keep the peace.¹¹ To this ruling an exception has been admitted by some courts, in the case of proceedings to *disbar attorneys* for professional misconduct; so that, where a special proceeding was provided by statute by which the accused was allowed the advantage of certain formalities, he could not be proceeded against and disbarred by the court in the exercise of its common-law powers.¹²

§ 128. **What are Superior Courts of Record.**—What are superior courts of record, within the meaning of this rule, is an important subject of inquiry. It must be stated in the outset, that it is not at all necessary to the inherent power of the court to fine and imprison for contempt that it should be what is termed a court of *general jurisdiction*. In the largest sense, there are no such courts, because there are no courts in England or America which exercise at once all the judicial power of the State, both original and appellate, legal and equitable, civil and criminal. The two houses of Parliament, for instance, have always been regarded, whenever their authority in this regard has been called in question in the judicial courts, as very high courts. The House of Lords, indeed, is the highest court of appellate jurisdiction in Great Britain, and it possesses a certain original jurisdiction, chiefly criminal, in respect of its own members, but it is in no sense a court of general jurisdiction. Nevertheless, its power, when sitting as a legislative body, to punish contempts of its authority is of so high a nature that it cannot even be inquired into by the judicial courts. The former Court of Chancery in England had no common-law jurisdiction, and hence was not, properly speaking, a court of general jurisdiction; but its power to punish contempts of its authority was not only never questioned, but in the earliest times this was the only way in which it enforced its orders and decrees.¹³ The Court of Common Pleas in England had no criminal jurisdiction, but its inherent power in this regard was

said to have sustained an indictment for speaking scandalous words of Sir J. K., a justice of the peace, namely: "Sir J. K. is a baffle-headed fellow and doth not understand law; he is not fit to talk law with me; I have baffled him, and he hath not done my client justice." The counsel for the crown urged that "this was a scandal upon the government; since it was as much as to say that the king hath appointed

an ignorant man to be a justice of the peace for which an indictment would lie; and of that opinion was the whole court, and gave judgment accordingly." *Rex v. Derby*, 3 Mod. 139.

¹¹ *Richmond v. Dayton*, 10 Johns. (N. Y.) 393.

¹² *St. v. Start*, 7 Iowa, 499; *Ex parte Smith*, 28 Ind. 47.

¹³ 3 Bl. Com. 287.

never questioned. So the Court of Common Pleas of Connecticut has no criminal jurisdiction, but its power in this regard, when questioned, was distinctly affirmed.¹⁴ The courts of the United States possess both common-law and equity powers, and their common-law jurisdiction extends to cases both civil and criminal. But in respect of parties to actions, those courts are not courts of general jurisdiction.¹⁵ Their jurisdiction is limited by the citizenship of the parties, except in cases relating to the federal revenue and in some other cases. But their power to punish contempts of their authority is unquestioned, and, when acting within the scope of their apparent jurisdiction, their judgments in this regard cannot be questioned in other courts.¹⁶ Passing to other courts, we find that the English common-law judges holding courts of *nisi prius*,¹⁷ courts of Oyer and Terminer in England¹⁸ and in New York¹⁹ and the Municipal Court of Bangor, Maine, existing in 1833,²⁰ were all ranked as superior courts of record, within the rule which clothes such courts with this power. So, the Court of Probate in Mississippi,²¹ and the Surrogates' Court in New York,²² possess the power to compel defaulting executors, administrators and guardians to pay over money or deliver property, where payment or delivery is within their power.²³

¹⁴ *Middlebrook v. St.*, 43 Conn. 257, 267.

¹⁵ *Ex parte Smith*, 94 U. S. 485. Compare *Ex parte Watkins*, 3 Pet. (U. S.) 193, 207; *McCormick v. Sulivant*, 10 Wheat. (U. S.) 192; *Kemp v. Kennedy*, 5 Cranch (U. S.), 185; *Skellern v. May*, 6 Cranch (U. S.), 267; *Ruckman v. Cowvell*, 1 N. Y. 505; *Thompson v. Lyle*, 3 Watts & S. (Pa.) 166; *Reed v. Vaughn*, 10 Mo. 447; *Hays v. Ford*, 55 Ind. 52.

¹⁶ *Williamson's Case*, 26 Pa. St. 9; *The Bark Laurens*, 1 Abb. Adm. 508, 513. It has even been held that contemnor of one of the circuit courts of the United States may be arrested in another federal district, even in another State, and brought before the court whose authority he has contemned, there to be dealt with for such contempt. *Fanshawe v. Tracy*, 4 Biss. (U. S.)

490. But some of the federal judges deny this power. Compare *Pooley v. Whethan*, 15 Ch. Div. 435, 50 L. J. (Chan.) 236.

¹⁷ *Rex v. Davison*, 4 Barn. & Ald. 329.

¹⁸ *Re M'Aleece*, 7 Ir. C. L. 146. Compare *Re Pater*, 5 Best & S. 299, 10 Jur. (N. S.) 972; *Re Fernandez*, 6 Hurl. & N. 717, 10 C. B. (N. S.) 3, 30 L. J. (C. P.) 321.

¹⁹ *People v. Fancher*, 4 Thomp. & C. (N. Y.) 467.

²⁰ *Morrison v. Macdonald*, 21 Mo. 551, 556.

²¹ *Watson v. Wilson*, 36 Miss. 331. But not in Vermont. *Re Bingham*, 32 Vt. 329.

²² *Seaman v. Duryea*, 11 N. Y. 324 (affirming 10 Barb. (N. Y.) 523); *Matter of Watson v. Nelson*, 69 N. Y. 536.

²³ In Missouri, there is a general

§ 129. **Power of Inferior Courts to Punish for Contempt.**—It may be stated as a general rule of the common law, that inferior courts not of record, inferior legislative bodies such as those of the British colonies and dependencies, and the legislative councils of municipal corporations,²⁴ have no power to fine and imprison for contempt, except in so far as such power has been expressly conferred by statute.²⁵ Much difference of opinion has existed as to what tribunals and officers are to be deemed inferior courts not of record, within the meaning of this rule. But it has been held that judges of courts performing *ex officio* acts out of court in vacation,²⁶ or at chambers,²⁷ have no power to fine or imprison for contempt; though judges of the Circuit Court of the United States, in cases in equity, possess power so to punish in vacation, because a court of equity has no terms, but is deemed to be always open.²⁸ By analogy

statutory provision to the effect that "when a judgment requires the performance of any other act than the payment of money, a certified copy of the judgment may be served upon the party against whom it is given, and his obedience thereto required. If he neglect or refuse, he may be punished by the court, as for a contempt, by fine or imprisonment, or both, and, if necessary, by sequestration of property." Rev. Stat., 1909, § 2528. Although courts of probate in Missouri are now, in respect of the presumptions in support of their jurisdiction in collateral proceedings, regarded, in certain cases, as superior courts of record (*Johnson v. Beasley*, 65 Mo. 250), yet it is believed that it is not the understanding of the profession in that State that the above statute extends to the courts of probate. Vide *Hughes v. Territory* (Ariz.), 85 Pac. 1058 (not reported in state reports); *Backs v. St.*, 75 Neb. 603, 106 N. W. 787.

²⁴ *Whitcomb's Case*, 120 Mass. 118.

²⁵ *Re Kerrigan*, 33 N. J. L. 344; *Batchelder v. Moore*, 42 Cal. 412, 414; *Reg. v. Lefroy*, L. R. 8 Q. B. 134, 4 Moak, 250; *Noyes v. Byxbee*,

45 Conn. 382; *Heard v. Pierce*, 8 Cush. (Mass.) 338.

²⁶ *Ex parte Ireland*, 34 Tex. 344.

²⁷ *People v. Brennan*, 44 Barb. (N. Y.) 344. The N. Y. Code Civil Proc., § 302, gives to the judge who issues the order in a proceeding supplementary to execution, the power to punish as for contempt, and such power is possessed by the county judge in that State. *Rugg v. Spencer*, 59 Barb. (N. Y.) 383, 398. But the possession of this special statutory power on the part of the *judge*, does not operate as an implied denial of it on the part of the *court*. *Kearney's Case*, 13 Abb. (N. Y.) Pr. 459. The later trend of decision is that the power to punish is a necessary concomitant of the right to perform judicial acts, make orders etc. and is therefore implied. *Harman v. Wagner*, 33 S. C. 487, 12 S. E. 98; *St. v. Cape Fear Lumber Co.*, 72 S. C. 322, 51 S. E. 873; *Mowser v. St.*, 107 Ind. 539, 8 N. E. 561.

²⁸ *Vose v. Reed*, 1 Woods (U. S.), 647, 652. It has been held that under statutes providing for orders in vacation, this in effect to declare that as to such orders courts are

to the well-known rule that in *summary proceedings* contrary to the course of the common law, nothing is presumed in favor of the jurisdiction even of a superior court of record, it has been laid down that no power resides in judicial officers when exercising a summary jurisdiction, to punish for contempts, unless this power is expressly conferred by statute.²⁹ In this category have been placed justices of the peace, recorders of municipal corporations, and the like officers who exercise summary jurisdiction expressly conferred by statute for the trial of certain petty offenses.³⁰ But there is a difference of opinion as to the powers of justices of the peace in this regard, as we shall hereafter see. County courts possess varying jurisdiction in different States; and no general rule can be stated with regard to the power of such courts to punish for contempts. Undoubtedly, they have such power in Vermont.³¹ But it would seem they do not in Alabama;³² and, unquestionably, they do not in Missouri, where the county court is merely an administrative board, possessing, except in a few provisional cases, no judicial powers. There seems to have been a difference of opinion in New York, as to whether surrogates possess this power; but it seems that, by force of statute, they possess it to a limited extent, and may use it to compel the payment of money into their hands by defaulting executors, administrators and guardians.³³

§ 130. [Continued.] **Power of Referees, Court Commissioners, Notaries.**—It is said, in North Carolina, that a referee sitting to try the issues of a cause which has been referred to him, has the same power to enforce obedience to his rulings which the court would have if the trial were before the court; but this is by virtue of the express provisions of a statute.³⁴ Where the referee is not to try

likewise always open. *Smith v. Speed*, 11 Okl. 405, 68 Pac. 511, 55 L. R. A. 402; *St. v. Loud*, 24 Mont. 428, 62 Pac. 497.

²⁹ *Matter of Kerrigan*, 33 N. J. L. 344, 348, 350; *Stuart v. Allen*, 45 Wis. 158, 160, per Orton, J.

³⁰ *Matter of Kerrigan*, *supra*. A statute providing that every court has the power to preserve and prevent disturbance or hindrance to its carrying on business, gives to a town council, recognized by charter as a court, power to punish for

contempt. *St. v. Aiken*, 113 N. C. 651, 18 S. E. 690; *Faircloth v. City of Macon*, 122 Ga. 795, 50 S. E. 915.

³¹ In that State it is held that justices of the peace have such power, without the aid of any statute. *Re Cooper*, 32 Vt. 253.

³² *St. v. McDuffie*, 52 Ala. 4.

³³ *Seaman v. Duryea*, 11 N. Y. 324 (affirming 10 Barb. (N. Y.) 523); *Matter of Watson v. Nelson*, 69 N. Y. 536.

³⁴ *Pell's Rev. Code N. C. 1908*, § 942.

the issues, but merely to collect evidence, in other words, where the officer, although called a referee, discharges merely the functions of an examiner in chancery, he has no power to punish a recusant witness for contempt, but must refer the matter to the court.³⁵ Court commissioners in Wisconsin have no such power, except in so far as it is conferred by statute.³⁶ According to the usual practice in chancery, an attachment against a witness for a contempt in a proceeding before a master, requires an application to the court.³⁷ A like practice is prescribed by act of Congress in the case of commissioners to take depositions to be used abroad, and in case of referees in bankruptcy.³⁸ Neither have commissioners of Circuit Courts of the United States power to commit for contempt, and the power of Congress to clothe them with this power has been doubted.³⁹ So, it has been well laid down that a party seeking to justify the commitment of a witness by a notary public, must put his finger upon some statute directly authorizing it.⁴⁰ We shall see in the next section, that justices of the peace do not possess this power at common law. For stronger reasons, then, it has been denied to the *police justices* of municipal corporations.⁴¹

§ 131. [Continued.] **Power of Justices of the Peace.**—The power of justices of the peace at common law, to fine and imprison for contempt, is involved in much doubt. I have not met with any authoritative adjudication in England which holds that they possess such power; and as late as 1822 the power was questioned in the King's Bench, and the court avoided expressing any opinion upon it. If they ever possessed this power at all, beyond question it was limited to the punishment of contempts committed *in facie curiæ*;⁴²

³⁵ *La Fontaine v. Southern Underwriters*, 83 N. C. 132, 137.

³⁶ *Haight v. Lucia*, 36 Wis. 355; *Stewart v. Allen*, 45 Wis. 158, 160, per Orton, J.

³⁷ *Gray, C. J.*, in *Whitcomb's Case*, 120 Mass. 118, 120. See *Rex v. Almon*, *Wilmot*, 243, 269; 2 Dan. Ch. Pr. (4th Am. ed.) 1178, 1198; 78th Eq. Rule of U. S. Courts, 17 Peters, lxxiv.

³⁸ Rev. Stat. U. S., 1901, §§ 4071, 4073; p. 3420, § 2 and p. 3437, § 41. Referees in bankruptcy have power to punish for contempt. See Nat. Bankruptcy Act 1898.

³⁹ *Ex parte Doll*, 7 Phila. (Pa.) 595.

⁴⁰ *Ex parte Mallinkrodt*, 20 Mo. 493; *U. S. v. Beavers*, 125 Fed. 778.

⁴¹ *Matter of Kerrigan*, 30 N. J. L. 344, 346-348. Where constitution gives power to punish for contempt in a judicial proceeding, the mayor of a city cannot be vested with such power by statute. *Roberts v. Hackney*, 22 Ky. Law Rep. 968, 58 S. W. 810.

⁴² *Reg. v. Lefroy*, L. R. 8 Q. B. 134; *Richmond v. Dayton*, 10 Johns. (N. Y.) 393; *Fitler v. Probasco*, 2 Browne (Pa.), 137

although a court of record possessed at common law the power to punish constructive contempts, that is, contempts committed out of court.⁴³ But a justice of the peace may, for this kind of contempt, compel the contemnor to find sureties to keep the peace, and commit him in default thereof;⁴⁴ but if he merely imprisons him for contempt, he will be liable to him for damages for false imprisonment.⁴⁵ Dicta may possibly be found in the old English books of reports which give color to the idea that justices of the peace have power to punish direct contempts;⁴⁶ and some of the authoritative text-writers seem to have supposed that this is the law.⁴⁷ But it has been pointed out by a learned judge in New Jersey, in by far the ablest discussion of this branch of the subject which has appeared in any American book of reports, that these assumptions are entirely destitute of the force of authority, and may be explained, for the most part, by the indefinite use of the word "commit," not discriminating between its use in the sense of committing in default of sureties of the peace or of bail, to answer before a criminal tribunal on an indictment, and the power to commit by way of punishment.⁴⁸ He pointed out that originally the powers of a justice of the peace were ministerial only,⁴⁹ consisting chiefly in preserving the peace, receiving complaints, issuing warrants for the arrest of accused persons, examining witnesses of the informant, and binding over or bailing or committing the accused.⁵⁰ Several American courts, however have conceded to justices of the peace the power to punish contempts of their authority, committed in their immediate presence while in the discharge of their judicial functions, independently of any express grant of such power by statute.⁵¹ This might be held in New England consistently with sound principles, upon an exceptional view there taken of the character of courts held by justices of

⁴³ Post, § 135. *Church v. Pearne*, 75 Conn. 350, 53 Atl. 955. Whether it is in session as a court of original jurisdiction or as a court of inquiry in felony matters. *Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383.

⁴⁴ *Richmond v. Dayton*, 10 Johns. (N. Y.) 393.

⁴⁵ *Fitler v. Probasco*, supra.

⁴⁶ *Rex v. Langley*, 2 Salk. 697, 2 Ld. Raym. 1029.

⁴⁷ 2 Hawk. P. C., book 2, ch. 16, § 3; 2 Hale P. C. 122.

⁴⁸ *Matter of Kerrigan*, 33 N. J. L. 344, 349.

⁴⁹ See, as to this, *Schraeder v. Ehlers*, 31 N. J. L. 146.

⁵⁰ See 3 Bl. Com. 354, note.

⁵¹ *Richmond v. Dayton*, 10 Johns. (N. Y.) 393; *Lining v. Bentham*, 2 Bay (S. C.), 1, 8 (anno 1796); *St. v. Johnson*, 2 Bay (S. C.), 385; *Hill v. Crandall*, 52 Ill. 70, 73; *Re Cooper*, 32 Vt. 253, 257; *St. v. Towle*, 42 N. H. 540.

the peace, that such courts are courts of record; ⁵² or at least, in certain cases, judges of record.⁵³ In New York this power is conferred by statute upon justices of the peace in certain defined cases, and prohibited in all others; ⁵⁴ so that, in that State, a justice of the peace has no power to adjudge a person guilty of contempt, and to punish him therefor, except in the cases prescribed.⁵⁵ In Illinois, the power is limited by statute to the imposition of a fine of \$5, and to imprisonment until the same is paid,⁵⁶ but there can be no imprisonment in the first instance.⁵⁷

§ 132. Power of all Courts to Protect their Proceedings from Interruption.—It must not be supposed from the foregoing that the common law has been so jealous of liberty as to deprive inferior judicatories and deliberative bodies of the power to preserve their deliberations from interruption and disorder, and from making or ordering the arrest of disturbers, for this purpose. Accordingly, under any view taken of the power of a justice of the peace to fine and imprison for contempt, he undoubtedly possesses the power, during the trial of a cause before him, to order the removal of a disorderly by-stander from his court room. Such a power lies at the very foundation of the administration of justice, and his order, in the exercise of it, will justify a sheriff or constable in an action of false imprisonment; and, not being an order of record, may be proved by parol.⁵⁸ So, one of the houses of the legislative assembly of a British colony, while possessing no power to imprison for contempt by way of punishment, nevertheless possesses the inherent power to arrest and remove a disorderly member. This power is necessary for self-preservation. It is warranted by the legal maxim *quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*.⁵⁹ In like manner, a grand jury, while possessing no inherent power to punish contempts of its authority, is held to possess, by necessary implication, the power to order a contuma-

⁵² *Holcomb v. Cornish*, 8 Conn. 375, 380. That this is not the view in New York, see *Brown v. Genung*, 1 Wend. (N. Y.) 115.

⁵³ *Thayer v. Commonwealth*, 12 Metc. (Mass.) 9. Compare *Smith v. Morrison*, 22 Pick. (Mass.) 430.

⁵⁴ Rev. Stat. 1902, § 2870.

⁵⁵ *Rutherford v. Holmes*, 66 N. Y. 368 (affirming 5 Hun (N. Y.), 31);

Mallory v. Benjamin, 9 How. Pr. (N. Y.) 419; *People v. Webster*, 14 How. Pr. (N. Y.) 242, 3 Park. Cr. (N. Y.) 503.

⁵⁶ R. S. Ill. 1909, p. 1402, § 162.

⁵⁷ *Newton v. Locklin*, 77 Ill. 103, 106.

⁵⁸ *St. v. Copp*, 15 N. H. 212.

⁵⁹ *Doyle v. Falconer*, L. R., 1 P. C. 328, 340.

cious witness or a disturber of its deliberations into the custody of its officer, for the purpose of being brought before the court, there to be dealt with as to the court shall seem proper.⁶⁰

§ 133. Of Direct Contempts or Contempts in Facie Curiae.—

Having thus stated by way of premise the general scope of the power which judicial courts possess of punishing contempts and protecting their proceedings from disorderly interruptions, we shall now proceed to speak of those contempts which most usually arise in the conduct of trials. And first of direct contempts, or contempts in the face of the court itself. What will amount to such a contempt will, of course, depend largely upon the personal temperament and the views of decorum of the judge who presides. The following acts have been held to constitute such contempt: Tearing up papers of the opposite counsel; ⁶¹ for a person conducting his own defense on a trial under an indictment for a blasphemous libel to say to the judge: "My Lord, if you have your dungeon ready I will give you the key." ⁶² To say on such a trial, "The deist is infamous because he cannot believe that some traditions handed down among the Jews and Christians are a divine revelation, and not only superior to the several and respective revelations possessed by the Turks, the Brahmins, the Hindoos, and many others, but the only genuine and authentic revelation in existence. Now, it so happens that a deist considers all as a collection of ancient tracts, to contain sentiments, stories and references totally derogatory to the honor of a God, destructive to pure principles of morality, and opposed to the best interests of society;" ⁶³ for the defendant on such trial to say, "All bishops are generally sceptics;" ⁶⁴ to call another person a liar in the presence of the court and in the hearing of its officers; ⁶⁵ to

⁶⁰ *Heard v. Pierce*, 8 Cush. (Mass.) 338.

⁶¹ *Thwing v. Dennie*, Quincy (Mass.), 338.

⁶² For this contempt the defendant was fined £200. *Rex v. Davis*, 4 Barn. & Ald. 329.

⁶³ For these expressions the learned judge fined the defendant £40. *Ibid.*

⁶⁴ This so horrified the learned judge that he imposed an additional £40. It is not supposed that

any American court will follow this infamous precedent. The trial of a person for a blasphemous libel, consisting in the expression of candid opinions upon matters of religious belief, could not take place anywhere in the United States (admitting that anywhere the laws are in such a barbarous state as to admit of such a prosecution), with the slightest prospect of success.

⁶⁵ *U. S. v. Emerson*, 4 Cranch C. C. (U. S.) 188.

protest against the judgment of the court in an insulting manner, though with language not necessarily insulting;⁶⁶ for a party against whom the judge had decided a cause to say to him when about to take his seat on the bench, "I do not speak to any one who acted so corruptly and cowardly as to attack my character when I was absent and so entirely defenseless;"⁶⁷ to perform militia evolutions, with music and firing near the court house while the court is in session;⁶⁸ for a Jew to refuse to be sworn on Saturday;⁶⁹ for one not a Quaker to refuse to be sworn on the grounds of conscientious scruples, the liberty of affirming being at the time confined to Quakers.⁷⁰

§ 134. [Continued.] **Matters which have been held not Contempts in Facie Curiae.**—On the contrary, the following cases have been held not to amount to contempts in the face of the court itself, so as to subject the person or persons guilty of them to immediate fine or commitment: To make an affray at a tavern near the court house, where the judge was stopping, of which the roisters were advised, during a night of the term, the court being then in recess;⁷¹ to serve a party or witness attending court, with a summons, in violation of privilege;⁷² for the clerk of a court to send up an imperfect record to an appellate court—this not being a contempt of the appellate court, though possibly a contempt of the court below;⁷³ to read an affidavit charging the judge with prejudice, on a motion for a

⁶⁶ Wilson's Case, 7 Q. B. 984. Mahoney v. St., 33 Ind. App. 655, 72 N. E. 151.

⁶⁷ Com. v. Dandridge, 2 Va. Cas. 408.

⁶⁸ St. v. Coulter, Wright (Ohio), 421; St. v. Goff, Id. 78.

⁶⁹ Stansbury v. Marks, 2 Dall. (Pa.) 213.

⁷⁰ U. S. v. Coolidge, 2 Dall. (U. S.) 364. Other instances of contempt in the presence of the court are for an intoxicated witness, becoming so voluntarily, to appear on the stand with a bottle containing liquor protruding from his pocket. Sims v. St., 146 Ala. 109, 41 South. 413. And for counsel to assume, contrary to the court's repeated admonition, as to matters not in evi-

dence. Spears v. People, 220 Ill. 72, 77 N. E. 112. And for a witness to refuse persistently to answer questions propounded by the court. St. v. Dalton, 43 Wash. 278, 86 Pac. 590. And for one to attempt to persuade or bribe a witness to testify falsely in a case on trial, where the attempt is in the immediate vicinity of the court. U. S. v. Carroll, 147 Fed. 947. And to assault a judge during a recess of the court for a sentence just imposed. Ex parte McCown, 139 N. C. 95, 51 S. E. 957.

⁷¹ Com. v. Stuart, 2 Va. Cas. 329.

⁷² Blight v. Fisher, Pet. C. C. 41.

⁷³ Moore v. Clerk, 6 Litt. (Ky.) 104.

change of venue; ⁷⁴ for counsel to use hasty expressions under excitement, where no disrespect was intended; ⁷⁵ or a justice to offer a protest to the county court, against their proceedings in making certain appropriations, and to complain of their acting illegally and oppressively; ⁷⁶ for an attorney to post up, with his name signed thereto, at the office of A. B., the judge, a paper reading: "A. B. is a damned base and corrupt man"—the court not being in session, and it not appearing that the language had reference to any official act of the judge.⁷⁷

§ 135. [Continued.] **What Acts are Punishable as Constructive Contempts.**—Many acts intimately connected with the conduct of trials, though not regarded as direct contempts, are punishable as constructive contempts. Within this category falls every species of interference with the process or authority of the court, direct or indirect, committed out of the presence of the court itself, such as removing the subject of the controversy beyond the jurisdiction of the court; ⁷⁸ taking papers from the files of the court and refusing to return them; ⁷⁹ for a juror to separate himself from his associates

⁷⁴ *Ex parte Curtis*, 3 Minn. 274; *Hunt v. St.*, 27 Ohio Cir. Ct. R. 16. Nor for a witness, in a contempt proceeding, to answer in response to a judge's direct question that he had given publicity to a statement heard by him that the court was corrupt. *Davies v. St.*, 73 Ark. 358, 84 S. W. 633.

⁷⁵ *St. Clair v. Piatt*, *Wright* (Ohio), 532. But it is contempt though not so intended and, where what was done was from zeal for his client, to abandon the defense in a criminal trial, after failing, by repeated efforts, to induce the court to rescind its ruling as to the admissibility of certain evidence. *People v. Newburger*, 90 N. Y. S. 740, 98 App. Div. 92.

⁷⁶ *Stokeley v. Com.*, 1 Va. Cas. 330.

⁷⁷ *Neel v. St.*, 9 Ark. 259.

⁷⁸ So held concerning the removal of a slave pending the trial of a suit for his freedom. *Richard v.*

Van Meter, 3 Cranch C. C. (U. S.) 214; *Thornton v. Davis*, 4 Id. 500. To interfere with an appellate court hearing, or deciding upon its jurisdiction to hear, a cause on appeal, as for example participating in the lynching of appellant during the time sentence of death was stayed by order of one of the justices of such court is contempt of such court. *U. S. v. Shipp*, 203 U. S. 563, 51 L. Ed. 319. Constructive contempts may be committed by a corporation and it punished by fine therefor. *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176; *St. v. Cape Fear Lumber Co.*, 72 S. C. 322, 51 S. E. 873. And this is true as well against a municipal, as a private, corporation, or at least so held under New York statute, general in its designation of corporations. *Marsen v. City of Rochester*, 97 N. Y. S. 881, 51 N. E. 873.

⁷⁹ *Baker v. Wilford*, *Kirby* (Conn.), 235.

and mingle with the community at large, or to hold communications with persons other than officers of the court;⁸⁰ holding improper communications with jurors;⁸¹ writing an insulting letter to a grand juror;⁸² spiriting away witnesses;⁸³ procuring an insolvent person to justify as bail;⁸⁴ becoming surety in a bail bond under a fictitious name;⁸⁵ interfering with property *in custodia legis*, as property in the possession of a receiver,⁸⁶ or an assignee in bankruptcy;⁸⁷ or property held under mesne process,⁸⁸ such as a writ of

⁸⁰ *St. v. Helvenston*, R. M. Charl. (Ga.) 48. See also *Milo v. Gardner*, 41 Me. 549; *Perkins v. Ermil*, 2 Kan. 325; *Burrill v. Phillips*, 1 Gall. (U. S.) 360; *Alexander v. Dunn*, 5 Ind. 122, 125; *Graves v. Monet*, 7 Smedes & M. (Miss.) 45; *Oram v. Bishop*, 7 Halst. (N. J. L.) 153.

⁸¹ *St. v. Doty*, 32 N. J. L. 403; *Hurley v. Com.*, 188 Mass. 143, 74 N. E. 677. Where statute authorized contempt for misbehavior in the presence of the court "or so near thereto as to obstruct the administration of justice," this reached, in contempt an attempt to corruptly influence a juror, though such attempt was not in the immediate vicinity of the court house. *McCaully v. U. S.*, 25 App. D. C. 404.

⁸² *Berg's Case*, 16 Abb. Pr. (N. Y.) 266. The contemnor was excused under the circumstances and in view of his official position. Or publish an article abusive of a grand jury during its session. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853.

⁸³ *Haskett v. St.*, 51 Ind. 176, 180. The contemnor was likewise excused under the circumstances in this case. For complainant in bill for injunction to sign a false affidavit, under pressure not amounting to duress, practically nullifying the effect of what had been done in furtherance of his suit, is contempt. *Seastream v. New Jersey Exhibition*

Co. (N. J. Eq.), 61 Atl. 1041 (not reported in state reports).

⁸⁴ *Hall v. Platimer*, 49 How. Pr. (N. Y.) 500, 5 Daly (N. Y.), 534. So as to procuring infant. *Hall v. Lanza*, 89 N. Y. S. 98, 97 App. Div. 49. And for an insolvent to qualify as surety on a replevin bond and thereby enable plaintiff to remove the subject of controversy beyond the control of the court. *In re Goslin*, 180 N. Y. 505, 72 N. E. 1142.

⁸⁵ *Re Fawcett*, 9 Phila. (Pa.) 217.

⁸⁶ *Secor v. Toledo etc. R. R. Co.*, 7 Biss. (U. S.) 513; *King v. Ohio etc. R. R. Co.*, Id. 529; *Gates v. People*, 6 Bradw. (Ill.) 383, 386, per Pillsbury, P. J. Compare *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.), 372; *Bowery Savings Bank v. Richards*, 3 Hun (N. Y.), 336, 6 Thomp. & C. (N. Y.) 59; *Parker v. Browning*, 8 Paige (N. Y.), 388, 390; *Sea Ins. Co. v. Stebbins*, 8 Paige (N. Y.), 565; *Gunning v. Sorg*, 113 Ill. App. 332. This rule does not operate, however, to compel the turning over of assets, or attorning as a tenant to a receiver, where claim is set up of adverse right to determine whether there is an adequate remedy at law. *First Nat. Bank v. Clauss*, 26 Ohio Cr. Ct. R. 107; *American Mortgage Co. v. Sire*, 92 N. Y. S. 1082, 102 App. Div. 396.

⁸⁷ *Gates v. People*, 6 Bradw. (Ill.) 383.

⁸⁸ *People v. Church*, 2 Wend. (N. Y.) 262.

replevin;⁸⁹ but not under final process, such as a writ of *feri facias*.⁹⁰

§ 136. **Contempts by Attorneys of the Court.**—There is no doubt of the power at common law of those superior courts of record which are commonly termed courts of *general jurisdiction*, to disbar, suspend, or otherwise punish attorneys of their bar for contempts.⁹¹ This is nothing more than a branch of that inherent power, which, as already seen, superior courts of record possess, of preserving their dignity and enforcing obedience to their process by summary proceedings for contempt.⁹² Thus, there seems never to have been any question that, where an attorney receives money for his client, upon an employment as an attorney, whether any suit or legal proceedings may have been instituted by him for his client or not, an attachment will lie to compel its payment.⁹³ This power has been exercised in a case where, after a temporary restraining order had been made in a suit in equity to wind up a banking corporation, certain attorneys advised the officers and stockholders to file a petition in bankruptcy for the corporation, with the view of removing its property beyond the jurisdiction of the State court;⁹⁴ where an attorney imposed upon the court by suing out an attachment for a witness before a subpoena had been issued;⁹⁵ or presented a straw bail to the court;⁹⁶

⁸⁹ *Knott v. People*, 83 Ill. 583; *People v. Neill*, 74 Ill. 68. Compare *Horr v. People*, 95 Ill. 169, 172.

⁹⁰ *Gates v. People*, 6 Bradw. (Ill.) 383, 388.

⁹¹ *St. v. Holding*, 1 McCord (S. C.), 379, where many precedents are cited; *Ex parte Biggs*, 64 N. C. 202; *Matter of Moree*, Id. 398; *Re Wolley*, 11 Bush (Ky.), 95; *Watson v. Citizens' Bank*, 5 S. C. 159; *Stevens v. Hill*, 10 Mees. & W. 30; *Butler v. People*, 2 Col. T. 295; *Winkleman v. People*, 50 Ill. 449; *Re Ingersoll*, 9 Phil. (Pa.) 216. The exercise of such a power has been held properly predicated on a statute requiring attorneys to make oath that they will maintain respect due the courts and judicial officers and employ only honorable means in sustaining causes confided to their

care. *In re Collins*, 147 Cal. 8, 81 Pac. 220.

⁹² See *Ex parte Robinson*, 19 Wall. (U. S.) 505.

⁹³ *Wilmerdings v. Fowler*, 14 Abb. Pr. (N. Y.) (N. s.) 249 (N. Y. Ct. of App.); *People v. Wilson*, 5 Johns. (N. Y.) 368; *Ex parte Staats*, 4 Cow. (N. Y.) 76; *Matter of Dakin*, 4 Hill (N. Y.), 42; *Matter of Steinert*, 24 Hun (N. Y.), 246; *People v. Nichols*, 36 Colo. 42, 84 Pac. 67. But a court can only acquire jurisdiction of a matter of this nature through a rule or attachment to show cause. *People v. Feenaughty*, 101 N. Y. S. 700, 51 Misc. Rep. 568.

⁹⁴ *Watson v. Citizens' Savings Bank*, 5 S. C. 159.

⁹⁵ *Butler v. People*, 2 Col. T. 295. See also *Brown v. Kellar*, 40 Ill. 81.

⁹⁶ *Re Ingersoll*, 9 Phil. (Pa.) 216.

or charged the judge with prejudice, in a motion for a new trial;⁹⁷ or where an attorney presented to the court scandalous matter reflecting on an opinion of the court, in a petition for a rehearing;⁹⁸ or attempted to suborn a witness;⁹⁹ or used sneering, insulting and disrespectful language in a written communication to the judge respecting his ruling upon a matter still pending;¹ or procured money for his client by practicing fraud upon the court;² or, being the editor of a newspaper, published therein a libel upon the judges of the court;³ or brought an action in the name of another without his privity or consent;⁴ or commenced a suit against a lunatic or habitual drunkard without permission, after notice of the inquisition declaring his incompetency;⁵ or brought a fictitious case for the purpose of obtaining the opinion of the court on the matters presented by it;⁶ or appeared for a defendant and confessed judgment without authority.⁷ On the contrary, it has been held not a contempt for an attorney to advise his client, who was indicted for assault and battery, and bound by a recognizance to answer the charge, that if he could not procure a continuance on affidavit, he could escape and forfeit his recognizance, which would work a continuance, for a trifling expense.⁸

§ 137. [Continued.] Punishment—Disbarment, Suspension.—

The subject of disciplinary action against attorneys is, to a considerable extent, regulated by statute, and it has been generally held that, where it has been made the subject of statutory regulation, a court cannot proceed to disbar or suspend an attorney by the ordinary process of contempt, under its common-law powers, but that the proceedings must be in conformity with the statute;⁹ that unquestionably, unless the statute contains a positive negation of this power

⁹⁷ *Harrison v. St.*, 35 Ark. 458. Contra, where the motion is for a change of venue. *Ex parte Curtis*, 3 Minn. 274. As to the limit of the privilege of an attorney in criticizing the rulings of the court, see *Matter of Pryor*, 18 Kan. 72; *Re Wolley*, 11 Bush (Ky.), 95.

⁹⁸ *Re Wolley*, 11 Bush (Ky.), 95. The punishment here was a fine. In *re Chartz*, 29 Nev. 110, 85 Pac. 352.

⁹⁹ *St. v. Holding*, 1 McCord (S. C.), 379.

¹ *Matter of Pryor*, 18 Kan. 72.

² *Wilmerdings v. Fowler*, 14 Abb. Pr. (N. Y.) (N. s.) 249.

³ *Ex parte Biggs*, 64 N. C. 202.

⁴ *Butterworth v. Stagg*, 2 Johns. (N. Y.) Cas. 291.

⁵ *L'Amoureux v. Crosby*, 2 Paige (N. Y.), 422.

⁶ *Smith v. Brown*, 3 Tex. 360.

⁷ *Denton v. Noyes*, 6 Johns. (N. Y.) 296.

⁸ *Ingle v. St.*, 8 Blackf. (Ind.) 574.

⁹ *St. v. Start*, 7 Iowa, 499; *Ex parte Smith*, 28 Ind. 47.

the court may proceed summarily, in virtue of its common-law powers, to fine and imprison an attorney, just as it may so proceed against any other contemnor.¹⁰ A fine so levied upon an attorney may be either enforced by execution, or by a *capias pro fine*;¹¹ or the attorney may be suspended from practice until he purge his contempt by paying the fine which has been assessed against him.¹² Such an order of suspension imposed by a court in virtue of its common-law powers, affects only the *status* of the attorney in that particular court; it will not prevent his being enrolled as a counselor in another, even a higher court, of the same sovereign;¹³ and it will cease with the abolition of the court by which he is thus disbarred.¹⁴

§ 138. **Procedure in Cases of Contempt in Facie Curiae.**—In cases of contempt, as in other cases, the one object of process is to bring the accused person into court;¹⁵ and the only object of an affidavit in such a case is to inform the court that a contempt has been committed.¹⁶ When, therefore, the contempt is committed in the face of the court itself, no affidavit,¹⁷ order to show cause,¹⁸ attachment,¹⁹ or interrogatories,²⁰ are necessary; but the court takes judi-

¹⁰ *Ex parte Smith*, *supra*. Statute regulating procedure as to disbarment etc. prevents any such punishment for direct contempt as well as other contempt, unless there is procedure according to the statute, and the court's common law powers would not extend to suspension or disbarment. *People v. Kavanaugh*, 220 Ill. 49, 77 N. E. 107.

¹¹ *Re Wolley*, 11 Bush (Ky.), 95.

¹² *Butler v. People*, 2 Col. T. 295, 297.

¹³ *Ex parte Tillinghast*, 4 Pet. (U. S.) 108, where an attorney who had been stricken from the roll of attorneys of the United States District Court for the Northern District of New York was, nevertheless, enrolled in the Supreme Court of the United States, Chief Justice Marshall saying: "The court finds that he comes within the rules established by this court. The circumstances of his having been stricken off the roll of counsel of

the District Court of the United States for the Northern District of New York, by the order of the judge of the court, for contempt, is one which the court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but this court does not consider itself authorized to punish him for a contempt which may have been committed in that court." As to disbarment of attorneys in United States courts, see *Ex parte Garland*, 4 Wall. (U. S.) 378; *Ex parte Robinson*, 19 Id. 505.

¹⁴ *Re Hirst*, 9 Phil. (Pa.) 216, 218.

¹⁵ *Com. v. Dandridge*, 2 Va. Cas. 408.

¹⁶ *Matter of Smethurst*, 2 Sandf. (N. Y.) 724; *Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677.

¹⁷ *Matter of Smethurst*, *supra*; *People v. Kelly*, *supra*.

¹⁸ *Matter of Smethurst*, *supra*.

¹⁹ *U. S. v. Green*, 3 Mason (U. S.), 482; *Commonwealth v. Dandridge*,

cial notice of the contempt,²¹ and proceeds immediately, without formality, to pass sentence upon the offender.²² The court may, however, in its discretion, require the contemnor to *answer interrogatories*; ²³ and, while the offending party may be ordered into custody although no warrant or written order is made out,²⁴ yet some record of the offense and the order for its punishment should be immediately made,²⁵ and in this record the matter of the contempt should be stated.²⁶ When, therefore, a witness refused to answer certain questions before a grand jury, and his refusal was reported to the court in the presence of the witness, who will not deny, but justified the same, and reiterated his refusal, it was held that this was a contempt in the immediate face and presence of the court, and that no affidavit or further evidence of it was necessary to a commitment.²⁷

§ 139. [Continued.] Procedure in Cases of Indirect or Constructive Contempts.—The subject of procedure in cases of indirect or constructive contempts, that is, contempts committed out of the immediate presence of the court while conducting its proceedings and not so near thereto as to interrupt such proceedings, is an extensive one, and would of itself form a long chapter. It is not so intimately connected with the conduct of a trial as to require treatment here. It has been carefully treated by the present writer in an article in the *Criminal Law Magazine*,²⁸ and also by Mr. Rapalje in his work on contempts.

2 Va. Cas. 408; *St. v. Mathews*, 37 N. H. 450, 453.

²⁰ *Matter of Percy*, 2 Daly (N. Y.), 530. Compare *Pitt v. Davidson*, 37 Barb. (N. Y.) 97; *People v. Nevins*, 1 Hill (N. Y.), 154; *Commonwealth v. Dandridge*, 2 Va. Cas. 408.

²¹ *People v. Kelly*, 24 N. Y. 75; *Gordon v. St.*, 73 Neb. 221, 102 N. W. 458.

²² 4 Bl. Com. 286; 1 Tidd Pr. 479; 2 Bac. Abr. (Bouv. ed.) 633; *Easton v. St.*, 39 Ala. 552; *Commonwealth v. Dandridge*, 2 Va. Cas. 408; *St. v. Mathews*, 37 N. H. 450, 453; *St. v. Copp*, 15 N. H. 212; *Middlebrook v. St.*, 43 Conn. 257; *People v. Kelley*, 24 N. Y. 75; *Ex parte Wright*, 65 Ind. 504. Compare *Holcomb v.*

Cornish, 8 Conn. 375; *Mahoney v. St.*, 33 Ind. App. 655, 72 N. E. 151. In Iowa the statute requires, that where the judge acts upon his own knowledge, he must cause a statement of the facts constituting the contempt to be entered of record, and it has been held that unless this is done the judgment is a nullity. *St. v. District Court*, 124 Iowa, 187, 99 N. W. 712.

²³ *U. S. v. Green*, 3 Mason (U. S.), 482.

²⁴ *St. v. Mathews*, 37 N. H. 450, 453.

²⁵ *Ibid.*

²⁶ *Ex parte Wright*, 65 Ind. 504.

²⁷ *People v. Kelley*, 24 N. Y. 75.

²⁸ 5 *Crim. L. Mag.* 483, 521.

§ 140. Remedies of the Person Committed for Contempt.—The rule of the common law, above stated,²⁹ that every superior court of record is the exclusive judge of contempts committed against its dignity and authority, has necessarily its counterpart in another rule of the common law, which is, that the judgment of every superior court of record (and this principle includes the legislative bodies of sovereign States), in a proceeding for contempt is final, and not subject to review by any superior authority by writ of error,³⁰ appeal,³¹ *certiorari*,³² or otherwise; nor subject to be relieved against in

²⁹ Ante, § 125.

³⁰ Rex v. Dean and Chapter, 1 Str. 536, 8 Mod. 27, per Fortescue, J.; Groenwelt v. Burwell, 1 Salk. 144, 1 Ld. Raym. 454, per Lord Hale, C. J.; Tyler v. Hammersley, 44 Conn. 393, 409; St. v. Tipton, 1 Blackf. (Ind.) 166; Lockwood v. St., 1 Ind. 161; Watson v. Williams, 36 Miss. 331; St. v. Galloway, 5 Coldw. (Tenn.) 326, 331; Shattuck v. St., 51 Miss. 50; Phillips v. Welch, 11 Nev. 187; Ex parte Kearney, 7 Wheat. (U. S.) 38; New Orleans v. Steamship Co., 20 Wall. (U. S.) 387; Hayes v. Fischer, 102 U. S. 121; Butler v. People, 2 Col. T. 295; Ex parte Bradley, 7 Wall. (U. S.) 376; Ex parte Robinson, 19 Wall. (U. S.) 505; Hagan v. Alston, 9 Ala. 627; Ex parte Martin, 5 Yerg. (Tenn.) 456; Re Cooper, 32 Vt. 253; Ex parte Summers, 5 Ired. (N. C.) 149; Cossart v. St., 14 Ark. 538; Bunch v. St., Id. 544. Compare Neel v. St., 9 Ark. 259.

³¹ Ex parte Summers, 5 Ired. (N. C.) 149; St. v. Woodfin, Id. 199; St. v. Tipton, 1 Blackf. (Ind.) 166; Lockwood v. St., 1 Ind. 161; Watson v. Williams, 36 Miss. 381; St. v. Galloway, 5 Coldw. (Tenn.) 326, 331; Shattuck v. St., 51 Miss. 50; Phillips v. Welch, 11 Nev. 187; Ex parte Kearney, 7 Wheat. (U. S.) 38; New Orleans v. Steamship Co., 20 Wall. (U. S.) 387; Hayes v. Fischer, 102 U. S. 121; First Congregational

Church v. Muscatine, 2 Iowa, 69; Ex parte Martin, 5 Yerg. (Tenn.) 456; Floyd v. St., 7 Tex. 215; Casey v. St., 25 Tex. 380, 385; Crow v. St., 14 Tex. 12, 14; St. v. Giles, 10 Wis. 101; Kernodle v. Cason, 25 Ind. 362; Larrabee v. Selby, 52 Cal. 506, 508; St. v. Mott, 4 Jones L. (N. C.) 449; St. v. Thurmond, 37 Tex. 340; Vilas v. Burton, 27 Vt. 56; McMicken v. Perin, 20 How. (U. S.) 133; Easton v. St., 39 Ala. 551; Wyatt v. Magee, 3 Ala. 94, 97; Cossart v. St., 14 Ark. 538; Bunch v. St., Id. 544; St. v. Towle, 42 N. H. 540, 546; Clark v. People, Breese (Ill.), 266; Ex parte Brown, 3 Ariz. 411, 77 Pac. 489; Sessions v. Gould, 63 Fed. 100, 11 C. C. A. 546; Cooper v. People, 13 Colo. 337, 22 Pac. 790, 6 L. R. A. 430. Contra, Meyers v. St., 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638. Statutes allowing appeals in all criminal cases have no reference to procedure in contempt. St. v. Peralta, 115 La. 530, 39 South. 550. In Missouri it is held that statute providing for appeals in civil cases does embrace appeal from judgment in contempt for violation of injunction, whatever might be held as to direct contempt and the power of inflicting summary punishment therefor. St. etc. v. Bland, 189 Mo. 197, 88 S. W. 128. See also In re Deaton, 105 N. C. 59; Brooks v. Fleming, 65 Tenn. (6 Baxt.) 331.

³² St. v. Tipton, 1 Blackf. (Ind.)

any manner, unless such judgment is absolutely void for want of jurisdiction, in which case relief is usually had by *habeas corpus*, as hereafter stated. In some American jurisdictions, however, under the operation of constitutional or statutory provisions, and perhaps in one or two cases, of judicial decisions, contrary to the general course of authority, writs of error,³³ lie in such cases; and in cases where the proceeding is in the nature of *execution* of judgments. orders or decrees in civil cases, such as orders upon trustees or executors to pay over money, the rule is varied in some jurisdictions by local statutes, perhaps by judicial decisions,³⁴ so that an appeal lies.³⁵ In some jurisdictions the *certiorari* is also used by the highest appellate court, in virtue of a superintending jurisdiction, to bring up such judgments for re-examination.³⁶ In most of these

166; *Lockwood v. St.*, 1 Ind. 161. The writ of *certiorari* is used to bring up contempt proceedings in several States; but the inquiry extends no further than the jurisdiction of the court below.

³³ *Matter of Pryor*, 18 Kan. 72; *Haines v. People*, 97 Ill. 161; *Baltimore etc. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40, 57; *Stuart v. People*, Breese (Ill.), 395; *Stokeley v. Commonwealth*, 1 Va. Cas. 330; *Ingle v. St.*, 8 Blackf. (Ind.) 574 (in case of an attorney fined for contempt). In California it has been held that no review is possible except upon the question of jurisdiction. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853. In North Dakota, under statute, there is given the right of appeal by an attorney for contempt in trial of a case, and by his client as for irregularity or abuse of discretion preventing a fair trial. *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085. Where the contempt proceeding is solely to vindicate the authority of the court, there can be no appeal. *St. v. Willis*, 61 Minn. 120, 63 N. W. 169.

³⁴ See the subject considered more at large in an article by the present writer. 5 *Crim. L. Mag.* 648, et seq.

³⁵ *Romeyn v. Caplis*, 17 Mich. 449; *McCredie v. Senior*, 4 Paige (N. Y.), 378; *Spaulding v. People*, 10 Id. 284, on appeal, 7 Hill (N. Y.), 302, and 4 How. Pr. (N. Y.) 21; *People v. Sturtevant*, 9 N. Y. 263; *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490; *Shannon v. St.*, 18 Wis. 604; *People v. Healey*, 48 Barb. (N. Y.) 564; *Forbes v. Willard*, 37 How. Pr. (N. Y.) 193; *Ludlow v. Knox*, 7 Abb. Pr. (N. Y.) (N. s.) 411 (N. Y. Court of Appeals, 1869); *Brinkley v. Brinkley*, 47 N. Y. 40; *Haines v. Haines*, 35 Mich. 138; *Matter of Daves*, 81 N. C. 72; *Re Pierce*, 44 Wis. 411, 422; *Watrous v. Kearney*, 79 N. Y. 496; *Witter v. Lyon*, 34 Wis. 564; *Hundhausen v. Ins. Co.*, 5 Heisk. (Tenn.) 702; *Crites v. St.*, 74 Neb. 687, 105 N. W. 469. If fine is imposed and is directed to be paid over to adversary party for his damage suffered, appeal is allowable. *Warden v. Seals*, 121 U. S. 14, 30 L. Ed. 853. *Semble*, *Lister v. People*, 150 Ill. 408, 23 N. E. 387, 41 Am. St. Rep. 375; *Snow v. Snow*, 13 Utah, 15, 43 Pac. 620.

³⁶ *Pennsylvania: Hummel's Case*, 9 Watts, 416; *Com. v. Newton*, 1 Grant Cas. 458. *Louisiana: St. v. The Judges*, 32 La. Ann. 549; *St.*

jurisdictions the writ of *certiorari* is limited to the office which it performed at common law, that is, it reaches only proceedings which are absolutely void for want of jurisdiction,³⁷ and in such cases the judgment of the superintending court in general is that the conviction be *quashed*. In others, it has substantially the scope of a writ of error;³⁸ and in still others it performs the office of an appeal and secures a re-examination of the merits.³⁹

§ 141. **Remedy by Habeas Corpus in Case of a Want of Jurisdiction.**—An order committing a person for such a contempt is in the nature of a *judgment*. The person so committed is committed in execution,⁴⁰ and if the court have jurisdiction so to commit him, and if the contempt be plainly charged in the warrant of commitment, he will no more be relieved on *habeas corpus* than he would be if he were committed in execution of a judgment founded upon a verdict in an ordinary criminal prosecution.⁴¹ It will appear from

v. The Judges, 32 La. Ann. 1256. *Arkansas: Harrison v. St.*, 35 Ark. 458. *Iowa: Ann. Code 1897*, § 4468; *St. v. Meyers*, 44 Iowa, 580; *Dunham v. St.*, 6 Iowa, 245. *California: People v. Turner*, 1 Cal. 152, 156; *Ex parte Field*, Id. 187. *New York: People v. Donohue*, 59 How. Pr. (N. Y.) 417; *People v. Kelly*, 24 N. Y. 74. *North Carolina: Ex parte Biggs*, 64 N. C. 202; *St. v. District Court*, 33 Mont. 138, 82 Pac. 789; *Rogers v. Superior Court*, 145 Cal. 88, 78 Pac. 344; *St. v. District Court*, 13 Mont. 347, 34 Pac. 39.

³⁷ *Louisiana: St. v. Judges*, 32 La. Ann. 1256. *California: People v. Dwinelle*, 29 Cal. 632. *Nevada: Maxwell v. Rives*, 11 Nev. 213. *Utah: Young v. Cannon*, 2 Utah, 560, 593; *Hutton v. Superior Court*, 147 Cal. 156, 81 Pac. 509; *St. v. Civil District Court*, 45 La. Ann. 1250, 14 South. 310, 40 Am. St. Rep. 282.

³⁸ *North Carolina: Ex parte Biggs*, 64 N. C. 202. *Pennsylvania: Com. v. Newton*, 1 Grant Cas. 453. *New York: People v. Kelly*, 24 N. Y. 74. *Arkansas: Harrison v. St.*, 35 Ark. 458, 461.

³⁹ *Iowa: Code 1897*, § 4160; *St. v. Meyers*, 44 Iowa, 580, 584. The question of the right of review by any other court is affected, more or less, by the different views of courts in the classification of contempts. Thus it seems ordinarily held that in civil contempt, taken to be the violation of any order, judgment or process made or issued for the benefit of a party, the offending of the dignity of the court is considered as incidental, and, punishment being to enforce the right of such party, appeal will lie. *Com. v. Perkins*, 124 Pa. 36, 16 Atl. 525; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961. In some courts, it has been held, that, though the order or process is for the benefit of a party, the punishment for disobedience thereof is primarily for the vindication of law, and the enurement of advantage to the party is secondary. *St. v. Knights*, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809.

⁴⁰ De Grey, C. J., in Crosby's Case, 3 Wils. 188.

⁴¹ *British: Paty v. The Queen*, 2 Ld. Raym. 1105; *Stockdale v. Han-*

the general current of the decisions which declare this rule, that the inquiry upon *habeas corpus* is ordinarily limited to the question whether the court which made the order of commitment had jurisdiction in the premises.⁴² If jurisdiction appear, the rule expressed in a former section,⁴³ that every superior court of record and every legislative body of a sovereign State is the exclusive judge of contempts committed in its presence or against its process or authority, forbids all interference on the part of other tribunals by means of the writ of *habeas corpus*, or otherwise, except in plain cases of ex-

sard, 9 Ad. & E. 1, 4 Jur. 70; sub nom. Reg. v. Gossett, 3 Per. & D. 349; sub nom. Reg. v. Evans, 8 Dowl. P. C. 451; sub mon. Re Sheriff of Middlesex, 11 Ad. & E. 273; Re Wilson, 7 Q. B. 984, 9 Jur. 393; 14 L. J. Q. B. 105; Re Cobbett, 17 Q. B. 187; Re Andrews, 14 C. B. 226; Bethel's Case, 1 Salk. 533. *United States*: Ex parte Kearney, 7 Wheat. (U. S.) 345. *Alabama*: Gates v. McDaniel, 4 Stew. & P. (Ala.) 69; Ex parte Stickney, 40 Ala. 167. *California*: Matter of Cohen, 5 Cal. 494; Ex parte Perkins, 18 Cal. 60 [Contra, Ex parte Rowe, 7 Cal. 181, 7 Cal. 177; per Burnett, J.]; People, ex rel. County Judge, 27 Cal. 151; Ex parte McCullough, 35 Cal. 97; Ex parte Smith, 53 Cal. 204; Ex parte Cohn, 55 Cal. 193. *Iowa*: Robb v. McDonald, 22 Iowa, 330. *Louisiana*: State, ex rel., v. Fagin, 28 La. Ann. 887. *Massachusetts*: Burnham v. Morrissey, 14 Gray (Mass.), 226, 240. *Michigan*: Matter of Bissell, 40 Mich. 63. *Mississippi*: Ex parte Adams, 25 Miss. 883; Shattuck v. St., 51 Miss. 50; Ex parte Wimberly, 57 Miss. 437. *Missouri*: Ex parte Goodin, 67 Mo. 637. *Nevada*: Ex parte Winston, 7 Nev. 71; Phillips v. Welch, 12 Nev. 171. *New Hampshire*: St. v. Towle, 42 N. H. 540. *New York*: People, ex rel., v. Jacobs, 66 N. Y. 8; Kearney's Case, 13 Abb. Pr. (N. Y.) 459; Davison's Case, 13 Abb. Pr. (N. Y.) 129;

Kahn's Case, 11 Abb. Pr. (N. Y.) 147, 19 How. Pr. (N. Y.) 475; People v. Cassel, 5 Hill (N. Y.), 164; People, ex rel., v. Sheriff, 7 Abb. Pr. (N. Y.) 96; Matter of Percy, 2 Daly (N. Y.), 530; Pitt v. Davidson, 37 Barb. (N. Y.) 97; People v. Fancher, 2 Hun (N. Y.), 226; Ex parte Devlin, 5 Abb. Pr. (N. Y.) 287; Matter of Smethurst, 2 Sandf. (N. Y.) 724; Myers v. James, 3 Abb. Pr. (N. Y.) 301; Matter of Hackney, 21 How. Pr. (N. Y.) 54, in Ct. of App., 24 N. Y. 74. *Pennsylvania*: Williamson's Case, 26 Pa. St. 9, 27 Pa. St. 18; Lessee of Penn. v. Messenger, 1 Yeates (Pa.), 2; Ex parte Nugent, 4 Clark (Pa. L. J.), 106. *South Carolina*: Re Stokes, 5 S. C. 71; Gilliam v. McJunkin, 2 S. C. 442; James v. Smith, 2 S. C. 183. *Tennessee*: St. v. Galloway, 5 Coldw. (Tenn.) 326. *Texas*: Holman v. Mayer, 34 Tex. 668; Jordan v. St., 14 Tex. 436. *Vermont*: Vilas v. Burton, 27 Vt. 61. *Wisconsin*: Re Perry, 30 Wis. 268; Ex parte Tyler, 149 U. S. 164, 37 L. Ed. 689; Ex parte Clark, 110 Cal. 405, 42 Pac. 905; Ex parte Keeler, 45 S. C. 337, 23 S. E. 867.

⁴² See Ex parte Adams, 25 Miss. 883; Elliott v. U. S., 23 App. D. C. 456; St. v. Scarborough, 70 S. C. 288, 49 S. E. 860; Ex pa Tyler, 149 U. S. 164, 37 L. Ed. 689; Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266.

cess of jurisdiction.⁴⁴ Great difficulty attends the application of this rule, and this difficulty is not sufficiently discussed and explained in the judgment of the courts.

§ 142. [Continued.] **Power of one Court to judge of the Jurisdiction of another Court.**—The question concerns the power of one court to judge of the jurisdiction of another court. This power will be freely exercised where the court which issues the *habeas corpus* is a court having appellate or superintending jurisdiction over the court which made the commitment; and this consideration will explain the fact that many such courts, while professing to limit their inquiry to the jurisdiction of the inferior court, push such inquiry much further than one court would go in inquiring concerning the jurisdiction of a co-ordinate court. Where the commitment is made by a court superior in rank or dignity to, or having appellate or superintending jurisdiction over, the court which issues the *habeas corpus*, it would be highly indecent for the inferior court to assume the right to judge of the jurisdiction of the superior court; and yet the doctrine of many of the courts, broadly stated and applied, would lead to this result. Thus, it is said in Missouri that the Supreme Court has no more power in the use of the writ of *habeas corpus* than any other court—even the county court, which has power to issue the writ—has.⁴⁵

§ 143. [Continued.] **Power to Rejudge the Question of Jurisdiction, but not the Judgment.**—Concerning this power of one court to judge of the jurisdiction of another court, if we take the English and American decisions together we shall be able to extract from them no uniform rule. The English courts of judicature, in proceedings by *habeas corpus*, and in actions for malicious prosecutions, have generally agreed, in respect of commitments made by authority of the houses of Parliament, that the judicial courts have no power to judge of the jurisdiction of Parliament; or, to use the expression in which the judicial courts couch this rule, they have

⁴³ Ante, § 125; 5 Crim. L. Mag. 151.

⁴⁴ Ex parte Hardy, 13 Cent. L. J. 50 (Supreme Court of Ala. 1881); Re Cooper, 32 Vt. 253; People v. Sturtevant, 9 N. Y. 263; Ex parte Adams, supra; Ex parte Sam, 51 Ala. 34; Ex parte Buskirk, 72 Fed.

14, 18 C. C. A. 410. It has been designated contempt even to apply to another court for similar writ after relief by *habeas corpus* has been refused. Terry v. St., 77 Neb. 612, 110 N. W. 733.

⁴⁵ See Ex parte Jilz, 64 Mo. 205, 216, per Henry, J.

no consueance of the *lex parliamenti*, and no power to judge of the *privileges* of either house of Parliament.⁴⁶ It may also be said with confidence that the English courts, in dealing by *habeas corpus* with commitments for contempts by other courts of co-ordinate dignity, have generally refused to judge of the jurisdiction of such other courts. To this extent they have pushed the doctrine that each superior court of record is the exclusive judge of its own contempts. This limitation upon the use of the writ of *habeas corpus* has been expressed by some of the most authoritative American courts.⁴⁷ In a case which was greatly agitated in the State of New York, where a judge of the Supreme Court of that State, in vacation, on *habeas corpus*, had discharged a prisoner committed by the chancellor on a conviction for a contempt, and such person was again arrested and committed for the same cause, the second commitment was held legal. It was held that a person who had been regularly committed by the chancellor for a contempt, and who afterwards had been improperly set at large, might be recommitted by an order of the court reciting the original writ of attachment.⁴⁸

⁴⁶ 5 Crim. L. Mag. 152, 153.

⁴⁷ See *Ex parte Kearney*, 7 Wheat. (U. S.) 345; *Williamson's Case*, 27 Pa. St. 18.

⁴⁸ *Yates v. Lansing*, 9 Johns. (N. Y.) 395 (overruling *Yates v. People*, 6 Johns. (N. Y.) 337; re-affirming *Ex parte Yates*, 4 Johns. (N. Y.) 317). In the case of *Ex parte Jilz*, 64 Mo. 205, the Supreme Court of Missouri, overlooking the fact that *Yates v. People*, 6 Johns. (N. Y.) 337, had been overruled, following the supposed authority of that case, laid down the doctrine that where a person, although held in execution under the judgment of a court having jurisdiction of the subject-matter of the crime for which he had been tried, is discharged on *habeas corpus* by another court or judicial officer having power to issue the writ, such discharge conclusively entitles the prisoner to his liberty, and he cannot thereafter be recommitted upon the same judgment, nor

can the propriety of the discharge on *habeas corpus* be reviewed by another judicial tribunal. This absurd and anarchical decision, which vested even in the county courts of Missouri the power of opening the penitentiary of the State and discharging therefrom men who were held in execution of judgments which had been affirmed by the Supreme Court of the State, called forth an act of the legislature, providing that whenever, on *habeas corpus*, it should appear that the prisoner was held in execution under a sentence for a crime, which sentence was erroneous as to time or place of imprisonment, the court hearing the *habeas corpus* should correct the sentence. R. S. Mo. 1909, §§ 2472, 2474. This act of the legislature was as nonsensical as the decision which produced it. It gives to courts of any grade above justices of the peace the power on *habeas corpus* to revise and correct the

The sound rule was thus expressed in a case in the former Supreme Court of New York: "If there has been error the remedy is by *certiorari* or writ of error. When the return states the imprisonment to be by virtue of legal process, the officer may inquire whether, in truth, there be any process, and whether it appears upon its face to be valid, and he may also inquire whether any cause has arisen since the execution for putting an end to the imprisonment—as a pardon, reversal of the judgment, payment of the fine, and the like. But he cannot rejudge the judgment of the committing court or magistrate."⁴⁹

§ 144. [Continued.] Statutory Expressions in Various States.—

In conformity with this rule, it is in several States provided by statute that a prisoner shall not be discharged on *habeas corpus* where he is held in custody for any contempts specially or plainly charged in the commitment, by some court or body politic having authority to commit for a contempt so charged.⁵⁰ In some of the States the statutory expression is somewhat different, thus: That the legality or justice of any order, judgment, decree or process of any court legally constituted, or the justice or property of any commitment for contempt made by a court, officer or body according to law, and charged in such commitment, will not be inquired into.⁵¹ In Massachusetts and Maine it is also provided that the Supreme Judicial Court shall have no authority to issue a writ of *habeas corpus* for the purpose of taking bail of any person committed for causes mentioned in the constitution by the governor and council, Senate or House of Representatives.⁵² In Minnesota, "persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree," are not en-

judgments or sentences of courts of co-ordinate or even superior jurisdiction.

⁴⁹ *People v. Cassels*, 5 Hill (N. Y.), 164, 167.

⁵⁰ Gen. Stats. Kan. 1909, § 6295; Burns' Anno. Stats. Ind. 1908, § 1176; Minn. Rev. L. 1905, § 4586; R. S. Mo. 1909, § 2475; Comp. L. Nev. 1900, § 3761; Stover's Code N. Y. 1902, § 2032; Pell's Revisal 1908, § 1848; Lord's Ore. Laws 1910, § 641; R. S. Wis. 1898, § 3408. This does not in-

clude an order of commitment as for contempt upon proceedings to enforce the remedy of a party. Gen. States. Kan. 1909, § 6295; Burns' Anno. Stats. Ind. 1908, § 1176.

⁵¹ Code Ala. 1907, § 7032; Gen. Stats. Fla. 1906, § 2252, par. 2; Comp. L. Mich. 1897, § 9881; Lord's Ore. Laws 1910, § 643; Stover's N. Y. Code 1902, § 2034.

⁵² Rev. Laws Mass. 1902, p. 1671, § 25; Rev. Stats. Me. 1903, p. 841, § 33.

titled to prosecute writs of *habeas corpus*; but "no order of commitment for any alleged contempt, or upon proceedings as for contempt to enforce the rights or remedies of any party, shall be deemed a judgment or decree within the meaning of this section; nor shall any attachment, order or process issued upon such order be deemed an execution within the meaning of this section."⁵³ In Vermont, by statute, the writ of *habeas corpus* is made to extend to commitments for contempt.⁵⁴ If it appear on the hearing upon such writ that such disobedience or contempt was committed through ignorance, mistake or misapprehension, or by acting in good faith under the advice of counsel, and that relief may be granted without impairing the rights of the parties concerned, or the due administration of the law, the Supreme Court may discharge such person from such imprisonment or confinement upon such terms as it thinks fit.⁵⁵ Where a party in a proceeding before a justice of the peace assailed the justice's decision with sneers, sarcasm and irony, and was fined for contempt in the sum of \$10, and committed to jail for the non-payment of the fine, the Supreme Court refused to relieve him on *habeas corpus* under this statute.⁵⁶

§ 145. [Continued.] Extension of the Use of this Writ by Appellate Courts.—The general habit of appellate courts of scrutinizing closely the records of inferior courts to discover errors or irregularities, has led them insensibly to pass beyond the bounds which have been set by sound principle to the use of the writ of *habeas corpus*, and, instead of limiting their inquiry to the mere question of general jurisdiction, they have extended it so as to inquire whether the sentence pronounced was legal. They have indeed said again and again that they would not discharge a prisoner for what is termed irregularity of procedure. They need not have said this, because this is the correct rule upon which courts proceed upon writ of error. But they have said that there is a distinction between irregularity and illegality, and that if the sentence was illegal—that is, such a sentence as the court in the *particular case* had no power to pronounce—they would discharge the prisoner on *habeas corpus*.⁵⁷ In other words, they have passed beyond the idea

⁵³ 2 R. L. Minn. 1905, § 4573. Compare Consol. L. N. Y. 1909, p. 2020, § 751.

⁵⁴ Pub. Stats. Vt. 1906, § 1965.

⁵⁵ Id., § 1966.

⁵⁶ Re Cooper, 32 Vt. 258.

⁵⁷ The writer refers to an article in the *Criminal Law Magazine* for a discussion of these distinctions. 4 Crim. L. Mag. 805. Thus where a

of the former school of jurists as to the limits which are set by sound principle to the inquiry into the jurisdiction of other courts. It was enough for the old judges to see that a court had what was termed *general jurisdiction* of the subject matter of the proceeding which resulted in the commitment, as well as jurisdiction of the person of the prisoner;⁵⁸ but the modern idea is that it must not only appear that the court making the commitment had general jurisdiction of the subject matter—that is, general power to commit for contempt, and also jurisdiction over the person of the prisoner—but it must also appear that the court had power to render the particular judgment or to order the particular commitment.⁵⁹ Accordingly, they will inquire whether the contempt charged in the commitment was a contempt in point of law; holding, in the expressive language of Denio, J., that “where the act is necessarily justifiable, it would be preposterous to hold it a cause of imprisonment.”⁶⁰ It is very plain that this view results substantially in converting the writ of *habeas corpus*, when used by appellate or superintending courts, into a writ of error.

§ 146. [Continued.] **Pernicious Consequences of such Extensions.**—It will not escape the attention of the judicious reader that this extension of the original doctrine must bear pernicious fruits, because the appellate courts which make this use of the writ of *habeas corpus* do not profess to use the writ as a means of exercising appellate jurisdiction.⁶¹ They do not profess to exercise a larger jurisdiction in the use of the writ than any other court or judicial officer, even the lowest, which is clothed by law with power to issue it, might exercise; and it will result from this that if, in a given case, the Court of Appeals of New York can say that an act charged in a commitment as a contempt of court is rightful and innocent, and that the commitment is accordingly preposterous, any justice of the Supreme Court of New York, revising a commitment of any

sentence amounts to perpetual imprisonment. Appeal of Scarborough, 139 N. C. 1423, 51 S. E. 931. And if it appears that the facts could not, as matter of law, constitute contempt the prisoner will be discharged. In re Shortridge, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755. But the correctness of conclusions of matters of

fact will not be reviewed. Ex parte Senior, 37 Fla. 1, 19 South. 652.

⁵⁸ Ex parte Watkins, 3 Pet. (U. S.) 193, 203.

⁵⁹ See this subject discussed in 5 Crim. L. Mag. 162.

⁶⁰ People v. Kelley, 24 N. Y. 74, 77.

⁶¹ The Supreme Court of the United States is an exception to this statement. 18 Fed. 69.

other court for contempt, can say the same thing; that a county court in Missouri, composed of men unlearned in the law, can say it; and that the writ of *habeas corpus*, instead of being a writ of liberty, becomes a writ of *anarchy*.

§ 147. **Injunction, Prohibition, Mandamus.**—It is scarcely necessary to suggest that the execution of a judgment imposed for a contempt will not be enjoined in equity;⁶² for, although courts of equity constantly, by orders *in personam*, exercise the jurisdiction of restraining the execution of judgments at law, yet they do this on the ground that, but for the existence of such a jurisdiction parties would frequently find themselves remediless; and this jurisdiction has never, except in one or two rare cases,⁶³ been exercised to restrain criminal proceedings.⁶⁴ The same may be said of the writ of prohibition. This writ, as is well known, is a superintending writ, used by the former Court of King's Bench, and now by the Queen's Bench Division of the High Court of Justice in England, and by certain courts in the United States, upon whom the jurisdiction to use it is specially conferred by constitutional ordinance or by statute, to restrain inferior courts from doing injurious acts in excess of their jurisdiction. Like the writ of *mandamus* it is never issued in a case where the party has any other plain remedy. As the writ of *habeas corpus* in the cases we are considering affords a plain remedy, the writ of prohibition will not ordinarily issue to restrain a court from proceeding against a party for a contempt.⁶⁵ So of the writ of *mandamus*. While this writ has been sometimes awarded to compel inferior tribunals to reinstate attorneys who have been expelled from the bar without notice or an opportunity of being heard,⁶⁶ yet it has been well laid down that it is not an appropriate remedy for one who has been fined or imprisoned for contempt; and opinion is divided upon the question whether it will lie to compel a court to proceed against a party for contempt.⁶⁷

⁶² *Sanders v. Metcalf*, 1 Tenn. Ch. 419, 428, per Cooper, C.

⁶³ *Mayor etc. of York v. PilRington*, 2 Atk. 302; *Turner v. Turner*, 15 Jur. 218.

⁶⁴ See an article on this subject, by the present writer in the *American Law Review* for July-Aug., 1884. 18 Am. L. Rev. 599.

⁶⁵ See *Ex parte Stickney*, 40 Ala. 160, 169.

⁶⁶ *Ex parte Bradly*, 7 Wall. (U. S.) 364.

⁶⁷ *People v. Turner*, 1 Cal. 153, 155. In North Carolina, it has been held that *mandamus* is not the proper proceeding to restore an attorney who has been disbarred by

§ 148. **Action for False Imprisonment.**—A remedy which has been frequently resorted to in cases of unlawful imprisonment for contempt is an action for false imprisonment, either against the ministerial officer executing the process of commitment, or the judicial officer who awarded the process, or both. The grounds which are necessary to support such an action are pretty well understood. An officer can justify under legal process, unless upon its face it is void for want of jurisdiction.⁶⁸ Such an action will not lie against the judge of a superior court of record, although he may have acted without jurisdiction and from express malice, if it appear that the act was done *colore officii*. He is under an absolute privilege in respect of his judicial acts. The rule which clothes him with this immunity is one of public policy, which has always been held to be necessary to preserve the independence of the judiciary.⁶⁹ The same immunity does not extend to courts of inferior jurisdiction, such as justices of the peace and the like. They are liable in such cases whenever they act in excess of their jurisdiction; and in their cases the single inquiry is whether the commitment was within or without the jurisdiction of the judicial officer against whom the action is brought.⁷⁰

§ 149. **Executive Pardon.**—If these remedies fail, the party fined or imprisoned has still a right to resort to the executive for pardon. There is little doubt that an order inflicting punishment for a criminal contempt comes within the scope of the pardoning power of the executive.⁷¹ It has even been held that where the imprisonment is

the superior court for contempt; that the proper proceeding is by certiorari in the nature of a writ of error. *Ex parte Biggs*, 64 N. C. 202. As to the writ of certiorari in the nature of a writ of error, under the North Carolina practice, see *Brooks v. Morgan*, 5 Ired. (N. C.) 481; *Raleigh v. Kane*, 2 Jones L. (N. C.) 288. That mandamus will lie, see *Ortman v. Dixon*, 9 Cal. 33; *Kimball v. Morris*, 2 Metc. (Mass.) 573. Contra, *St. ex rel. v. Horner*, 16 Mo. App. 191. Compare *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49.

⁶⁸ *Anderson v. Dunn*, 6 Wheat. (U. S.) 204.

⁶⁹ *Bradley v. Fisher*, 13 Wall. (U.

S.) 335; *Fray v. Blackburn*, 3 Best & S. 576. See *Morrison v. Macdonald*, 21 Me. 550; *Pratt v. Gardner*, 2 Cush. (Mass.) 68; *Cooley on Torts*, 409.

⁷⁰ *Piper v. Pearson*, 2 Gray (Mass.), 120; *Newton v. Locklin*, 77 Ill. 103; *Fitler v. Probasco*, 2 Browne (Pa.), 137. Compare *Beaurain v. Scott*, 3 Camp. 388; *Ackerly v. Parkinson*, 3 Maule & S. 425, 428; *Borden v. Fitch*, 5 Johns. (N. Y.) 121; *Biglow v. Stearnes*, 19 Johns. (N. Y.) 39; *Allen v. Gray*, 11 Conn. 95; *Clark v. May*, 2 Gray (Mass.), 440; *Bushell v. Starling*, 3 Keb. 322.

⁷¹ *Ex parte Hickey*, 4 Sm. & M. (Miss.) 751; *St. v. Sauvinet*, 24 La.

imposed to compel the payment of a fine assessed for the violation of an injunction, and after a length of time it appears that payment of the fine has become impossible, the president has power to pardon the contemnor and release him from imprisonment.⁷²

§ 150. Application to the Judge who has Imposed the Punishment.—Where the contempt is merely a criminal contempt, and no civil right is involved in the punishment of the accused, if all these remedies fail, there still remains one which, though not agreeable to the pride of the contemnor, is seldom ineffective, and that is a submission and an application for forgiveness to the judge of the court whose process has been disobeyed or whose authority or dignity has been offended. Nothing can be more distasteful to a right-minded judge or hurtful to his feelings, than the necessity of being compelled to impose a punishment upon a party for an offense which, though an offense against the State and against the administration of justice, is, nevertheless, in a greater or less degree, a personal affront to himself. Experience shows that in such cases judges are generally eager to grant pardon upon the apology and submission of the offender, and that they very often accompany the remission of the fine or the discharge of the order of imprisonment with complimentary allusions to the person committed.⁷³

Ann. 119; 4 Opp. Atty. Gen. 458, 3 Id. 662. But see *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515. In respect to pardon, it has been held that where such was granted in another State, this did not efface moral turpitude to be considered in proceedings for disbarment of an attorney. *People v. Gilmore*, 214 Ill. 569, 73 N. E. 737. And while the conviction would not in view of such pardon alone suffice for disbarment, yet the pardon did not prevent the conviction being considered in a disbarment proceeding in another state along with the subsequent conduct

of the attorney. *People v. Payson*, 215 Ill. 476, 74 N. E. 383.

⁷² *Re Mullee*, 7 Blatchf. (U. S.) 24. It has been ruled that the president has no right, by pardon, to relieve from imprisonment an official refusing obedience to mandamus to perform an act in the interest of a party. *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622.

⁷³ *St. v. Hunt*, 4 Strobb. (S. C.) L. 322, 340; *Ex parte Biggs*, 64 N. C. 202; *De Witt v. Dennis*, 30 How. Pr. (N. Y.) 131; *People v. Murphy*, 1 Daly (N. Y.), 462.

CHAPTER VI.

OF COMPULSORY PROCESS AGAINST WITNESSES.

SECTION

155. Scope of this Chapter.
156. Power of Court to compel Attendance of Witnesses.
157. Of Subpœnas.
158. Particularity in this Writ.
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184. Power to compel Answer before Grand Jury.
185. Protection of Witness against Arrest and Service of Process.
186. Privilege of Member of Congress.
187. Refusing to be Sworn on the Ground of Conscientious Scruples.

§ 155. **Scope of this Chapter.**—It is not designed to discuss in this chapter the subject of the *privilege* of witnesses except so far

as it arises incidentally;¹ but chiefly to give a sketch of the mode of compelling the *attendance* of witnesses and the *production* of books and papers.

§ 156. **Power of Court to compel Attendance of Witnesses.**—“Every court,” says Dr. Greenleaf, “having power definitely to hear and determine any suit, has, by the common law, inherent power to call for all proofs of the facts in controversy, and, to that end, to summon and compel the attendance of witnesses before it.”²

§ 157. **Of Subpoenas.**—The first process for bringing a witness into court is a subpoena. This is a judicial writ, directed to the witness, commanding him to appear at the court on a day named, there to give evidence and the truth to say in a cause therein pending, wherein A. B. is plaintiff and C. D. is defendant (or otherwise describing the parties), and not depart thence without leave of the court, under a certain penalty therein named.

§ 158. **Particularity in this Writ.**—As this writ is the foundation of any future compulsory process against the witness, particularity is required in its terms. A subpoena issuing in a criminal case out of a court of the United States must command the witness to attend from day to day, and not to depart without leave of the court; otherwise it will not support a proceeding against the witness for contempt, in case he attends on the day named and afterwards departs without leave.³ Where subpoenas for witnesses against whom a contempt is charged, are issued *in blank* as to the names of the parties to the case, such subpoenas are not valid process on which to predicate a rule for contempt, in hiring a person to intimidate such witnesses.⁴

¹ See post, ch. 12.

² 1 Greenl. Ev., § 309. It was ruled in New York that a *surrogate* had no power to issue an attachment to bring in a witness to testify. *Perry v. Mitchell*, 5 Denio (N. Y.), 537. Wherever a municipal judge, justice of the peace or police justice is given jurisdiction over certain offenses, this implies the power to summon and compel witnesses to appear and testify and punish for contempt for

refusal to do either. *St. v. Keyes*, 75 Wis. 288, 44 N. W. 13.

³ *Re Spencer*, 4 McArthur (D. C.), 433. If the witness attends, no objection, to the technical sufficiency of the subpoena can be interposed by a third person, for example, one proceeded against in contempt for attempting to decoy the witness. *Scott v. St.*, 109 Tenn. 390, 71 S. W. 824.

⁴ *Dobbs v. St.*, 55 Ga. 272. The

§ 159. **Right to this Process.**—The granting of this process is matter of right, where it appears that the attendance of the witness cannot otherwise be procured, and the granting or refusing of it is not within the discretion of the judge or clerk.⁵ In criminal cases, by the terms of American constitutions, the accused is entitled to have *compulsory process* for obtaining witnesses in his favor.⁶ The accused may, therefore, demand that his witnesses shall be compelled to enter into a *recognizance* for their appearance at the trial,⁷ and the court may compel a witness in such a case to enter into a recognizance to appear at a future day; but, according to one view, cannot require him to find *sureties* for his appearance.⁸ It is

subpoena must state the name of the case. *People v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, affirming 99 N. Y. S. 114.

⁵ *Edmonson v. St.*, 43 Tex. 230.

⁶ Const. U. S., 6th Amendment; Ind. Const. 1851, art. 1, § 13; Const. Cal. 1879, art. 1, § 13; Const. Colo., art. 2, § 16; Conn. Const. 1818, art. 1, § 9; Const. Ill. 1870, art. 2, § 9; Kans. Const. Bill of Rights, § 10; Md. Const. Bill of Rights, art. 21; Mich. Const., art. 6, § 28; N. Y. Const. 1847, art. 1, § 6; Ohio Const. art. 1, § 10; Tex. Const., art. 1, § 10. See *Buchman v. St.*, 59 Ind. 1; *Bills v. St.*, Id. 15; *Ex parte Marmaduke*, 91 Mo. 228; *St. v. Fairfax*, 107 La. 624, 31 South. 1011. The federal constitution on this subject has no application to cases tried in the State courts. *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228. This constitutional guarantee is not to be impaired by any rule of court, by discretion of the court or by any statutory regulation touching applications for continuance, if accused is not chargeable with lack of diligence, where witnesses are not in attendance. *Rogers v. St.*, 144 Ala. 32, 40 South. 572. Where prosecution consents, that what is stated in an application to be what the absent witness will swear to

shall be taken as true, this as generally held, will avoid a continuance. *St. v. St. Clair*, 6 Idaho, 109, 53 Pac. 1; *St. v. Rogers*, 117 La. 1040, 42 South. 495. Where it is only consented that this may be read as the testimony of the absent witness, the decisions are somewhat conflicting. *St. v. Wiltsey*, 103 Iowa, 54, 72 N. W. 415; *Davis v. Com.*, 25 Ky. Law Rep. 1426, 77 S. W. 1101. If the obtaining of the witnesses is upon application for the prosecution to bear the expense, statutes may prescribe as to time and conditions and the court may judge of the good faith of the applicant, and put a limit upon the number. *Jenkins v. St.*, 31 Fla. 190, 12 South. 680; *St. v. Goddard*, 4 Idaho, 750, 44 Pac. 643. The guaranty has been held not to apply to witnesses merely for corroboration. *St. v. Woodward*, 182 Mo. 391, 81 S. W. 857. And that it does not apply to a preliminary trial. *St. v. Grimes*, 7 Wash. 445, 35 Pac. 361. See, however, *St. v. Crocker*, 5 Wyo. 385, 40 Pac. 681.

⁷ *St. v. Zellers*, 7 N. J. L. 220.

⁸ The refusal of a witness, summoned as such upon an indictment for a felony, to enter into a recognizance to appear as a witness and give evidence upon the trial of such indictment, cannot be regarded as

usual, upon preliminary examinations in criminal cases, where the accused is held to bail or committed, to require the witnesses thus to enter into a recognizance, and, according to early conceptions, to commit them upon their refusal to do so.⁹ But one American court has declared that it is unjust, oppressive and against common right to commit a witness to jail in default of sureties, without some proof of his intent not to appear at the trial. But where such intention appears, the commitment is not prohibited by the fourteenth amendment to the constitution of the United States, nor by the constitution of the State.¹⁰ In another State, by statute, the witness in a criminal case, if unable to procure sureties, may be discharged from commitment and his deposition taken;¹¹ and the power to require undertakings from such witnesses is limited in the same jurisdiction to those who have been examined before a committing magistrate.¹² Moreover, the constitution of that State provides that witnesses shall not be "unreasonably detained;" under which it is held that if a witness is detained for ninety days, after several continuances not satisfactorily explained, he is entitled to be discharged on *habeas corpus*.¹³

§ 160. Of Letters Rogatory.—The etymology of the word *subpœna* implies that it is issued from a tribunal having the power to command and to enforce obedience to its command by the imposition of a penalty. It, therefore, cannot properly issue to a person who, under the law, is *privileged* from arrest in case of his refusal to obey it. In such a case, it is improper to issue such a writ, but it is sometimes the practice to issue, instead of it, what is called a *letter rogatory*. It seems that where the attendance of a member of a *legislative body*, then in session, is desired before a court of judicature, the proper practice is to issue a letter rogatory to the speaker of the body, requesting the attendance of the member named as a witness, and not to issue a *subpœna* in the first instance.¹⁴ Letters

a. contempt, where there is no statute authorizing the court to require such security. *Bickley v. Com.*, 2 J. Marsh. (Ky.) 572, 574.

⁹ 1 Greenl. Ev., § 313; *Bennett v. Watson*, 3 Maul. & S. 1; *Evans v. Rees*, 12 Ad. & El. 55. For ruling on statutes see *In re Petrie*, 1 Kan. App. 184, 40 Pac. 118; *Comfort v. Kittle*, 81 Iowa, 179, 46 N. W. 988.

¹⁰ *St. v. Grace*, 18 Minn. 398.

¹¹ *People v. Lee*, 49 Cal. 37.

¹² *Ex parte Shaw*, 61 Cal. 58.

¹³ *Ex parte Dressler*, 67 Cal. 257.

¹⁴ In a case in 1800, in the Circuit Court of the United States for the District of Pennsylvania, before Mr. Justice Chase, of the Supreme Court of the United States, and Mr. District Judge Peters, the defendant,

rogatory are also issued to foreign judicatories, whose assistance is desired in obtaining the depositions of witnesses residing abroad.¹⁵

§ 161. Of Attachments for Witnesses.—Where a witness has been duly subpoenaed and fails to attend, the usual course is for the court, on the application of the party whose witness he is, to issue an attachment for him, under which he is arrested by the court's officer and brought before the court and there compelled to give his evidence, with or without the imposition of punishment, according to the excuse which he may have to offer.¹⁶ In ordinary cases

being indicted for a libel on the President, applied to the court for a letter to be addressed by them to several members of Congress (Congress being in session), requesting their attendance as witnesses on his behalf. In support of the application, a variety of similar cases arising under the government of Pennsylvania were referred to. Mr. Justice Chase, who appears to have been a person of hasty, arbitrary and unjudicial temperament, is reported to have said: "The constitution gives to every man charged with an offense the benefit of compulsory process to secure the attendance of his witnesses. I do not know of any privilege to exempt members of Congress from the service or obligations of a subpoena. In such cases I will not sign any letter of the kind proposed. If, upon service of a subpoena, the members of Congress do not attend, a different question may arise; and it will then be time enough to decide whether an attachment ought or ought not to issue. It is not a necessary consequence of non-attendance after the service of a subpoena that an attachment shall issue. A satisfactory reason may appear to the court to justify or excuse it." Mr. District Judge Peters, on the contrary, is reported to have said: "I know the practice in Pennsylvania to be as it has been stated; for I have re-

ceived such letters from the Supreme Court while I was speaker of the House of Representatives requesting that members might be permitted to attend as witnesses. In the present case I should have no objection to acquiesce in the defendant's application, with the concurrence of the presiding judge." But, in accordance with the opinion of the presiding judge, the motion was refused. *U. S. v. Cooper*, 4 Dall. (U. S.) 341.

¹⁵ 1 Greenl. Ev., § 320, where the practice is described and a form given; also 1 Rol. Abr. 530, pl. 15. A statutory commission, if sufficient, is preferred to letters rogatory. *Froude v. Froude*, 3 Thomp. & C. (N. Y.) 79.

¹⁶ See *Burnham v. Morrissey*, 14 Gray (Mass.), 226; *Ex parte Humphrey*, 2 Blatchf. (U. S.) 228; *Ex parte Judson*, 3 Blatchf. (U. S.) 89; *U. S. v. Moore*, Wall. C. C. (U. S.) 23; *Ex parte Beebees*, 2 Wall. Jr. (U. S.) 127; *Re Roelker*, 1 Sprague (U. S.), 276; *West v. St.*, 1 Wis. 209; *Bleecker v. Carroll*, 2 Abb. Pr. (N. Y.) 82; *St. v. Trumbull*, 4 N. J. L. 139; *Stephens v. People*, 19 N. Y. 537, 549. Where witness is female and application fails to show why her deposition was not taken, attachment should be denied. *City of Dallas v. Lentz* (Tex. Civ. App.), 81 S. W. 55 (not reported in state reports).

the purpose of the attachment is satisfied when the presence of the witness is secured; but where contumacious neglect or disobedience of the court's process appears, a pecuniary fine, generally small, is also imposed; and where the contumacy is aggravated, as in the case of the witness concealing himself or keeping out of the way of the court's officer to avoid giving his testimony in the particular case, a substantial punishment by fine or imprisonment, within the limits allowed by law may be inflicted.

§ 162. **Whether Attachment a Matter of Discretion.**—According to certain conceptions the *refusing* of an attachment for an absent witness is a matter of *discretion*, which will not be reviewed on error or appeal, in the absence of an appearance of abuse.¹⁷ But another and better view is that, if the witness has been regularly served with subpoena, the party requiring his attendance may claim an attachment as a matter of right.¹⁸

§ 163. **[Continued.] Personal Service of Subpoena necessary.**—In order to entitle a party to an attachment against a defaulting witness, it is necessary for him to show that the subpoena was duly served,¹⁹—it being a general rule that before a person can be brought into contempt for disobeying an order of court, he must be personally served with the order,²⁰ unless he was present in court when

¹⁷ West v. St., 1 Wis. 209; St. v. Archer, 48 Iowa, 310. Thus, where an attachment against an absent female witness was refused on account of her condition, and the accused failed to apply for a continuance, it was held that relief could not be granted on appeal. St. v. Benjamin, 7 La. Ann. 47; Wallace v. Traction Co., 145 Ala. 682, 40 South. 89. If witness is seriously ill, court may refuse attachment. St. v. McCarthy, 43 La. Ann. 541, 9 South. 493.

¹⁸ Green v. St., 17 Fla. 669. And no showing of materiality of evidence need be made. Moore v. St. (Tex. Cr. R.), 33 S. W. 980 (not reported in state reports).

¹⁹ St. v. Trumbull, 4 N. J. L. 139; U. S. v. Caldwell, 2 Dall. (U. S.) 334. It has been held, in the case

of an order for the examination of a party under a statute (N. Y. Code Civ. Proc., § 873) service of order upon the *attorney* of the party is not sufficient to authorize an attachment in case it is disobeyed. Loop v. Gould, 17 Hun (N. Y.), 535; Tebo v. Baker, 16 Hun (N. Y.), 182, 19 Alb. L. J. (N. Y.) 398. Where statute says by "reading" same to witness, this is not satisfied by doing this over a telephone. Ex parte Ferrell (Tex. Cr. R.), 95 S. W. 536 (not reported in state reports).

²⁰ McCaulay v. Palmer, 40 Hun (N. Y.), 38; Sanford v. Sanford, Id. 540; Bate Ref. Co. v. Gilett, 24 Fed. 697; Johnson v. San Francisco Superior Court, 63 Cal. 578. In re Haines, 67 N. J. L. 442, 51 Atl. 928.

the order was made, or knowing that the order was about to be made, left the court in order to avoid being present when it was made and in order to prevent its service upon him.²¹ If, however, the return of the sheriff shows that the witness wilfully refused to permit the sheriff to serve the subpoena upon him, this will be sufficient ground for the attachment.²² It is said that, in order to punish a witness for contempt in not attending in obedience to a subpoena, two things are necessary: 1. That the process of subpoena, be strictly and legally served. 2. That the disobedience is of such a nature as to indicate a design to condemn the process and authority of the court. Upon the first point, where it did not appear from the return of the subpoena, where it was delivered to the witness, it was held that it was not a sufficient basis to punish the witness for the contempt, since it might have been delivered to him at a place where he was not bound to yield it obedience. It might have been out of the jurisdiction of the court or out of the limits of the State. Upon the second head, it was said: "It is the *contempt* which is punishable in this summary way. In the present instance there is not the slightest appearance of any intention to disregard the process or authority of the court. The defendant had yielded obedience, and when he left the place it seems to have been under a well-founded impression that his presence would not at the time be required. Besides, he was in another State and attending to necessary business of deep importance to himself. The court therefore see no grounds for an attachment."²³

§ 164. What will excuse non-attendance.—The serious *illness* of the witness,²⁴ or of his wife,²⁵ will generally be a sufficient excuse for his failure to attend. So, where there is a statute requiring the party desiring the attendance of the witness to tender to him his legal *fees*, he cannot be punished for refusing to obey the subpoena, if the same are not tendered, or the tender waived.²⁶ For the wit-

²¹ Hearn v. Tennant, 14 Ves. 136.

²² Wilson v. St., 57 Ind. 71. Moreover, all the papers on which the attachment is awarded ought to be filed in court. U. S. v. Caldwell, 2 Dall. (U. S.) 334.

²³ St. v. Trumbull, 4 N. J. L. 139.

²⁴ Cutler v. St., 42 Ind. 244. Where it appeared that the witnesses thus brought in had been so much indis-

posed as to be incapable of attending, they were discharged, and the costs of the attachment directed to abide the event of the suit. Butcher v. Coats, 1 Dall. (U. S.) 340; St. v. Wiltsey, 103 Iowa, 54, 72 N. W. 415. ²⁵ Foster v. McDonald, 12 Heisk. (Tenn.) 619.

²⁶ Re Thomas, 1 Dill. (U. S.) 420; 1 Greenl. Ev., § 319; Garden v. Cres-

ness is not bound to testify until his fees are tendered;²⁷ and if he attends for one party and testifies and then departs, without notice that he will be required to remain for cross-examination, the cross-examining party must tender his fees in order to secure his return for that purpose.²⁸ By an early English statute,²⁹ the witness was entitled to his "reasonable charges," "according to his countenance or calling;" but in the United States, the fees and mileage of witnesses are, it is believed, universally fixed by statute;³⁰ but there is so little uniformity in the practice touching this subject that it cannot properly be discussed here.³¹ Nor will the court compel the attendance of an *interpreter*, or of an *expert*, who has neglected to obey a subpoena, unless in case of necessity.³² If the witness against whom an attachment is issued, arrives in court before it has been served and makes a reasonable excuse, the court will countermand the attachment on payment of the costs of it.³³ Moreover, an attachment will not be granted where it appears that the testimony of the witness could not be *material* to the issues.³⁴ So, where a *public officer* is served with a subpoena *duces tecum*, requiring him to bring certain *public documents* which may be proved by *copies*, an attachment will not be granted because of his refusal to obey;³⁵

well, 2 Mees. & W. 319; In re Depue, 185 N. Y. 60, 77 N. E. 798; Hollister v. People, 116 Ill. App. 338. This question is cared for by varying statutes in the different states, in nearly all of which the requirement applies to civil, and not to criminal, cases or to civil only as respects distance from the place of trial.

²⁷ Atwood v. Scott, 99 Mass. 177; Bliss v. Brainard, 42 N. H. 255. Contra, in the federal courts, at least so far as *mileage money* is concerned: Norris v. Hasler, 23 Fed. 581. It has been held in Wisconsin, that, if he attends without demanding prepayment, he waives this provision. Rozek v. Redzinski, 87 Wis. 525, 58 N. W. 262.

²⁸ Richards v. Goddard, L. R. 17 Eq. 238. Where a party is summoned as a witness, under a statute, by the opposite party, it has been held that he is entitled to witness fees. Penny v. Brink, 75 N. C. 68.

²⁹ Stat. 5 Eliz., ch. 9.

³⁰ See Holbrook v. Cooley, 25 Minn. 275.

³¹ See 1 Greenl. Ev., § 310, and citations.

³² Re Roelker, 1 Sprague (U. S.), 276; post, § 171.

³³ U. S. v. Scholfield, 1 Cranch C. C. (U. S.) 130.

³⁴ Dicas v. Lawson, 1 Crompt. M. & R. 934; Morgan v. Morgan, 16 Abb. Pr. (N. S.) (N. Y.) 291. Compare Courtney v. Baker, 3 Denio (N. Y.), 27, 30, 31, and other cases cited. Nor will a witness found in, but who resides out of, the county be compelled to attend, as the statute does not contemplate he shall thus be kept from his own county. Ex parte Branch 105 Ala. 231, 16 South. 926; Fidelity etc. Co. v. Johnson, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206.

³⁵ Corbett v. Gibson, 16 Blatch. (U. S.) 334.

otherwise if he refuses to furnish copies.³⁶ Where the witness had reasonable grounds to suppose that he would not be wanted at the trial,³⁷ or was excused by the attorney of the party who summoned him,³⁸ attachments were refused. An attachment will not be issued where it would be *oppressive*, or *dangerous* to the *health* of the witness, or where any strong reason relating to the business or family of the witness exists, against his compulsory absence from home; but the court will either postpone the cause or have his deposition taken.³⁹

§ 165. **When Attachment Issues in First Instance.**—It is not usual to grant an attachment against a witness in the first instance, unless some willful disobedience to the authority of the court is made to appear. The usual practice is to grant only a rule to show cause.⁴⁰ But where a witness is regularly served with subpoena and money tendered him for his expenses, which he does not object to for its insufficiency, but positively refuses to attend, it is a palpable case of contempt, and the court will award an attachment in the first instance. "The sum of money tendered may or may not have been adequate; but as the witness did not object to it at the time, it is to be considered sufficient."⁴¹

§ 166. **Service and Return of Attachment.**—The attachment must be *served* by the proper executive order of the court,—in the courts of the United States, by the *marshal* of the United States, although the witness reside in a distant county of the State; it being process regularly issued for the administration of justice.⁴² It has been held, under statutes, that it is unnecessary that an attachment for a defaulting witness should be issued and executed *at the same term*. It may be issued at the close of the term, returnable to the succeeding term, and may be executed by the *sheriff in vacation*,

³⁶ *Delaney v. Regulators*, 1 Yeates (Pa.), 403.

³⁷ *Reg. v. Slowman*, 1 Dowl. 618.

³⁸ *Farrar v. Keat*, 6 Dowl. 470.

³⁹ *Ex parte Beebees*, 2 Wall. Jr. (U. S.) 127. It has been held, that an attorney attending court in another state cannot be compelled to remain there after attending to his business, on the principle that this violates the protection extended by law to one necessarily attending on

court. *Central Trac. Co. v. Milwaukee St. Ry. Co.*, 74 Fed. (C. C.) 442.

⁴⁰ *Jackson v. Mann*, 2 Caines (N. Y.), Rep. 92; *Morris v. Creel*, 1 Va. Cas. 333; *In re Haines*, 67 N. J. L. 442, 51 Atl. 929.

⁴¹ *Andrews v. Andrews*, 2 Johns Cas. (N. Y.) 109; *Coleman's Cases* (N. Y.), 119.

⁴² *U. S. v. Montgomery*, 2 Dall. (U. S.) 335.

who may discharge him upon his giving *bail* in the amount required by statute; and, after such an attachment, the cause may be *continued*.⁴³

§ 167. **Hearing the Excuse—Purging the Contempt.**—When the witness is brought in by the officer, in execution of the attachment, the court will, of course, hear his *excuse*, if any he have to offer, and if it is a valid one, will discharge him from the arrest and hear his testimony. “He is called upon to *purge himself* of the alleged contempt, which, if he does to the satisfaction of the court, he is dismissed without more; but if he fail to purge himself, the court adjudges him guilty of *contempt*, and imposes the cost of the attachment, and such additional *fine* as, in their discretion, the case seems to demand; and, in default of payment, he may be *committed* to jail to compel execution of the sentence.”⁴⁴

§ 168. **Punishment of the Recusant Witness.**—As a general rule, the refusal of a witness to attend, to submit himself to an examination, or to answer particular questions before a subordinate officer of a court of record, appointed, or having authority to take the deposition of the witness, or to conduct his examination, is a contempt of the court, and not of the officer.⁴⁵ In like manner, the refusal of a witness to submit to an examination, or to answer particular questions⁴⁶ before a *grand jury*, is a contempt of the court

⁴³ St. v. Archer, 43 Iowa, 310.

⁴⁴ Com. v. Newton, 1 Grant's Cas. (Pa.) 453, 456. This case discusses at length the power of the courts to punish contempts under the Pennsylvania statute of June 16th, 1836. (Purd. Dig. 158). See also Purdon's Dig. 13th Éd. p. 735.

⁴⁵ La Fontaine v. Southern Underwriters, 83 N. C. 132, 137; Stuart v. Allen, 45 Wis. 158, 161, per Orton, J.; Whitcomb's Case, 120 Mass. 118, 121, per Gray, C. J.; Rex v. Almon, Wilmot, 243, 269; 2 Dan. Ch. Pr. (4th Am. ed.) 1178, 1198; 78th Eq. Rule of U. S. Courts, 17 Pet. lxxiv; Rev. Stat. U. S., 1901, §§ 4071, 4073; p. 3420, § 2; p. 3437, § 41. Ex parte Doll, 7 Phil. (Pa.) 595; Matter of Allen, 13 Blatchf. (U. S.) 271. Compare Shepherd v. Dean, 13 How. Pr.

(N. Y.) 174; Wicker v. Dresser, 13 How. Pr. (N. Y.) 331; Com. v. Newton, 1 Grant (Pa.) Cas. 453; Gay v. Thorpe, 1 Cal. App. 312, 82 Pac. 221; In re Butler, 76 Neb. 267, 107 N. W. 572. If he refuses to testify generally the petition for attachment need not set forth the questions put. Brumiger v. Smith, 49 Fed. (C. C.) 124.

⁴⁶ U. S. v. Caton, 1 Cranch C. C. (U. S.) 150. Where the writ issues from a federal court, refusal to obey it is an offense against the United States. Re Ellerbe, 4 McCrary (U. S.), 449. That a question is irrelevant merely does not excuse the witness from answering. Ex parte Butt, 78 Ark. 262, 93 S. W. 992.

by which the grand jury is impaneled.⁴⁷ The *grand jury* is merely an appendage of the court, of which the judge is the head or controlling power.⁴⁸ It is only through the subpoena of the court that witnesses can be brought before them, who do not choose to attend voluntarily; and they must invoke the powers of the court, when necessary, to compel the attendance of witnesses, and to protect themselves from insult or interference.⁴⁹ Under the limitations imposed upon the process of contempt by statute in Pennsylvania, a sentence *disbarring an attorney* for default as a witness is merely void. "This legislation," said Woodward, J., "would be a vain array of words, if a gentleman of the bar who happened to be in technical *contempt* as a tardy witness, might, instead of being fined, be stripped of his profession. As well might the occupation of another witness be taken away from him for disobedience to a *subpœna*, and his family beggared. Before such things can be done, the acts of assembly *restricting* punishments for contempt must be repealed and forgotten." ⁵⁰

§ 169. **Power to Award Compensation to Party injured by Recusancy of Witness.**—The power of courts to award indemnity to an injured party, in a summary proceeding as for a *contempt*, is said, in Wisconsin, to rest entirely upon the statute.⁵¹ This may be true, but it is beyond question that it was the practice of the court of chancery in England, independently of statute, to fine contemnors in the amount which the opposite party had been damaged by their contempt.⁵² Following this view, however, the Wisconsin court,

⁴⁷ *People v. Kelly*, 24 N. Y. 74; *Heard v. Pierce*, 8 Cush. (Mass.) 338; *People v. Fancher*, 4 Thomp. & C. (N. Y.) 467, 470; *Commonwealth v. Bannon*, 97 Mass. 214; *Rex v. Lord Preston*, 1 Salk. 278; *Ex parte Maulsby*, 13 Md. 625; *Lockwood v. St.*, 1 Ind. 161; *Ward v. St.*, 2 Mo. 120. Contra, in Alabama, where the proceeding must be by indictment. *St. v. Blocker*, 14 Ala. 450.

⁴⁸ *U. S. v. Hill*, 1 Brock. (U. S.) 156; *Denning v. St.*, 22 Ark. 131, 132; *Cherry v. St.*, 6 Fla. 679, 685; *People v. Naughton*, 7 Abb. Pr. (N. Y.) (N. S.) 421, 423; *Heard v. Pierce*, 8 Cush. (Mass.) 338, 339;

Commonwealth v. Bannon, 97 Mass. 214, 219; *Lewis v. Wake County*, 74 N. C. 194, 198; *Commonwealth v. Crans*, 3 Pa. L. J. 449, 450, 2 Clarke (Pa. L. J.), 180.

⁴⁹ *Commonwealth v. Crans*, 3 Pa. L. J. 453, 2 Clarke (Pa. L. J.), 184; *Ex parte Van Hook*, 3 N. Y. City Hall Rec. 64; *Ex parte Spooner*, 5 Id. 109; *Bergh's Case*, 16 Abb. Pr. (N. Y.) (N. S.) 266. Compare *Storey v. People*, 79 Ill. 45; *Grand Jury v. Public Press*, 4 Brewst. (Pa.) 313.

⁵⁰ *Com. v. Newton*, 1 Grant's Cas. (Pa.) 453, 457.

⁵¹ *St. v. Lonsdale*, 48 Wis. 348, 366.

⁵² 3 Bla. Com. 344.

having held in a previous case that the "loss or injury" for which the court may award compensation to the injured party in a proceeding for contempt, under the statutes of that State,⁵³ is a pecuniary loss or injury, for which the party injured might recover damages by an action,⁵⁴—with this ruling as the basis of its reasoning, proceed upon the consideration that, while the statute of that State⁵⁵ gives or recognizes a right of action by the aggrieved party against one duly *subpœnaed* and under obligation to attend as a witness, who fails to attend without reasonable excuse, to recover damages caused by such failure; yet no right of action exists against a witness for the mere refusal to answer proper questions, at least without allegation and proof of some special loss or injury. The conclusion of the court, therefore, is that, in a proceeding against a witness for contempt in refusing to answer proper questions propounded to him, it is not competent for the court to impose a fine upon him for an *indemnification* of the party by whom he was *subpœnaed*.⁵⁶ Speaking for the court, Lyon, J., says: "Neither the statute nor any adjudged case that has come to our notice recognizes such right of action against a witness for refusing to answer proper questions. It may be, however, that in special cases such an action can be maintained on common-law principles. But it seems to us it can only be maintained (if at all) for some special damage resulting from the unlawful refusal of the witness to testify. For example, such refusal might compel a party to take a *continuance* one term. The continuance *costs* would probably be the *measure of damages*. If such an action can be maintained in any case, we think the recovery will be limited to the actual, direct tangible damages; and that the mere refusal to testify, unaccompanied by such damages, is not a ground of action. And we think also that no recovery can be had in such an action, based upon the possibility or probability that, had the witness testified fully, the judgment would have been more favorable to the aggrieved party than it was. Such damages are altogether too uncertain and conjectural to furnish a ground of action."⁵⁷

⁵³ R. S. 1898, §§ 3490, 3491.

⁵⁴ *Re Pierce*, 44 Wis. 411. The complaint in such an action should set forth the matter to which witness could testify and its material-

ity. *Nolan v. Grider*, 135 Cal. 49, 67 Pac. 9.

⁵⁵ R. S. Wis. 1898, § 4063.

⁵⁶ *St. v. Lonsdale*, 48 Wis. 348, 367.

⁵⁷ *Ibid.* 367.

§ 170. **Relief by Habeas Corpus.**—If the commitment of the witness is illegal, he is entitled to be discharged by *habeas corpus*.⁵⁸ At the same time, the sentence of commitment will not—at least at common law—be reviewed on error or appeal.⁵⁹ But, on well settled principles touching the office of the writ of *habeas corpus*, he cannot be discharged because of any mere *error* or *irregularity* in the *commitment*, or in the steps which have led up to it; he can only be discharged for what is termed *illegality*—that is, because the sentence was one which could not be legally imposed.⁶⁰ Upon this subject—the difference between *irregularity* and *illegality* in respect of the remedy by *habeas corpus*,—there is much contrariety of judicial opinion. It would appear, on the whole, that courts of co-ordinate jurisdiction will not assume the right, on *habeas corpus*, to judge of each other's jurisdiction and of the legality of each other's commitments for contempt; while it cannot escape attention that appellate or superintending courts are more and more in the habit of doing so.⁶¹ It is apprehended that the generally prevailing view is that a person committed contempt for refusing to produce certain papers in his possession before a grand jury, in compliance with an order of the court in the nature of *subpœna duces tecum* is in law committed *in execution* of a criminal judgment, and cannot be enlarged by another tribunal or judge on *habeas corpus*, upon any view of *errors* in the judgment of commitment, as that the witness was *privileged* by his position of attorney from producing the documents called for; they being the documents of his client, or for any other error which may have led to the judgment of committal, or for any excess in the fine or imprisonment imposed.⁶² On the other hand, there is authority in support of the view that if the refusal of the witness to answer the question is altogether *innocent* and *justifiable*, or only an assertion of a *constitutional right*, such as the right of not giving evidence against himself, a commitment for contempt is illegal in such a sense that the error may be reached by *certiorari*, if not examinable upon the return to a *habeas corpus*.⁶³ Where an event occurs which renders it impossible for the witness,

⁵⁸ Ex parte Maulsby, 13 Md. 625, 641, app.; People v. Kelly, 24 N. Y. 74.

⁵⁹ Lockwood v. St., 1 Ind. 161. Otherwise under statutes. Ante, § 140. If there was jurisdiction and the punishment imposed is within the statute, an appellate court will

not interfere. Crommer v. Dickmann, 180 Mo. 148, 79 S. W. 1195.

⁶⁰ Ante, §§ 140 et seq.

⁶¹ Ante, § 145.

⁶² Ex parte Maulsby, 13 Md. App. 625.

⁶³ People v. Kelly, 24 N. Y. 74.

or other contemnor, to perform the thing required of him, for refusing to perform which he is imprisoned, he will be entitled to be relieved from imprisonment by *habeas corpus*; otherwise he might be doomed to perpetual imprisonment.⁶⁴ Thus, where a witness is imprisoned for refusing to answer questions in a pending cause, he will be released on *habeas corpus* upon the *abatement of such suit*.⁶⁵

§ 171. **Compelling the Testimony of Experts.**—This subject is also in much confusion. Statutes exist fixing the fees of experts at larger sums than those of ordinary witnesses. Judicial opinion is much at variance on the question whether an expert may be compelled to testify without the payment of the statutory fees, or even as to whether a witness can be compelled to give his *opinion* at all. According to one view, the witness meets the requirements of a subpoena if he appears in court when required to testify and gives *impromptu* answers to such questions as are then put to him. He cannot be required, by virtue of the subpoena, to examine the case, to use his skill and knowledge, to form an opinion, or to attend, hear and consider the testimony given, so as to be qualified to give an opinion on a question of science arising upon such testimony,—from which the conclusion follows that a professional witness called as an expert may properly be paid for his time, services and expenses, and that the amount which is paid to him cannot, in the absence of anything showing bad faith on his part and on the part of the party calling him, affect the regularity of the trial, though it may affect his credit with the jury. It was also reasoned that it is not improper for the State's attorney, in a criminal case, to procure the attendance of skilled witnesses for a special compensation, and that the fact that an expert attended and testified at his instance, under an agreement for compensation, which was unknown to the defendant until after the witness' testimony had closed, did not affect the regularity of the verdict.⁶⁶ Opinion has so far varied that in one jurisdiction it has been held that an expert may refuse to give his opinion on matters of science or skill until the statutory fees are paid;⁶⁷ and another court has gone so far as to hold that he may refuse to give his opinion at all;⁶⁸ while still another court has held that such a

⁶⁴ Ex parte Rowe, 7 Cal. 175.

⁶⁵ Ibid.

⁶⁶ People v. Montgomery, 13 Abb.

Pr. (N. S.) (N. Y.) 207.

⁶⁷ Buchman v. St., 59 Ind. 1; Dills

v. St., Id. 15.

⁶⁸ Ex parte Roelker, 1 Sprague

(U. S.), 276.

refusal is a contempt.⁶⁹ It has been reasoned in an English case that there is a distinction between a witness to the facts and a witness selected by a party to give his opinion as an expert; that the former is bound, as a matter of public duty, to testify to facts within his knowledge, while the latter is under no such obligation to testify as to his opinion on matters of skill or science; and accordingly that the party who selects him must pay for his time before he will be compelled to testify.⁷⁰ If a professional man is called as an ordinary witness to testify to facts within his knowledge, he will not be entitled to the extra compensation allowed by a statute in the case of experts;⁷¹ and it has been held that physicians called to give their opinions on facts observed by them while treating a person professionally, are not within the meaning of a statute empowering the court in its discretion to give extra compensation to expert witnesses.⁷²

§ 172. **When the Witness is privileged to depart.**—By the usual terms of a subpoena, the witness is required to attend *de die in diem*, and not to depart without leave of the court. But it is usual, and hence not blameable, for him to depart as soon as his examination has been completed and he is notified by the party calling him that his attendance will not be further required, unless he receives contrary notice from the opposite party or from the court. It has even been held that the party calling the witness may allow him to depart after cross-examination, and that the opposite party cannot demand that he be detained to testify regarding new matter, or that he be required to produce documents to be used by the latter in support of his case; and this for the reason that if he desires him for this purpose, he should subpoena him as his own witness.⁷³ In another

⁶⁹ *Ex parte Derhent*, 53 Ala. 389; *St. v. Teipna*, 36 Minn. 535, 32 N. W. 678; *Fairchild v. Ada Co.*, 6 Idaho, 340, 55 Pac. 654; *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 54 N. E. 1006. If he is not required to make any preliminary examination or preparation or to attend and listen to testimony, then he stands like any other witness, though asked to testify as an expert. *Flynn v. Prairie County*, 60 Ark. 204, 29 S. W. 459, 40 Am. St. Rep. 168, 27 L. R. A. 669.

⁷⁰ *Webb v. Page*, 1 Car. & K. 23; *Northern Pac. R. Co. v. Keyes*, 91 Fed. 47.

⁷¹ *Snyder v. Iowa City*, 40 Iowa, 646.

⁷² *Le Mere v. McHale*, 30 Minn. 410. While there are statutes providing for the allowance of extra compensation for a professional opinion, there is only one where it is provided that an expert may be summoned to make examination (see *Tenn. Code* 1896, § 7281).

⁷³ *Wells v. Wells*, 33 N. J. Eq. 4.

case, the court refused to allow the defendant to prove his case by cross-examination of the plaintiff's witness, thus enforcing what we shall hereafter find to be the general rule in several American jurisdictions;⁷⁴ whereupon the defendant said that he would call the witness as his own at the proper time, and the plaintiff replied that he had no objection to the witness remaining. Next day, when the defendant desired to call the witness, he could not be found. It appearing that the defendant had not subpoenaed him, or tendered him the statutory fee for the second day, it was held that he could not have an attachment for him.⁷⁵ But there is another conception, which is that, when a witness has been subpoenaed and called to testify, he is presumed to be present until the conclusion of the trial, and that if he has left the court after the close of his examination, and is thereafter wanted by the opposite party, the court may, in its discretion, suspend the trial until he can be brought in.⁷⁶ On a similar view, it has been held that, after the announcement of the counsel on each side in a criminal case that the testimony is closed, it is within the *discretion* of the presiding judge to issue attachments to compel the attendance of an absent witness.⁷⁷

§ 173. **Habeas Corpus ad Testificandum.**—Where the witness is in custody or in the military or naval service, it has been usual to compel his attendance by a writ of *habeas corpus ad testificandum*, directed to his prison-keeper if in confinement,⁷⁸ or to his superior officer if in the military or naval service. This writ is a very ancient one, and appears to have been granted at the discretion of the courts of common law. It is said to have been employed to bring witnesses before the court when in custody awaiting trial, and also when undergoing sentence.⁷⁹ The writ has issued in civil cases

⁷⁴ Post, ch. 17.

⁷⁵ Beaulieu v. Parsons, 2 Minn. 37.

⁷⁶ Neil v. Thorn, 88 N. Y. 270.

⁷⁷ Stephens v. People, 19 N. Y. 549.

⁷⁸ Chapman v. Welles, Kirby (Conn.), 133, 137. By statute in Georgia, it is provided that application to secure attendance must be made to the governor. Roberts v. St., 94 Ga. 66, 21 S. E. 132.

⁷⁹ Ex parte Marmaduke, 91 Mo. 228, 250, per Sherwood, J. See Adam's Case, 3 Keb. 51; Rex v. Burbage, 3 Burr. 1440; Rex v.

Layer, Fort. 396; Geery v. Hopkins, 2 Ld. Raym. 851; Friend's Case, 13 How. St. Tr. 1; 2 Tidd Prac. (9th ed.) 809; Shank's Case, 15 Abb. Pr. (N. S.) (N. Y.) 38; Re Mason, 8 Mich. 7. It was held in New York, that the inherent power of the Supreme Court to issue such a writ could not be limited by statute. People v. Sebring, 35 N. Y. S. 237, 14 Misc. Rep. 31. In California it appears to rest in the sound discretion of the court to grant or refuse the writ, and, if the testimony

from the federal courts, and seemingly without regard to the question whether the witness was in Federal or in State custody.⁸⁰ Its use is recognized by several American statutes.⁸¹ The Missouri statute empowers the judge of any court of record to issue the writ to bring up persons detained for any cause, "except a sentence for felony." It was held, where the writ was demanded on behalf of a prisoner on trial for felony, that this exception did not infringe his constitutional right to have process to compel the attendance of witnesses in his behalf, and that obedience to the writ, when directed to the warden of the penitentiary of the State to bring up a prisoner there confined under sentence for a felony, could not be enforced by a criminal court.⁸²

§ 174. Proceeding to Obtain this Writ.—According to an early English case, in order to lay the proper foundation for the writ of *habeas corpus ad testificandum*, it is necessary to show by affidavit that the persons whom it is desired to bring up as witnesses have been served with subpoenas, and that they are not willing to attend. "Without such an affidavit," said Lord Mansfield, "the writ ought not to go. They can never be brought up as prisoners against their consent."⁸³ According to Dr. Greenleaf, "the application in civil

of the convict is the only testimony obtainable and is highly material, it is reversible error to refuse it. *People v. Willard*, 92 Cal. 482, 28 Pac. 585. This was so ruled, notwithstanding the court had previously held, that a statute providing for deposition of such a witness in the presence of counsel and accused was valid under the constitutional guaranty of compulsory process, but its effect was only to offer what might be regarded by the court as a sufficient, but not exclusive, method of obtaining the testimony of the witness. *Willard v. Superior Court*, 82 Cal. 456, 22 Pac. 1120.

⁸⁰ *Ex parte Barnes*, 1 Sprague (U. S.), 133; *Ex parte Cabrera*, 1 Wash. C. C. (U. S.) 232; *Ex parte des Rochers*, 1 McAll. (U. S.) 68; *Ex parte Dorr*, 3 How. (U. S.) 104; *Ex parte Bollman*, 4 Cranch (U. S.),

75; *Elkison v. Dellesseline*, 2 Wheel. Crim. Cas. 56; *U. S. v. Moore*, 3 Cranch (U. S.), 159.

⁸¹ *Crim. Code Ind.*, §§ 245, 246; *Rev. Laws Ohio 1910*, § 11517; *Stat. Me. 1903*, p. 841, § 37; *Stat. Mass. 1902*, p. 1670, § 25; *Rev. Stat. Mo. 1909*, § 6376.

⁸² *Ex parte Marmaduke*, 91 Mo. 228 (Sherwood, J., dissenting).

⁸³ *Rex v. Roddam*, Cowp. 672. The King's Bench, in 1804, granted a *habeas corpus ad testificandum* to bring up a prisoner who was confined in jail for the non-payment of a fine imposed on him as a part of a judgment of the court upon an indictment for assault, in order that he might give evidence before an election committee of the House of Commons, on an affidavit of service of a rule to show cause upon the under sheriff, the solicitor of the treasury, the prisoner, and the per-

cases, is made upon affidavit, stating the nature of the suit, and the materiality of the testimony, as the party is advised and verily believes, together with the fact and general circumstances of restraint, which call for the issuing of the writ; and, if he is not actually a prisoner, it should state his willingness to attend. In criminal cases, no affidavit is deemed necessary on the part of the prosecuting attorney. The writ is left with the sheriff, if the witness is in custody; but if he is in the military or naval service, it is left with the officer in immediate command, to be served, obeyed and returned like any other writ of *habeas corpus*.⁸⁴ This writ will not be issued in any case to bring out of the penitentiary a witness who, by reason of his conviction for a felony is *incompetent* to testify.⁸⁵ Nor will it be issued in such a case where the competency of the witness is *substantially* in doubt;⁸⁶ nor will its execution be enforced when *improvidently* granted.⁸⁷

son at whose instance he was in execution, and, no cause having been shown. *Matter of Price*, 4 East, 587. See also *Rex v. Burbage*, 3 Burr. 1440; *Thelusson v. Copinger*, 3 Esp. 283; *Noble v. Smith*, 5 Johns. 357. It was at one time a doubtful point whether a *habeas corpus ad testificandum* could be granted in the Common Pleas, to bring up a prisoner charged in execution in the Fleet, in order that he might testify in a pending cause. The doubt turned upon whether the writ of *habeas corpus* would be a good defense to an action for an escape against the warden of the Fleet. *Burdus v. Shorter, Barnes' Notes*, 222. The court refused the writ in *Francia v. De Mattos*, Id. 223. The court declared it to be a very doubtful point and did not grant the writ; but the deposition of the prisoner taken in chancery was read by consent.

⁸⁴ 1 Greenl. Ev., § 312. See *Evans v. Rees*, 12 Ad. & El. 55; *Hammond v. Stewart*, 1 Strange, 510.

⁸⁵ *Ex parte Marmaduke*, 91 Mo. 228, 236.

⁸⁶ *U. S. v. Barefield*, 23 Fed. 136.

⁸⁷ Accordingly, where, in a trial of an issue in a divorce case, the respondent, the father, had been served with a *habeas corpus ad testificandum*, directing him to produce the two daughters of the parties who were at school in Boston, and he made return that the children had been sent to the school more than six months before, and that the libellant, the mother, had visited them there and had free access to them,—it was held that, as the libellant knew of the whereabouts of the children and could have taken their depositions under a commission, she had been guilty of laches in not doing so, and could not obtain a continuance of the cause because of their absence; that the writ of *habeas corpus ad testificandum* had been improvidently issued, and could not, therefore, be enforced; that the witnesses, not having been sent away by the father to avoid service of the subpoena, and being at the time of the application, and for several months before, in another State, could not be

§ 175. **Subpoena Duces Tecum.**—The ordinary process for compelling the production of books and papers which are necessary to be used in evidence upon a trial or other judicial examination, is a *subpœna duces tecum*. This is usually the ordinary subpoena with an additional clause to the following effect: "And also, that you diligently and carefully search for, examine, and inquire after, and bring with you and produce at the time, and place aforesaid, a bill of exchange, dated," etc. [here describing with precision the papers and documents to be produced], "together with all copies, drafts and vouchers, relating to said documents, and all other documents, letters, and papers, writings whatsoever, that can or may afford any information or evidence in said cause; then and there to testify and show all and singularly those things which you (or either of you) know or the said documents, letters or instruments in writing do import, of and concerning the said cause now pending. And this you (or any of you) shall in no wise omit," etc.⁸⁸ It has been held that unless the subpoena contain the words "to testify," it will not support further compulsory process against the witness; since the power of the court to compel the witness to attend at all is based upon the assumption that his *testimony* is material to a case in court.⁸⁹ *Particularity* is required in describing the documents which the witness is required to produce. Thus, a subpoena to produce all the dispatches received at a certain telegraph office between the 6th and 20th days of the month, is too general.⁹⁰ So, it has been held that a subpoena requiring a solicitor to produce all his books, papers, etc., relating to all dealings between him and a party to the suit during a term of thirty-three years, is too vague.⁹¹ But

brought in under this writ without their consent. *Koecker v. Koecker*, 7 Phila. 364, before Paxson, J.

⁸⁸ *Amey v. Long*, 9 East, 473; 3 Chit. Gen., Prac. 830, note; 1 Greenl. Ev., § 309; *In re Rauh*, 65 Ohio St. 128, 61 N. E. 701.

⁸⁹ *Murray v. Elston*, 23 N. J. Eq. 212; *Holly Mfg. Co. v. Vermer*, 143 N. Y. 639, 37 N. E. 648.

⁹⁰ *U. S. v. Hunter*, 15 Fed. 712; *U. S. v. Collins*, 145 Fed. 709. This process cannot be employed to enable a plaintiff to make allegations of fact in a pleading by the obtaining of data or memoranda

taken from books, e. g. against a private abstract company for information obtained from certain deed books, which had been lost from the office of the public recorder of deeds. *Ex parte Calhoun*, 87 Ga. 359, 13 S. E. 694. It has been ruled, however, that a subpoena duces tecum may call for that which may be gathered from books and records without calling for the books or records. *Murray v. Louisiana*, 163 U. S. 101, 41 L. Ed. 87.

⁹¹ *Lee v. Angas*, L. R. 2 Eq. 59. But it has been held that such a

"the papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may know what is wanted of him, and may have the papers at the trial so that they can be used, if the court shall then determine them to be competent and relevant evidence."⁹² There is, of course, some limit to the *thing* which the witness can be compelled under such a writ to produce. It has been held in a patent case that he could not be thus compelled to bring before the court the *patterns of a stove*.⁹³ It was held in an early case in Pennsylvania that a *subpoena duces tecum* would not lie to compel a party, residing at a great distance from court, to produce in court certain *newspapers* containing advertise-

notice is not wholly invalid, and the party summoned must apply to the court for a modification. *Consol. Rendering Co. v. Vermont*, 207 U. S. 541; *Hale v. Henkel*, 201 U. S. 42, 50 L. Ed. 652. It has also been held that this subpoena is not unconstitutional, as constituting unreasonable search and seizure, nor may it be disobeyed, because the production of what is called for might incriminate the witness, as this might only be determined by the court inspecting what is called for and excluding the whole or whatsoever part thereof amenable to such an objection. *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575. It has also been held, that where a notice to produce before a grand jury operates as a subpoena duces tecum, there is no lack of due process of law, if the party notified is given opportunity to bring his objection to compliance before the court and have a hearing thereon. *Simon v. Craft*, 182 U. S. 427, 45 L. Ed. 1165; *Wilson v. Standifer*, 184 U. S. 415, 46 L. Ed. 612. For examples of sufficient and insufficient specification of what is sought by the process, see *In re Stover*, 63 Fed. 564; *St. v. Davis*, 117 Mo. 614, 23 S. W. 759.

⁹² *U. S. v. Babcock*, 3 Dill. (U. S.) 566, 568, per Dillon, J. It was ruled in New York that the process does not give a party the right to inspect the books, but to enable the witness producing same to testify by reference to same. *Franklin v. Judson*, 96 App. Div. 607, 88 N. Y. S. 904. It has been held that a court of equity has inherent power to issue the writ where it is made to appear to the court that there is reasonable ground to believe that books and papers in the possession of defendant will be relevant and material evidence in the cause. *U. S. v. Terminal Railway Assn. of St. Louis*, 148 Fed. 486.

⁹³ *Re Shepherd*, 18 Blatchf. (U. S.) 225. Where a large number of heavy books were called for under the general designation of "defendant's books" the court could require plaintiff to examine and ascertain the particular books needed. *McDonald v. Ideal Mfg. Co.*, 143 Mich. 17, 106 N. W. 279. The books of a corporation may only be called for as involving the particular matter before the court. *U. S. Casualty Co. v. Robins Co.*, 95 N. Y. S. 726, 108 App. Div. 361.

ments of the sale of unseated lands for taxes; the court reasoning that if the party applying for the process desired the benefit of the newspapers, it behooved him to produce them or get them the best way he could.⁹⁴ Moreover, if books or papers are brought into court under a *subpœna duces tecum*, a party who *withdraws* them from the court and restores them to their original custody, is guilty of a *contempt* of court and may be punished for so doing.⁹⁵ A witness will not be punished for *contempt* for failing to produce books and papers in a case pending before a *referee*, where it appears from his affidavit that he has not had *reasonable time* within which to procure and produce them.⁹⁶ On the other hand, it has been held that a public officer,—the surveyor-general of the State,—is guilty of *contempt* if he refuses to furnish *copies of official records* in obedience to a *subpœna duces tecum*, though applied to for this purpose *after office hours*.⁹⁷

§ 176. [Continued.] May be used for obtaining a Discovery.—The use of the *subpœna duces tecum* is regulated to such an extent by local statutes that it would be unsafe to attempt any extended exposition of the practice under it in this country, without a very minute examination. One idea concerning it seems to be that it is not to be used as a means of obtaining a discovery of evidence in the possession of the opposite party.⁹⁸ But this cannot be stated with much confidence, especially in view of recent statutes rendering *parties* competent as witnesses; for we find that it has been ruled that a *subpœna duces tecum* must in all cases be issued for the purpose of obtaining proof of books and papers; and that, upon taking conditionally the testimony of a witness, whether a party to the action or not, he may be required, by such a *subpœna*, to produce

⁹⁴ *Shippen's Lessee v. Wells*, 2 Yeates (Pa.), 260.

⁹⁵ *Com. v. Braynard*, Thach. Cr. Cas. 146, 155.

⁹⁶ *Heerdt v. Wetmore*, 2 Rob. (N. Y.) 697.

⁹⁷ *Delaney v. Regulators*, 1 Yeates (Pa.), 403.

⁹⁸ *Smith v. McDonald*, 50 How. Pr. (N. Y.) 519; *Campbell v. Johnson*, 3 Del. Ch. 94. Statute authorizing the calling of opposite party makes him subject to a notice to produce etc. just as any other per-

son, who is a competent witness. *Banks v. Conn. Ry. & Lighting Co.*, 79 Conn. 116, 64 Atl. 14. See also *St. ex rel. etc. v. Standard Oil Co.*, 194 Mo. 124, 91 S. W. 1062, a proceeding under the Missouri anti-trust statute. While objection cannot be made that the books and papers are not relevant, yet the *subpœna* cannot call for such as are presumptively irrelevant. *Peterson Bros. v. Minerva King Fruit Co.*, 140 Cal. 624, 74 Pac. 162.

any books or papers specified in the writ, and, for disobedience, is guilty of contempt and also liable in damages to any party aggrieved thereby.⁹⁹ It is held that it may issue to compel the president and secretary of a *corporation* to produce books and papers of the corporation in a suit in equity to which the corporation is *not* a party.¹

⁹⁹ Central Nat. Bank v. Arthur, 2 Sweeny (N. Y.), 194; Trotter v. Latson, 7 How. Pr. (N. Y.) 261. Mott v. Consumers Ice Co., 52 How. Pr. (N. Y.) 244; Murray v. Elston, 23 N. J. Eq. 212. As to the proper proceeding where the witness appears but neglects to produce the books or papers, see O'Toole's Estate, 1 Tuck. (N. Y.) (Surr.) 39. Where, in an action for ejectment against a grantee, his *warrantor*, though not nominally a party, employed counsel to defend the case, and placed in his hands a deed to be used in the litigation, it was held that the paper was legally in the custody of the warrantor and must be produced under such a subpoena. Steed v. Cruise, 70 Ga. 168. It is no answer to such a writ that the books and papers are *private property* of the witness, nor is it necessary that the subpoena should declare them material to the investigation. Re Dunn, 9 Mo. App. 255.

¹ Wertheim v. Continental etc. Co., 21 Blatchf. (U. S.) 246. Contra, Boorman v. Atlantic etc. R. Co., 17 Hun (N. Y.), 555; Central Nat. Bank v. White, 37 N. Y. Super. 297. In the view of other courts, the statute affords ample means of compelling a corporation to produce its books under a subpoena duces tecum in like manner as in the case of a natural person. N. Y. Code Civ. Proc., § 868; Central etc. R. Co. v. Twenty-third Street R. Co., 53 How. Pr. 45. On the contrary, it has been laid down in New York that, even in case of an action in

which a corporation is a party, the production of its books cannot be enforced by subpoena duces tecum, served on its officers; it can only be effected by way of *discovery* under the provisions of the statutes (Stover's Anno. Code New York 1902, § 868; Stover's Anno. Code New York 1902, tit. 6, art. 4, p. 899; La Farge v. La Farge Ins. Co., 14 How. Pr. (N. Y.) 26; Opdyke v. Marble, 44 Barb. (N. Y.) 64), and the exercise of this power is left to the discretion of the court. As to the books of a corporation, not a party to the action, no such power of enforcing an examination or production of them on a trial between other parties is afforded; nor can its agents or officers, in their individual capacity, be compelled to discover or produce the books of a corporation over which they have not an absolute control and right of disposition at their own will and discretion. Morgan v. Morgan, 16 Abb. Pr. (N. s.) 291, 295. See Opdyke v. Marble, *supra*. Accordingly, a motion for an attachment against the chief officers of a *founding hospital*, to compel them to produce upon the hearing, before a referee, of an action for *divorce*, the books of the hospital, for the purpose of disclosing the supposed fact that the defendant had left an infant with such hospital, the result of an illicit sexual intercourse with a third person, was denied. Morgan v. Morgan, *supra*. Whether these decisions are law in that State at the present

§ 177. [Continued.] **Witness when privileged against the Writ.**—The command of a *subpœna duces tecum* is sometimes met by the claim of *absolute privilege*; and where the claim is well founded, the person to whom the subpœna is directed will be justified in disobeying it, and if he is thereafter committed for the supposed contempt, he will be entitled to be discharged by *habeas corpus*. Thus, it has been held that an attachment will not be awarded against an *attorney* for refusing to obey a *subpœna duces tecum*, to appear before a grand jury with vouchers which have been intrusted to him by his client in confidence, which vouchers contain evidence of a forgery committed by his client.² In such circumstances, it is the duty of the attorney, immediately on receiving the subpœna, to deliver up the papers to his client.³ This subject is merely suggested here, and is discussed hereafter.⁴

§ 178. **Actions against Witnesses for Non-attendance.**—Statutes exist imposing *penalties* upon witnesses for non-attendance, to be recovered by the parties on whose behalf they have been subpoenaed. It has been held that, before a fine is entered against a witness for disobedience to a subpœna it must be shown that his evidence was *material*.⁵ Under some systems, the party summoning the witness also may have an *action for damages* against the witness;⁶ but here it must likewise appear that his testimony was *material* and necessary to prove the case of the party requiring his attendance.⁷ But in order to sustain such an action, it is necessary to prove that time, the writer does not undertake names of box holders, were over-ruled.

² *Rex v. Dixon*, 3 Burr. 1687.

³ *Ibid.*

⁴ Post, ch. 12. As examples of cases where official claimed to be privileged against the writ, see *In re Hirsch*, 74 Fed. 928, where the claim was made of exemption of United States internal revenue collector from subpoena duces tecum, issued by a state court for application for retail liquor license, under instructions of the Commissioner of Internal Revenue and disallowed, and *Rice v. Rice* (N. J. Eq.), 25 Atl. 321, where Post Master's claim that Post Office Department's regulations forbade producing record showing

⁵ *Carrington v. Hutson*, 28 Hun (N. Y.), 371. See also *Courtney v. Baker*, 3 Denio (N. Y.), 27. This is required by the Texas statute, Tex. Crim. Proc. 1895, art. 517. *McGehee v. St.*, 4 Tex. App. 94.

⁶ *McCall v. Butterworth*, 8 Iowa, 329; *Hurd v. Swan*, 4 Denio (N. Y.), 75.

⁷ It is an answer, as well to a common-law action against a witness, as to a proceeding to punish him for contempt for neglecting to attend in obedience to a subpoena served upon him, that he knows nothing material to the issue; or, if it were a subpoena duces tecum,

the *fees* of the witness for *travel* and *attendance* were duly paid or tendered according to the requirements of the statute; it is not sufficient to prove a *waiver* on the part of the witness of his right to such fees.⁸ Under some systems the penalty does not go to the injured party, but is in the nature of a *fine* imposed on the witness by way of punishment.⁹ Under the Tennessee statute, the penalty can only be recovered in the name, and to the use of the *State*.¹⁰ In order to recover such a penalty there must have been a substantial compliance with the statute in the matter of summoning the witness.¹¹ Such a statute has been regarded as *penal* and to be *strictly pursued*, for which reason a judgment *nisi* for any sum,—even a *less* sum,—than therein prescribed, has been held a nullity.¹² Under some systems, defaulting witnesses are liable to *summary proceedings* for punishment.¹³

§ 179. **Striking out the Answer of a Defendant who fails to Appear.**—Under some statutes, if the defendant, duly summoned as a witness, fails to appear and testify, either in court or before any person authorized to take his deposition, besides being punished himself for a contempt, the court may strike out his answer and give judgment for the plaintiff.¹⁴

§ 180. **Interfering with Witnesses.**—Tampering with witnesses, attempting to bribe them, or to dissuade them from attending and testifying, is not only a contempt of court, but a misdemeanor at common law and punishable by indictment.¹⁵

that he has not any document such as he is called upon to produce, material and necessary as evidence tending to prove the case of the party requiring his attendance. *Morgan v. Morgan*, 16 Abb. Pr. (N. Y.) 291. Compare *Courtney v. Baker*, 3 Denio (N. Y.), 27, 30, 31, and cases cited.

⁸ *McKeon v. Lane*, 1 Hall (N. Y.), 319.

⁹ *Maclin v. Wilson*, 21 Ala. 670.

¹⁰ *Nelson v. Ewell*, 2 Swan (Tenn.), 271. As to forfeitures against witnesses who have been put under recognizance, see *St. v. Herndon*, 1 Murph. (N. C.) 269. See, as to statute forfeitures against witnesses, *St. v. Thomas*, 11 Lea (Tenn.), 113; *Duke v. Given*, 4

Yerg. (Tenn.) 478; *St. v. Butler*, 8 *Yerg. (Tenn.)* 83; *St. v. Dill*, 2 *Sneed (Tenn.)*, 414; *Kincaid v. Rogers*, 3 *Sneed (Tenn.)*, 1; *Mattocks v. Wheaton*, 10 *Vt.* 493; *Kinzey v. King*, 6 *Ired. (N. C.)* 76.

¹¹ *Durden v. St.*, 32 *Ala.* 579. See also *Mattocks v. Wheaton*, 10 *Vt.* 493.

¹² *St. v. Dill*, 2 *Sneed (Tenn.)*, 414.

¹³ *Robbins v. Gorham*, 25 *N. Y.* 588.

¹⁴ *R. S. Mo.* 1909, § 6361; *Snyder v. Raab*, 40 *Mo.* 166; *Hewlett v. Brown*, 1 *Bosw. (N. Y.)* 655.

¹⁵ *Com. v. Reynolds*, 14 *Gray (Mass.)*, 87; *U. S. v. Carroll*, 147 *Fed.* 947. Nor is it absolutely necessary, that the witness shall have

§ 181. **Refusing to Appear before Commissioners, Examiners, Notaries.**—The process for compelling the attendance of witnesses and their answers to questions, before examiners, notaries, commissioners or other officers, is too wide a question for general discussion in a work of this kind. Nothing can be done beyond suggesting certain lines of inquiry. In the first place, it should be observed that the subject is very much controlled by local statutes. For instance, we find that it has been laid down in Pennsylvania that a failure on the part of the witness to appear before an *examiner* in obedience to a subpoena is not a *contempt* of the court in which the proceeding is pending, in which his testimony was to be used, but a contempt of the process of the law, for which the examiner is entrusted by the law with power to punish him.¹⁶ On the other hand, it was held in Wisconsin, as a rule under a statute of that State,¹⁷ as well as at common law, that the circuit court of any county may punish as for a criminal contempt a person, who subpoenaed to testify in an action pending in such court, before a *court commissioner* in another county, disobeys the summons or refuse to be sworn or to answer.¹⁸ It has been laid down that the same rules must be applied in determining the propriety of compelling a witness to answer a particular question, on his examination *de bene esse* before a *commissioner* of the Circuit Court of the United States, under section thirty of the Judiciary Act of 1789, which govern the court in the examination of a witness on a trial before a court; and accordingly, that an attachment will not be granted against a witness for *contempt* in refusing to answer questions before such a commissioner on the taking of a deposition *de bene esse*, unless the materiality of the evidence sought to be elicited is shown. In so holding Mr. Dis-

been subpoenaed, e. g. where a witness has been before the grand jury and is expected to be called for the trial on the indictment. *St. v. Homer*, 1 *Marv.* (Del.) 504, 26 *Atl.* 73; *St. v. Desforbes*, 47 *La. Ann.* 1167, 17 *South.* 811. Getting a witness drunk, so as to prevent his testifying, constitutes a tampering, amounting to contempt of court. *St. v. Holt*, 84 *Me.* 509, 24 *Atl.* 951. As favoring the theory of strict construction of criminal laws it was ruled, that § 5404, *Rev. Stats. U. S.*, imposing penalty for conspiring to

deter a witness from attending or testifying in a proceeding, "in any court of the United States" does not apply to a preliminary examination before a United States Commissioner. *Todd v. U. S.*, 158 *U. S.* 278, 39 *L. Ed.* 982.

¹⁶ *Com. v. Newton*, 1 *Grant's Cas.* (Pa.) 453.

¹⁷ *R. S. Wis.*, 1898, § 3477.

¹⁸ *St. v. Lonsdale*, 48 *Wis.* 348, 865. The like rule has been applied in supplementary proceedings on execution. *Shepard v. Grove*, 109 *Mich.* 606, 68 *N. W.* 221.

strict Judge Betts said: "I see no reason why any more stringent obligation should be imposed upon a witness in these outside examinations than is enforced in court. Before the court will adjudge a witness to be in contempt, or commit him therefor, it will require more than proof of the fact that he declines to respond to a question. It will inquire whether the question is relevant and material to the case on hearing,¹⁹ and also whether the witness is exempt from answering it. No contumacy can be imputed to him until these points are determined."²⁰

§ 182. Refusing to attend or testify before Municipal Boards, Committees, etc.—A statute of Wisconsin²¹ empowers a judge of a court of record or court commissioner to punish for *contempt* witnesses who refuse to attend and give evidence before any officer, arbitrator, board, committee or other person authorized to examine witnesses.²² A similar statute formerly existed in New York City,²³ under which it has been held that an *attachment* will not be granted against a witness subpoenaed to attend and testify before a committee of the New York Common Council, unless it satisfactorily appears to the judge to whom the application is made: (1) That the witness refused to obey a subpoena issued by the clerk; or (2) that, on appearing, he refused to be sworn as a witness; or (3) that, after being sworn, he refused to answer some question which, in the opinion of the judge, was a question proper to be put. Therefore, where the witness attended pursuant to the subpoena and submitted to be sworn, and then stated that he declined generally to answer any questions, and none were put to him by the committee, an attachment was refused.²⁴

§ 183. Refusing to give Deposition to be used in Foreign Court.—Construing a statute, the Supreme Court of Wisconsin said:

¹⁹ Citing Greenl. Ev., § 319.

²⁰ Re Judson, 3 Blatchf. (U. S.) 148.

²¹ R. S. Wis. 1898, § 4066. Vide also New Jersey statute giving power to receiver of insolvent corporation to send for persons, and examine on oath as to its affairs and scope and validity thereof. Fidelity & Cas. Co. v. MacAfee Co., 72 N. J. Eq. 279, 65 Atl. 879.

²² See St. v. Lonsdale, 48 Wis. 348, 363; and compare Stuart v. Allen, 45 Wis. 158. As to proceeding

to compel production of documents before Interstate Commerce Commission brought under anti-trust, and interstate commerce acts upholding the statute, see Interstate Com. Com'n v. Baird, 194 U. S. 25, 48 L. Ed. 860.

²³ N. Y. Act of Feb. 8th, 1855; Laws N. Y. 1855, p. 24, ch. 20 (local to the city of New York); repealed by the N. Y. Laws of 1860, ch. 39; 1 R. S. N. Y. 1882, p. 921.

²⁴ Biggs v. Matsell, 2 Abb. Pr. (N. Y.) 156.

“The law which compels the citizens of this State to give testimony in such cases is founded in *comity*, and such testimony is, so to speak, extra-judicial as to our courts. A witness who unlawfully refuses to testify in a foreign cause, although he violates a penal law and is liable to be punished therefor, commits no *contempt* of any court of this State.”²⁵

§ 184. **Power to Compel answer before Grand Jury.**—As already suggested,²⁶ courts of criminal jurisdiction, which have power to impanel grand juries, have inherent power to compel witnesses summoned to appear before such grand juries, to answer proper questions propounded to them by such bodies.²⁷ A grand jury falls within the designation of “persons appointed under the authority of the court, to take depositions or testimony,” within the meaning of a statute empowering courts to compel the attendance of witnesses in such cases.²⁸ Where a witness is committed for contempt in refusing to produce certain papers before a grand jury, in obedience to an order of the court in the nature of a *subpœna duces tecum*, the commitment reciting that he shall remain in custody till “purged of contempt by appearing before the grand jury and furnishing to them the paper or papers required by them,”—he is entitled to his discharge upon *habeas corpus*, from such commitment, upon the *discharge of the grand jury*; for this circumstance renders obedience to the *subpœna duces tecum* impossible; and if he were not entitled to his discharge upon the happening of this event, he would be doomed to perpetual imprisonment.²⁹

²⁵ *St. v. Lonsdale*, 48 Wis. 348, 365.

²⁶ *Ante*, § 168. *Wheatley v. St.*, 114 Ga. 175, 39 S. E. 877; *St. v. Faulkner*, 175 Mo. 546, 78 S. W. 611. That the witness deems a question irrelevant is no excuse for refusal to answer. *In re Rogers*, 129 Cal. 468, 62 Pac. 47.

²⁷ *People v. Fancher*, 4 Thomp. & C. (N. Y.) 467, 470; *People v. Kelly*, 24 N. Y. 74; *Heard v. Pierce*, 8 Cush. (Mass.) 338. So by statute in Missouri. *Ward v. St.*, 2 Mo. 120.

²⁸ *Ward v. St.*, *supra*. For a witness summoned to attend before a grand jury to *conceal himself*, in

order to prevent the service of the process, has been held, under a statute, not a contempt such as could be punished in a summary manner. *Com. v. Deskins*, 4 Leigh (Va.), 685. But this would seem to be a contempt of court upon common-law principles.

²⁹ *Ex parte Maulsby*, 13 Md. 625, 641, App. The proper practice for one summoned to produce books before a grand jury is to produce them and when requested to exhibit them, then to raise any question he may desire as to materiality and have it determined by the court, if necessary. *In re Archer*, 134 Mich.

§ 185. **Protection of Witnesses against Arrest and Service of Process.**—Moreover, it is to be observed that the court has power, at common law, to protect witnesses and parties from arrest on civil process during their attendance, and for a reasonable time in going and returning,—*eundo, morando, et redeundo*;³⁰ and this whether they attend under the compulsion of a subpoena or voluntarily, or whether or not they have obtained a writ of protection.³¹ According to early conceptions, the privilege extended only to exemption from arrest, but not to the mere service of a summons,—a distinction not of much importance at a time when civil actions were ordinarily commenced by the issuing of a *capias*;³² but later views incline to extend it to immunity from the service of all process.³³

408, 96 N. W. 442. Being granted such opportunity or entitled to demand same, makes a notice to produce books and papers before a grand jury due process of law. *Wilson v. Standifer*, 184 U. S. 415, 46 L. Ed. 612.

³⁰ 1 Greenl. Ev., § 316; *Palmer v. Rowan* (Neb.), 32 N. W. 210 (where numerous authorities are collected by Maxwell, C. J.); *Thompson's Case*, 122 Mass. 428. See also *Larned v. Griffin*, 12 Fed. 590; *Ex parte Levy*, 28 Fed. 651; *Atchison v. Morris*, 11 Fed. 582; *Plimpton v. Winslow*, 9 Fed. 365; *Bridges v. Sheldon*, 7 Fed. 19; *Brooks v. Farwell*, 4 Fed. 166; *Parker v. Hotchkiss*, 1 Wall. Jr. 269. For statute on this subject see *Greenleaf v. People's Bank*, 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499. A resident of another state attending trial as a witness is entitled to the like exemption. *In re Eliason*, 19 R. I. 117, 32 Atl. 166. Or attending a hearing before a referee. *Dickinson v. Farwell*, 71 N. H. 213, 51 Atl. 624. Where he comes into the state in obedience to a subpoena from a federal court he is likewise exempt from arrest in criminal process. *U. S. v. Baird*, 85 Fed. 633.

³¹ *Walpole v. Alexander*, 3 Doug.

45; *Meekins v. Smith*, 1 H. B. L. 636; *Arding v. Flower*, 8 Term R. 534; *Spence v. Stuart*, 3 East, 89; *Ex parte Byne*, 1 Ves. & B. 316; *Persse v. Persse*, 5 H. L. Cas. 671; *McNeil's Case*, 6 Mass. 245; *Wood v. Neale*, 5 Gray (Mass.), 538; *May v. Shumway*, 16 Gray (Mass.), 86; *Gray, J.*, in *Thompson's Case*, *supra*.

³² *Blight v. Fisher*, Pet. C. C. 41;

Hunter v. Cleveland, 1 Brev. 167;

Taft v. Hoppin, Anth. N. P. 255;

Booraem v. Wheeler, 12 Vt. 311.

³³ *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, sub nom. *Mitchell v. Wixon*, 19 N. W. 176; *Compton v. Wilder*, 40 Ohio St. 130. See, as to the nature and extent of the immunity and the reasons which support it, *Morris v. Beach*, 2 Johns. (N. Y.) 294; *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *Hopkins v. Coburn*, 1 Wend. (N. Y.) 292; *Seaver v. Robinson*, 3 Duer (N. Y.), 622; *Merrill v. George*, 23 How. Pr. (N. Y.) 331; *Matthews v. Tufts*, 87 N. Y. 568, 570; *Huddeson v. Prizer*, 9 Phila. (Pa.) 65; *Dungan v. Miller*, 37 N. J. Law, 182; *Vincent v. Watson*, 1 Rich. 194; *Saddler v. Ray*, 5 Rich. L. (S. C.) 523; *Martin v. Ramsey*, 7 Humph. (Tenn.) 260; *Dickenson's Case*, 3 Har. (Del.) 517; *Hanegar v. Spangler*, 29 Ga. 217;

§ 186. **Privilege of Member of Congress.**—The constitution of the United States declares that “the senators and representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to or returning from the same.”³⁴ It has been said: “There is no ambiguity in these expressions; they convey precise and definite ideas. The privilege secured to the members of both houses is freedom *from arrest*. It cannot be asserted that the service of a subpoena is an arrest. It is a mere notice to the party to appear and give testimony. But it is certain that, unless a court can constitutionally enforce the attendance of a witness under a subpoena, it will be of little avail to issue that process to a reluctant witness. And this necessarily leads to the inquiry whether an *attachment* can issue against a senator or representative in Congress, neglecting or refusing to attend in consequence of a subpoena properly served? On the most mature reflection, I am of the opinion that the court may either grant or refuse such compulsory process, according to existing circumstances. That the service of an attachment for a *contempt* includes an arrest there can be little doubt; and it cannot be said that such contempt is either treason, felony or breach of the peace. But the privilege is confined to the periods of the members’ attendance at the sessions of their respective houses, going to or returning from the same. If a member should neglect his duty by not attending the session of Congress, or should desert it without leave, he is no more entitled to the privilege in such circumstances from arrest than a mere private citizen. The court, however, will not presume a dereliction of duty unless it is established by satisfactory proof; they will construe the privilege liberally, and by no means weigh the absence of the

May v. Shumway, 16 Gray (Mass.), 86; Thompson’s Case, 122 Mass. 428; Ballinger v. Elliott, 72 N. C. 596; Parker v. Hotchkiss, 1 Wall. Jr. (U. S.) 269; Juneau Bank v. McSpedon, 5 Biss. 64; Arding v. Flower, 8 Term R. 534; Newton v. Askew, 6 Hare, 310; Persse v. Persse, 5 H. L. Cas. 671. See also In re Cannon, 47 Mich. 481, 11 N. W. 280. This same principle of common law has been held applicable to suitors in attendance on trials

in going and returning. In re Thompson, 122 Mass. 428; People v. Judge, 40 Mich. 729; Hammerskold v. Rose, 52 N. C. 629; Ellis v. Degarmo, 17 R. I. 715, 24 Atl. 579. As to whether this exemption applies also to a defendant in a criminal case, the courts are in conflict. See Scott v. Curtis, 27 Vt. 762; Moore v. Greene, 73 N. C. 394, 21 Am. Rep. 470. .

³⁴ Const. U. S., art. 1, § 6.

member in scales too nice. Should it appear to them that he is on his return to Congress, they will at once refuse the attachment.”⁸⁵

§ 187. Refusing to be sworn on the Ground of Conscientious Scruples.—A *Jew* refusing to be sworn on Saturday, was fined ten pounds for contempt, but, the defendant afterwards waiving the benefit of his testimony, he was discharged from the fine.⁸⁶ One who, *not* being a *Quaker*, was called as a witness and refused to be *sworn*, on the ground of conscientious scruples, but offered to *affirm*, was committed for contempt,—the liberty to affirm being strictly confined to Quakers by the laws and practice of Massachusetts then existing.⁸⁷

⁸⁵ *Respublica v. Duane*, 4 Yeates (Pa.), 347, 348, per Yeates, J. Compare *U. S. v. Cooper*, 4 Dall. (U. S.) 341. A slight deviation from the direct route of a member on his way to congress will not forfeit his exemption from arrest. *Miner v. Markham*, 28 Fed. 387. It does not extend, however, to a period 40 days before or after a session, but is limited to a reasonable time in going or returning. *Hoppin v. Jenckes*, 8 R. I. 453, 5 Am. Rep. 597.

⁸⁶ *Stansbury v. Marks*, 2 Dall. (Pa.) 313.

⁸⁷ *U. S. v. Coolidge*, 2 Gall. (U. S.) 364, before Mr. Justice Story. In a state whose statute provided, that the oath regarded by the person about to be sworn as most binding on his conscience should be administered, it was held error to compel a Chinaman to be sworn in

the usual way, when the court was informed through an interpreter that “the joss stick burning is the true oath among the Chinese.” *St. v. Chyo Chiack*, 92 Mo. 395, 4 S. W. 704. In California it was held not mandatory, that an oath other than the usual form should be administered to such as Chinese witnesses, and there was no error to administer the usual form where it was not made to appear that the witnesses regarded another form more binding (*People v. Green*, 99 Cal. 564, 34 Pac. 231), which ruling seems to be contrary to a presumption, of which a court should take judicial cognizance, viz: that greater solemnity is enforced by an oath taken under that religious sanctity which the usual form implies for those who believe in the Christian religion.

CHAPTER VII.

ENFORCING THE STIPULATIONS AND ADMISSIONS OF COUNSEL.

SECTION

190. Extent of Authority of Attorney in Management of Cause.
191. [Continued.] What he may do.
192. [Continued.] What he may not do.
193. Binding Nature of his Stipulations.
194. Setting aside and relieving against such Stipulations.
195. [Illustration.] Agreement that several Causes shall abide the Event of One.
196. [Further Illustrations.] That the opposite Party may take Judgment.
197. [Further Illustrations.] Admissions in the Pleadings.
198. Admissions and Agreements of State's Attorney.
199. Stipulation cannot confer Jurisdiction.
200. Verbal Stipulations, how far Binding.
201. Solemnity and Formality required in Admissions of Counsel.
202. Interpretation of Various Stipulations and Agreements.

§ 190. **Extent of Authority of Attorney in Management of Cause.**—While a general retainer to collect a debt or to conduct a cause does not, except under extraordinary circumstances, enable the attorney to bind his client by a *compromise* entered into with the opposite party,¹ yet he has general power to make such engage-

¹ Jones v. Inness, 32 Kan. 177; Kelly v. Wright, 65 Wis. 236; Roberts v. Nelson, 22 Mo. App. 28; Walden v. Boulten, 55 Mo. 405; Spears v. Ledergerber, 56 Mo. 465; Ambrose v. McDonald, 53 Cal. 28; Preston v. Hill, 50 Cal. 43; Township v. Keller, 100 Pa. St. 105, 43 Am. Rep. 42; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307; Stackhouse v. O'Hara, 14 Pa. St. 88; Stokely v. Robinson, 34 Pa. St. 315; Mackey v. Adair, 99 Pa. St. 143; Hamrich v. Combs, 14 Neb. 381; Robinson v. Murphy, 69 Ala. 543; Herriman v. Shoman, 24 Kan. 387, 36 Am. Rep. 261; Levy v. Brown,

56 Miss. 83; Picket v. Merchants' Nat. Bank, 32 Ark. 346; Mandeville v. Reynolds, 68 N. Y. 528; Wadhams v. Gay, 73 Ill. 415; People v. Quick, 92 Ill. 580; Holker v. Parker, 7 Cranch (U. S.), 436. The English courts, after some vacillation, seem to have settled upon the view that the attorney has power, by virtue of his retainer, to compromise the action in which he is retained, provided he acts bona fide and reasonably, and does not violate the positive instructions of his client, and that the compromise will bind the client even if he does violate instructions, unless the vio-

ments and stipulation in or out of court as he may deem proper in the conduct of the litigation,² and where they are entered into with-

lation is known to the adverse party,—the reason being that the attorney, within the scope of his retainer, is the general agent of his client. *Swinfen v. Swinfen*, 18 C. B. 485; *Swinfen v. Chelmsford*, 5 Hurl. & N. 890; *Chambers v. Mason*, 5 C. B. (N. S.) 59; *Chown v. Parrott*, 14 C. B. (N. S.) 74; *Prestwitch v. Poley*, 18 C. B. (N. S.) 806; *Fray v. Voules*, 1 El. & El. 839; *Butler v. Knight*, L. R. 2 Exch. 109. A few American courts have followed the same rule. *Wieland v. White*, 109 Mass. 392; *Potter v. Parsons*, 14 Iowa, 286; *Holmes v. Rogers*, 13 Cal. 191 (overruled it seems, by *Preston v. Hill*, 50 Cal. 43, and *Ambrose v. McDonald*, 53 Cal. 28). And American courts generally show a leaning in favor of such compromises, when fairly made, and uphold them if they seem advantageous to the party complaining. *Holker v. Parker*, 7 Cranch (U. S.), 436, 452; *Whipple v. Whitman*, 13 R. I. 512. See also *Roller v. Wooldrige*, 46 Tex. 485; *Potter v. Parsons*, 14 Iowa, 286; *Bank of Georgetown v. Geary*, 5 Pet. (U. S.) 99; *Black v. Rogers*, 75 Mo. 441; *Williams v. Nolan*, 58 Tex. 708; *Bonny v. Morrill*, 57 Me. 374; *Jones v. Williamson*, 5 Coldw. (Tenn.) 371; *Union Mutual Life Ins. Co. v. Buchanan*, 100 Ind. 63; *Albee v. Hayden*, 25 Minn. 267. Nor has he generally authority to release a surety. *Stowe v. Sheldon*, 13 Neb. 207; *Halback v. Loft*, 19 Colo. 74, 34 Pac. 568; *Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534; *Schlemmer v. Schlemmer*, 107 Mo. App. 487, 81 S. W. 636; *Dalton v. West End St. Ry. Co.*, 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep.

410. If an attorney is known by the debtor to be authorized to settle a claim, private instructions limiting his authority will not avoid a compromise. *Kelly v. C. & A. Ry. Co.*, 113 Mo. App. 468, 87 S. W. 583. In South Carolina it was held he could during the progress of the case before a master. *Dixon v. Floyd*, 73 S. C. 202, 53 S. E. 167. Circumstances, however, often make the existence or not of such authority a question for the jury. In *re Heath*, 83 Iowa, 215, 48 N. W. 1037. The power of waiver or compromise was held not to exist with respect to the rights of an executrix in settlement with heirs. *Succession of Landry*, 116 La. 773, 41 South. 88.

² *Greenlee v. McDowell*, 4 Ired. Eq. (N. C.) 485; *Branch v. Walker*, 92 N. C. 89; *Moulton v. Bowker*, 115 Mass. 36; *Williamson-Stewart Paper Co. v. Bosbyshell*, 14 Mo. App. 534, 538; *Levy v. Brown*, 56 Miss. 83; *Annelly v. Saussure*, 12 S. C. 488; *Read v. French*, 28 N. Y. 293; *Nightingale v. Oregon etc. R. Co.*, 2 Sawy. (U. S.) 338. See also *Schoregge v. Gordon*, 29 Minn. 367; *Clark v. Randall*, 9 Wis. 135; *Nelson v. Cook*, 19 Ill. 440; *Gorham v. Gale*, 7 Cow. (N. Y.) 739; *Union Bank v. Geary*, 5 Pet. (U. S.) 99; *Newberry v. Lee*, 3 Hill (N. Y.), 526; *Oestrich v. Gilbert*, 9 Hun (N. Y.), 242; *Jennie v. Delesdernier*, 20 Me. 183; *Week's Att.*, § 218; *Whart. Ag.*, §§ 585 et seq. He cannot stipulate that a sheriff shall conduct a business on which he has levied. *Alexander v. Denaveaux*, 53 Cal. 663, 59 Cal. 476; *Ephraim v. Bank*, 149 Cal. 222, 86 Pac. 507. Where an attorney for a state railway company was invested with plenary power during a strike, as to prosecution of offenders who

out fraud or collusion, they will bind his client.³ In short, according to Dr. Greenleaf, "the effect of a retainer to prosecute or defend a suit, is to confer upon the attorney all the powers exercised by the forms and usages of the court in which the suit is pending."⁴

§ 191. [Continued.] What he may do.—He may agree to submit the matter in controversy to *arbitration*,⁵ or not to take an *appeal* or *writ of error*;⁶ or may agree that the opposite party may *take judgment*,⁷ and this, too, although he may know that his client has a good defense to the action.⁸ So, where he represents the plaintiff,

should molest the company's employes in endeavoring to run its cars, his powers are to be regarded as so going beyond the rigid limits usual in the employment of an attorney as to carry the question to the jury of his authority to bind the company by an offer of reward for the conviction of one arrested for firing a shot at a moving car. *Cornwell v. St. L. Transit Co.*, 106 Mo. App. 135, 80 S. W. 744.

³ *Beck v. Bellamy*, 93 N. C. 129. Though an attorney be merely employed to enter a special appearance, yet, if he honestly pleads matter operating as a general appearance, this binds his client. *McNeal v. Gossard*, 68 Kan. 113, 74 Pac. 628.

⁴ 2 Greenl. Ev., § 141; *Smith v. Bossard*, 2 McCord Ch. (S. C.) 409.

⁵ *Sargeant v. Clark*, 108 Pa. St. 588; *Bingham v. Guthrie*, 19 Pa. St. 418; *Tilton v. U. S. Life Ins. Co.*, 8 Daly (N. Y.), 84; *Somers v. Balabrega*, 1 Dall. (U. S.) 164; *Holker v. Parker*, 7 Cranch (U. S.), 436; *Buckland v. Conway*, 16 Mass. 396. Compare *Connett v. Chicago*, 114 Ill. 233; *McElreath v. Middleton*, 89 Ga. 83, 14 S. E. 906. There is, however, much authority against this proposition. *King v. King*, 104 La. 420, 29 South. 205; *Rhutassel v. Rule*, 97 Iowa, 20, 65 N. W. 1013.

And in one state which concedes it may be done the authority is qualified that the submission shall not be so as to make the award final. *Daniel v. City of New London*, 58 Conn. 156, 19 Atl. 573, 7 L. R. A. 563.

⁶ *Shisler v. Keavy*, 75 Pa. St. 79.

⁷ *Hudson v. Allison*, 54 Ind. 215. Compare *Pike v. Emerson*, 5 N. H. 393; *Talbott v. McGee*, 4 T. B. Mon. (Ky.) 377; *Union Bank v. Geary*, 5 Pet. (U. S.) 99; *Town of Chalmers v. Tandy*, 111 Ill. App. 252; *Devenbaugh v. Nifer*, 3 Ind. App. 379, 29 N. E. 923. Contra, *Pfister v. Wade*, 62 Cal. 133, 10 Pac. 369; *Ohlquest v. Farwell*, 71 Iowa, 231, 32 N. W. 277. Where an attorney represents adults and infants and their interests are in some respects opposed, his consent to a decree cannot bind the latter. *Walker v. Grayson*, 86 Va. 337, 10 S. E. 51.

⁸ *Thompson v. Pershing*, 86 Ind. 304, 310. So, an attorney has authority, in virtue of his general retainer, to bind his client by a stipulation to take a judgment on a verdict already rendered, and such a stipulation does not lose its force by the lapse of over ten years before judgment is entered, if no revocation of the authority of the attorney has taken place in the meantime. *Barlow v. Steel*, 65 Mo. 611, 618.

he may, without the consent of his client, dismiss the action,⁹ or restore it after a dismissal or *nolle pros.*,¹⁰ or bring a new action;¹¹ and he may take an appeal, and, according to one opinion, bind his client by a recognizance in the name of the latter for the prosecution of it.¹² So, he may have printed, at the charge of his client, such briefs or arguments as he may judge advisable for the more convenient presentation of the cause in an appellate court.¹³ In all these cases if, in the absence of collusion with the opposite party, he acts contrary to the express directions of his client, or to his injury, the client must look to the attorney, and not to the opposite party, for redress.

§ 192. [Continued.] What he may not do.—But there is even here a line which he cannot overstep. He cannot, by virtue of his

⁹ *McLeran v. McNamara*, 55 Cal. 508; *Gaillard v. Smart*, 6 Cow. (N. Y.) 385; *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382. Contra, *Brown v. Mead*, 68 Vt. 215, 34 Atl. 950. The practice of dismissal by the attorney is spoken of disapprovingly by United States court of claims. *The Zilpha*, 40 Ct. Cl. 200. A stipulation for dismissal at defendant's cost binds plaintiff. *Alexander v. Harrison*, 2 Ind. App. 47, 48 N. E. 119.

¹⁰ *Reinhold v. Alberti*, 1 Binn. (Pa.) 469.

¹¹ *Scott v. Elmendorf*, 12 Johns. (N. Y.) 315.

¹² *Adams v. Robinson*, 1 Pick. (Mass.) 462; *Fraser v. Curry Amington & Co.*, 119 Ga. 908, 47 S. E. 206. Or he may, though not gratuitously, stipulate to waive appeal. *S. H. Keoughan & Co. v. Equitable Oil Co.*, 116 La. 773, 41 South. 88. Though an attorney may execute in his client's name an appeal bond, he may not execute an indemnity bond to sheriff. *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027. But see *Audley v. Townsend*, 96 N. Y. S. 439, 49 Misc. R. 23, where it was held that attorney of non-resident client could bind the latter as sheriff under the

statute had right to require indemnity on condition of his making a levy. It is generally held that attorneys may accept payment of a judgment and it was ruled that this was even so where a city issued a warrant in the name of an attorney for the guardian ad litem of an infant. *St. v. Ballinger*, 41 Wash. 23, 82 Pac. 1018.

¹³ *Williamson-Stewart Paper Co. v. Bosbyshell*, 14 Mo. App. 534; *Weisse v. City*, 10 La. Ann. 46. Other acts by attorneys binding their clients are as follows: An injunction bond given by an attorney where his client was absent. *Gauthier v. Guardernal*, 44 La. Ann. 884, 11 South. 403. Or attachment bond under like circumstances. *Fornes v. Wright*, 71 Iowa, 392, 59 N. W. 251. May obligate client to pay expense of moving replevined property to place of safety. *Fox v. William Deering & Co.*, 7 S. D. 443, 64 N. W. 520. May consent to third parties intervening in the suit. *Lee v. Hickson*, 40 Tex. Civ. App. 632, 91 S. W. 636. May waive objection to plaintiff splitting his demand. *Dowling v. Wheeler*, 117 Mo. App. 169, 93 S. W. 924.

general authority, *accept service* for his client of the original process by which the action is begun;¹⁴ nor, under the old law excluding interested witnesses, could he *release* a claim of his client against a witness, in order to render the latter competent to testify;¹⁵ nor release *sureties*;¹⁶ nor execute a *replevin bond* for his client;¹⁷ nor enter a *retraxit*;¹⁸ nor, according to one doubtful opinion, stipulate *what law* shall govern the case,—as that a particular statute was or was not duly enacted;¹⁹ nor *assign the judgment* when recovered;²⁰ nor *release* or postpone the *lien* thereof;²¹ nor act for the *legal representatives* of his deceased client.²²

¹⁴ Bayley v. Buckland, 1 Exch. 1; Masterson v. Le Claire, 4 Minn. 163; Anderson v. Hall, 87 N. C. 381.

¹⁵ Shores v. Casswell, 13 Metc. (Mass.) 413. See also Marshall v. Nagel, 1 Bail. (S. C.) 308; Ephraim v. Pacific Bank, 149 Cal. 222, 86 Pac. 507.

¹⁶ Givens v. Briscoe, 3 J. J. Marsh. (Ky.) 532; Lowry v. Clark, 20 Pa. Super. Ct. 357.

¹⁷ Proprietors v. Wentworth, 36 Me. 339. But aliter as to an *indemnifying* bond to a sheriff, in the name of his principal. Ford v. Williams, 13 N. Y. 577; Smiley v. U. S. Building etc. Ass'ns Assignee, 23 Ky. Law Rep. 250, 62 S. W. 853; Gardner v. R. Co., 102 Ala. 635, 15 South. 271.

¹⁸ Lambert v. Sanford, 2 Blackf. (Ind.) 137; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568. The Indiana statute appears to have extended his discretion in this respect so that, if such a cause is deemed for the best interests of his client, a *retraxit* may be entered in writing of certain matters in the complaint, while consideration of referee's report is pending. Barnard v. Doggett, 68 Ind. 305.

¹⁹ Graves v. Alsap, 1 Ariz. Ter. 274; Wade v. Lumber Co., 51 Fla. 628, 41 South. 72. Contra, In re Cullinan, 99 N. Y. S. 74, 113 App. Div. 485. But a stipulation that "judgment" in a certain action was

"duly entered" and that a certain sale was made "on notice duly given" has been held binding and conclusive. Purcell v. Farm Land Co., 13 N. D. 327, 100 N. W. 700. Semble, City of Helena v. Helena Waterworks Co., 122 Fed. 1, 58 C. C. A. 381, 195 U. S. 383, 49 L. Ed. 245. And where foreign laws are offered in evidence, stipulations as to purported copies are binding. Hall v. Western Union etc. Co., 139 N. C. 369, 52 S. E. 50. It has also been held that a stipulation fixing the value of saloon fixtures, for whose destruction an action was brought at a certain price, prevented defendant from urging the defense at law, that they were worthless because of their being devoted to an illegal purpose. Coppedge v. M. K. Goetz Brewing Co., 67 Kan. 851, 73 Pac. 851.

²⁰ Wilson v. Wadleigh, 36 Me. 496; Bosler v. Searight, 149 Pa. St. 241, 24 Atl. 303; Maxwell v. Owen, 47 Tenn. (7 Cold.) 630. He may however collect and enter satisfied the judgment. Rhinehart v. New Madrid Banking Co., 99 Mo. App. 381, 73 S. W. 315; Cruikshank v. Goodwin, 66 Hun, 626, 20 N. Y. S. 757.

²¹ Wilson v. Jennings, 3 Ohio St. 528. See also Doub v. Barnes, 1 Md. Ch. 27. Nor of a mortgage. Ludden & Bates Southern Music House v. Sumter, 45 S. C. 186, 22 S.

§ 193. **Binding Nature of his Stipulations.**—Such being the extensive nature of his powers in the conduct of the litigation, it follows that his stipulations, made in open court with the opposite counsel, have in general the force of *contracts*, the performance of which the court will enforce.²³ Some decisions add, as a condition of the binding character of a stipulation, that it be also *entered of record*.²⁴ But, on principle, it would seem sufficient, to give the stipulation or promise, made *in facie curiæ*, the binding nature of

E. 738. Aliter as to directing a constable to release property seized in attachment. *Muir v. Oscar*, 87 Mo. App. 38. An attorney has no implied authority to employ assistant counsel at client's expense. *Emblem v. Bicksler*, *McLean & Bennett*, 34 Colo. 496, 83 Pac. 636; *Chicago & S. Traction Co. v. Flaherty*, 222 Ill. 67, 78 N. E. 29. As the service to be rendered is personal he cannot transfer to another attorney and executory agreement, undertaking to supply professional services. *Johnston v. Baca*, 13 N. M. 338, 85 Pac. 237.

²² *Campbell v. Kincaid*, 3 T. B. Mon. (Ky.) 560; *Wood v. Hopkins*, 3 N. J. 507. Not even to suggest death for the purpose of obtaining an order of revival. *Chicago, R. I. & P. R. Co. v. Woodson*, 110 Mo. App. 208, 85 S. W. 105. The relation of attorney terminates with the client's death. *Moyle v. Landers*, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22; *Butler v. Gordy*, 146 U. S. 303, 36 L. Ed. 981. This principle is qualified to some extent. Thus it has been held, that an attorney may move to dismiss an appeal after his client's death. *Wharton v. Reay*, 92 Cal. 74, 28 Pac. 56. But he cannot take an appeal. *Stith v. Winbush*, 3 La. 442. If he have a contract to prosecute a claim to final adjudication on a contingent compensation, authority is not revoked by death. *Price v. Hoberle*, 25 Mo. App. 201.

Insanity also terminates the relationship. *Chase v. Chase*, 163 Ind. 178, 71 N. E. 485.

²³ *Banks v. American Tract Society*, 4 Sandf. Ch. (N. Y.) 438; *Staples v. Parker*, 41 Barb. (N. Y.) 648. It is said to have always been the practice in New York "to hold the parties strictly to their engagements made during the trial and in the face of the court, relating to the conduct of the suit, and its proceedings." *Staples v. Parker*, *supra*; *Wood v. Wood*, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42; *Coonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940.

²⁴ *Caldwell v. McWilliams*, 65 Ga. 99. Under the statute of *Minnesota*, which declares that the authority of an attorney to bind his client shall extend to "any of the proceedings in an action or special proceeding, duly made, or entered upon the minutes of the court," it has been held that a stipulation touching the conduct of a cause, so made and entered, is in the nature of a contract, which the court cannot set aside at the instance of one of the parties. *Bingham v. Supervisors*, 6 Minn. 136; *Tevis v. Palatine Ins. Co.* 149 Fed. 560. Such a stipulation may provide by nunc pro tunc order for a matter resting on oral understanding where one of the parties has proceeded thereon. *White v. Jones*, 83 Miss. 231, 35 South. 450.

a contract, that the other party has *acted upon it*. This conclusion is supported upon the familiar principle of an *estoppel in pais*, which is that when a party, by his declaration or conduct, has induced another to act in a particular manner which he would not otherwise have done, such party will not afterwards be permitted to set up a claim inconsistent with such declaration and conduct, if such claim will work an injury to the other party or to those claiming under him.²⁵ Sometimes the qualification is added that the agreement be *fair and reasonable*. Thus, it is said in Tennessee by the court, speaking through Reese, J.: "The power of the court, as well as the duty, to enforce fair and reasonable agreements relating to the conduct and dispatch of business before it, is necessarily incident to the nature of its position and required to insure the orderly and faithful determination of causes. It is a power which this court has repeatedly exercised upon deliberation and examination of authorities, and very recently in a highly important case."²⁶

§ 194. Setting aside and relieving against such Stipulations.—

Such being the nature of the stipulations of counsel made in court touching the cause of the trial, it follows that they will not be set aside upon any lower grounds than those which would warrant the rescission of a contract,—namely, fraud, collusion, accident, surprise, or some ground of the same nature.²⁷ The court will not relieve parties from the effects of a stipulation made under a full understanding of the facts existing at the time.²⁸ The mere fact

²⁵ *Banks v. American Tract Society*, 4 Sandf. Ch. (N. Y.) 438, 467; *Reclamation District v. Hamilton*, 112 Cal. 603, 44 Pac. 1074. Where for the purpose of avoiding a continuance plaintiff agreed not to inquire into a prejudicial matter occurring at the term, allusion by counsel thereto in his argument to the jury was held to entitle the defendant to a new trial.

²⁶ *Jones v. Kimbro*, 6 Humph. (Tenn.) 319.

²⁷ *Bingham v. Supervisors*, 6 Minn. 136; *Keogh v. Main*, 52 N. Y. Super. 160; *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507. If a stipulation is wanting in explicitness an appellate court has

no jurisdiction to supply the defect, but the only remedy of a defeated party is in application to the trial court. *Dame v. Woods*, 73 N. H. 391, 62 Atl. 379. Where the stipulation has no consideration for its being made, the court will permit its being revoked. *Southern Bell Telephone etc. Co.*, 118 Ga. 506, 45 S. E. 319. One seeking relief from a stipulation must offer to put his adversary in statu quo. *Emerick & Duncan Co. v. Hascy*, 146 Fed. 688, 77 C. C. A. 114.

²⁸ *Conner v. Belden*, 8 Daly (N. Y.), 257. Unless it has been improvidently entered into and stands in the way of substantial justice, when a wise discretion should re-

that a party, by such a stipulation, has *waived defenses* which he might otherwise urge, is no sufficient ground for setting it aside.²⁹ But, by analogy to the relief of parties from contracts entered into under a mutual *mistake of fact*, it is clear that a court will relieve a party against a stipulation made under such a mistake.³⁰ It has been held that an order setting aside a stipulation of counsel touching the conduct of a case, is *appealable*.³¹ But this, under most systems, would obviously depend upon the nature of the order; it would not be appealable unless it were in the nature of a final judgment dispositive of a substantial right.

§ 195. [Illustration.] **Agreement that Several Causes shall Abide the Event of one.**—Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys, in virtue of their general retainers, to stipulate that only one shall be tried and that the others shall abide the result of that one.³² Such a stipulation is not merely an independent executory agreement, but it operates presently to affect the status

lieve from its effects. *Butler v. Chamberlain*, 66 Neb. 174, 92 N. W. 154. This principle does not, however, embrace a case of omission of those things which reasonable prudence should have included or provided against. *Rowell v. Lewis*, 95 Me. 83, 49 Atl. 423. Thus it may be said the trial court's discretion, while not arbitrary, is greatly deferred to in these matters. *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863.

²⁹ *Bingham v. Supervisors*, *supra*.

³⁰ *Wells v. American Express Co.*, 49 Wis. 224. In this case the mistake does not appear to have been *mutual* and yet the stipulation was set aside. The case of *Danerl v. Gazzolo*, 2 Cal. App. 351, 83 Pac. 455, shows a liberal application of this principle. The facts show that the case was on its second trial. At the former trial plaintiff stipulated, at defendant's request, that a certain deed had been "duly executed and delivered." Ascertaining before

the second trial that testimony was to be had tending to show the deed was never delivered, he notified defendant that the same admission would not be made at the next trial. It was held no abuse of discretion to relieve from the stipulation, though in the meantime a witness, who presumably would have testified to delivery, had died. It is to be supposed that the court reasoned, that the misfortune of the defendant arose from his seeking his own convenience or advantage and plaintiff ought not for that reason to be deprived of his right to make this an issuable matter for the jury to determine.

³¹ *Bingham v. Supervisors*, 6 Minn. 136.

³² *North Missouri R. Co. v. Stephens*, 36 Mo. 150. As to the effect of a stipulation that one cause shall abide the result of another, see *Gilmore v. American Central Ins. Co.*, 67 Cal. 366; *Ohlquest v. Farwell*, 71 Iowa, 231, 32 N. W. 277;

of the case itself, and invests the plaintiff with rights in respect to its conduct, which he otherwise would not have had, and of which neither the opposite party nor the court can lawfully divest him. When, therefore, one suit was selected from among a number which were founded upon the same cause of action, and a stipulation made that all the causes then pending on appeal from a justice should abide the final determination of this case,—the defendant thereafter had no right to dismiss his appeal in the case in which the stipulation was entered of record.³³

§ 196. [Further Illustrations.] That the Opposite Party may take Judgment.—The foregoing principle no doubt extends so as to give binding force to a stipulation that one of the parties to the suit may take judgment, since it is competent for counsel to make such an agreement.³⁴ Under a statute providing that parties may agree to a judgment by *writing* filed in open court, it is held that an agreement between the parties to an action, stipulating the terms upon which a decree shall be entered, when filed in open court, becomes

Scarritt Furniture Co. v. Moser, 48 Mo. App. 543. An attorney in whose favor a judgment has been rendered may enter into such a stipulation even after the term but within the time for suing out a writ of error. Brown v. Arnold, 131 Fed. 723, 67 C. A. 125. This however has been ruled otherwise on the principle that a writ of error is a new suit. Delaney v. Husband, 64 N. J. L. 275, 45 Atl. 265. The condition that the two or more cases must involve the same questions of law and fact is a strict one. Thus it was held by the federal Supreme Court that the stipulation by a city attorney, where there was an essential difference in a claim of exemption from tax by a trust company and a regular banking corporation, that the decision in a suit against a regular bank should be decisive of the suit against a trust company was not authorized. Fidelity Trust etc. Co. v. City of Louisville, 174 U. S. 429, 43 L. Ed. Such a stipulation has been held

not to become operative so long as either of the parties has a right to have it reviewed by appeal or writ of error. Peoples' Bank v. Merchants & Mech. Bank, 116 Ga. 279, 42 S. E. 490. Such a stipulation does not waive objection that may be taken to a complaint in the action, in which the stipulation is made, that it fails to state facts sufficient to constitute a cause of action. Pacific Pav. Co. v. Vizelech, 141 Cal. 4, 74 Pac. 352.

³³ McKinley v. Wilmington Star Mining Co., 7 Bradw. (Ill.) 386.

³⁴ Pike v. Emerson, 5 N. H. 393; Talbott v. McGee, 4 T. B. Mon. (Ky.) 377; Union Bank v. Geary, 5 Pet. (U. S.) 99; 2 Greenl. Ev. § 141. It has been held that a party who obtains a judgment in violation of his written stipulation on file, dismissing the action,—may be restrained or enjoined from enforcing it by the court in which it was obtained. McLeran v. McNamara, 55 Cal. 508.

a part of the record, and is in effect an answer or pleading, and, unless for good cause shown, should be so regarded by the court, and cannot hence be stricken from the files or withdrawn upon the motion of the parties; and accordingly, that a subsequent pleading, filed by one of the parties, inconsistent therewith, should be stricken from the files.³⁵

§ 197. [Further Illustrations.] Admissions in the Pleadings.—The pleadings are drawn by the attorneys of the parties, except in those few cases where parties are foolish enough to endeavor to act as their own attorneys; and no better illustration of the principle under discussion could be furnished than is found in the binding nature of the admissions in the pleadings. Such admissions are *evidentiary* in their character, are an absolute *estoppel* upon the party making them, unless he seasonably withdraws them by amendment, and obviates the necessity of the other party proving the facts thus admitted. Much could be written upon this subject. There are *implied* admissions as well as *express* admissions. It has been held that, where an answer sets up several distinct defenses, a denial in one is qualified by an admission in another,—which is merely an application of the rule that a party's pleading, like any other written instrument, is to be construed as a whole, and in case of any incongruities or contradictions, is to be taken most strongly against the pleader. If, therefore, a party in one count of an answer denies a fact alleged in the petition or complaint, and in another count admits it, the admission, and not the denial, will be taken to be true. It will estop him, and the plaintiff will not be bound to prove the fact thus admitted. For instance, where the action was replevin for unlawfully taking the plaintiff's goods, and the answer contained two defenses: (1) a general denial of the allegations of the complaint, and (2) a justification of the taking under a levy upon execution,—it was held that the answer admitted the taking for the purposes of the trial, and that to that extent the second defense vacated the first.³⁶ In another case, the same court, applying the same principle, held that a general denial in one count of the answer was inconsistent with special matter alleged in another count, and was to be construed as modified by the latter.³⁷ This principle has been applied by the Supreme Court of the United States in a case

³⁵ Vail v. Stone, 13 Iowa, 284.

³⁶ Derby v. Gallup, 5 Minn. 119.

³⁷ Scott v. King, 7 Minn. 494. See also Zimmermann v. Lamb, 7 Minn. 421.

originating in the Circuit Court of the United States for the District of Minnesota,—the court holding that the admission of the plaintiff's title contained in an equitable defense set up in the third count of the answer, overrode and controlled a denial of the plaintiff's title in the first count, and was conclusive upon the question of title.³⁸

§ 198. **Admissions and Agreements of State's Attorney.**—Admissions made by the State's attorney of facts for the purpose of the trial are to be considered, for all the purposes to which they are relevant, in precisely the same light as if they had been proved by testimony instead of admitted.³⁹ Where the State's attorney is not in a condition to go to trial or to demand the forfeiture of a recognizance, he may lawfully agree in consideration of a consent to the forfeiture, that it shall be set aside on the appearance of the defendant at the next term.⁴⁰

§ 199. **Stipulation cannot confer Jurisdiction.**—An exception to the rule touching the binding force of stipulations of counsel as to the conduct of a cause is founded in the principle that consent cannot confer jurisdiction over the subject matter of a litigation: a stipulation giving the court jurisdiction which it does not possess is invalid.⁴¹

§ 200. **Verbal Stipulations, How far Binding.**—Subject to the statute of frauds, verbal promises, whether made in or out of court, if *acted upon* by the other party, are binding as contracts, at least by way of estoppel, on a principle already suggested.⁴² Acting upon this principle, one court has ruled that although there may be a rule of court intended to prevent disputes and uncertainties,

³⁸ Northern Pacific R. Co. v. Paine, 7 Sup. Ct. Rep. 323, 325.

³⁹ People v. Tyler, 36 Cal. 522, 531.

⁴⁰ Esmond v. People, 18 Bradw. (Ill.) 114.

⁴¹ Bingham v. Supervisors, 6 Minn. 136, 147; Muir v. Preferred Ass. Ins. Co., 203 Pa. 338, 53 Atl. 158. A stipulation cannot obviate the taking of the necessary steps whereby an appellate tribunal comes into possession of the record of a cause or whereby its cognizance may be brought to a cause on appeal and its

decision invoked, e. g. the filing of a bill of exceptions, where matters outside of the record proper are to be considered. Robin v. Vanderbeck, 55 N. J. L. 364, 26 Atl. 919; McDowell v. Fowler, 80 Tex. 587, 16 S. W. 531. If the court has jurisdiction of the subject matter it will recognize an agreement to permit third parties to intervene with respect thereto. Lee v. Hickson, 40 Tex. Civ. App. 632, 91 S. W. 66.

⁴² Ante, § 193.

requiring stipulations of counsel touching the conduct of causes to be put in writing, yet where such an agreement has been orally made between counsel, and the substance of it is admitted, the court will not allow one of the counsel to disregard it, after it has been acted upon by the other. "We think it well established by the authorities," said Paine, J., "that, although the rule requires stipulations to be in writing in order to be binding, yet it was not designed to allow a party who had entered into a verbal stipulation, upon which his adversary had relied and acted, to obtain an unjust advantage, and destroy the other's rights by disregarding it himself."⁴³ Another court has ruled, proceeding upon the necessity of avoiding disputes between counsel, that verbal stipulations with reference to proceedings pending an action cannot be regarded, except so far as they are admitted by the parties against whom they are sought to be enforced.⁴⁴ For stronger reasons, a verbal stipulation not entered of record will not be enforced after a long and *unexplained delay*, as for instance, a stipulation that a default may be set aside where a delay of seven years has intervened before making the application to the court to enforce the same.⁴⁵ Statutes exist in some States like the following: "An attorney and counsellor has authority to bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise."⁴⁶ Such statutes are regarded as in the nature of a *statute of frauds*.⁴⁷ Under them an attorney cannot bind his client, by a verbal stipulation, made during the progress of a trial and not entered on the minutes, to waive the rights of his client under an issue made by the pleadings,—as, for instance, that the judgment of the plaintiff, if he recover, shall be

⁴³ *Burnham v. Smith*, 11 Wis. 258. The court cite *Gaillard v. Stuart*, 6 Cow. (N. Y.) 385; *Ex parte Lassell*, 8 Cow. (N. Y.) 119; *Montgomery v. Ellis*, 6 How. Pr. (N. Y.) 326; *Wager v. Stickle*, 3 Paige (N. Y.), 407; *Turner v. Burrows*, 1 Hill (N. Y.), 627; *Jose v. Hoyt*, 106 Mo. App. 594, 81 S. W. 468; *Talbot v. Mason*, 125 Fed. 101, 60 C. C. A. 145.

⁴⁴ *Patterson v. Ely*, 19 Cal. 35; *Reese v. Mahony*, 21 Cal. 305, 308; *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150. Affidavit of counsel will not be received to establish any

stipulation or any waiver of an irregularity. *Hardin v. Iowa Ry. & Const. Co.*, 78 Iowa, 726, 43 N. W. 543, 6 L. R. A. 52. Where a rule of court requires stipulation to be in writing, this was held not to apply to an agreement before a master during the progress of a hearing before him. *Black v. Black*, 206 Pa. 116, 55 Atl. 847.

⁴⁵ *Reese v. Mahony*, *supra*.

⁴⁶ Cal. Code Civ. Proc., 1909, § 283.

⁴⁷ *Borkheim v. Insurance Co.*, 38 Cal. 623, 628.

for payment in gold coin; ⁴⁸ or even extending the time for filing a bill of exceptions.⁴⁹

§ 201. **Solemnity and Formality Required in Admissions of Counsel.**—In order that admissions of counsel of facts may take the place of evidence in a civil trial, such admissions “must be distinct and formal, or such as are termed *solemn admissions*, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial.”⁵⁰ The *remarks* of counsel during the progress of a trial are not to be regarded as admissions by which the rights of the client are to be determined.⁵¹ It has even been held that counsel who, when *evidence* is offered, make declarations that it is offered for a *limited purpose* only, are not *estopped*, after it is received, from drawing from it deductions other than those contained in the offer, unless injustice will be done to the opposite party by permitting such new deductions. Counsel, it is reasoned, have no power to limit the effect of evidence, but its effect is regulated by the court in its charge to the jury. The statement by counsel of the purpose for which evidence is offered is only a reason given why the evidence should be received.⁵² But the *failure to object to evidence* in the course of the trial will, in many cases, have the effect of an admission of certain facts which flow as a natural consequence from acts done or evidence admitted. Thus, in a suit upon notes where certain notes are offered in evidence without objection, this, it has

⁴⁸ *Merritt v. Wilcox*, 52 Cal. 238. Under a substantially similar statute the same rule exists in Indiana. *Louisville etc. R. Co. v. Boland*, 70 Ind. 595.

⁴⁹ *Goben v. Goldsberry*, 72 Ind. 44 (distinguishing *Ridgway v. Morrison*, 28 Ind. 201). Or thus to waive the issuance of a summons in error. *Haylen v. Mo. Pac. R. Co.*, 28 Neb. 660, 44 N. W. 873.

⁵⁰ 1 Greenl. Ev., § 186; *Ferson v. Wilcox*, 19 Minn. 449, 451. See also Revised Laws Minn. 1905, § 2283; *Schilling v. Buhne*, 139 Cal. 61, 73 Pac. 431.

⁵¹ *McKeen v. Gammon*, 33 Me. 187. See for illustration, *Stewart v.*

Shaw, 55 Mich. 613. Thus where counsel said he “thought he had no contention to make” on defendant’s claim that he was surety and the latter’s counsel replied, “than judgment might be entered showing that fact,” this did not constitute an agreement as to the form of the judgment. *Newton v. Pence*, 10 Ind. App. 672, 38 N. E. 484. Nor is plaintiff bound by a remark of counsel that a plea of estoppel is well founded. Where there is nothing in the record to show such as a conclusion of law upon any facts in evidence. *Harvin v. Beackman*, 108 La. 426, 32 South. 452.

⁵² *Sill v. Reese*, 47 Cal. 294.

been held, is equivalent to a tacit admission that they were the notes in suit. "If they were not," said the court, "by timely objection, by pointing out any substantial difference between the notes sued on and those offered, he (defendant) could very easily have prevented their introduction in evidence."⁵³

§ 202. Interpretation of Various Stipulations and Agreements.

A stipulation which on its face purports to be "*a statement of the facts in this action*" does not, unless its terms so import, preclude the parties from introducing other evidence on the trial.⁵⁴ An

⁵³ *Fitzgerald v. Barker*, 85 Mo. 13, 20.

⁵⁴ *Dillon v. Cockcroft*, 90 N. Y. 649; *Erdmann v. Upham*, 70 App. Div. 315, 75 N. Y. S. 241. Such a stipulation carries no inference whatever of further facts than such as are necessary in point of law. *Coffin v. Artesian Water Co.*, 193 Mass. 274, 79 N. E. 262; *Wetyen v. Fick*, 90 App. Div. 43, 85 N. Y. S. 492, affirmed 178 N. Y. 223, 70 N. E. 497. See, however, for a less stringent application of this principle, *Parker v. Atlantic Coast Line R. Co.*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827. For further illustrations of stipulations and their effect and conclusiveness see *Mugge v. Jackson*, 50 Fla. 235, 39 South. 157. Where it was held that a stipulation not limited by its terms will be deemed to hold for a subsequent trial as well as at that which it was entered into; as if not so limited it is not apparently intended to serve a present purpose, e. g. avoiding a continuance on account of the absence of a witness. See *Cutler v. Cutler*, 130 N. C. 1, 40 S. C. 689. Where it is stipulated that a witness is competent to testify on a certain subject, e. g. value, this does not prevent cross-examination to show his means of knowledge. *Chankalian v. Powers*, 89 App. Div. 395, 85 N. Y. S. 753. Especially

where the stipulation was agreed to as a means of avoiding a continuance of the case because of the non-attendance of another witness. Nor does a stipulation as to facts preclude objection as to their legal effect. *Conway v. Sup. Council C. K. of A.*, 137 Cal. 384, 70 Pac. 223. Nor that a judgment was rendered prevent an attack upon its validity as shown by the entire record in the case. *Rosenberger v. Gibson*, 165 Mo. 16, 65 S. W. 237. Nor that an abstract of title may be used in evidence preclude the showing of a mistake therein. *Taffinder v. Merrill* (Tex. Civ. App.), 61 S. W. 936 (not reported in state reports). It is, however, conclusive of the validity of a tax lien to stipulate that certain money was paid to "redeem from a tax lien." *Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894. And in extradition proceedings, that accused was not in the demanding state at the time of the offense charged, that he was not there when the crime was committed. *People v. Hyatt*, 172 N. Y. 176, 64 N. E. 825, 188 U. S. 691, 47 L. Ed. 657. Where a stipulation waives all objections to evidence and authorizes the trial judge to render any judgment he sees fit upon the evidence, this has been held to take away the right of appeal. *Lipps v. Markowitz*, 84 N. Y.

agreement to *supply lost papers* or dismiss cause at the next term, is construed to mean at that period of the term when the cause is reached for trial on the docket in regular course of business.⁵⁵ An agreement to *submit* a case *on briefs* to be decided in vacation, the order and decree to be entered as of that or the next term, is construed as a submission of the whole controversy, and not as merely the submission of a motion to disallow an injunction.⁵⁶ Where the parties, upon the evidence as it stands at a given stage of the trial, stipulate that the *jury may be discharged* and the cause submitted to the court alone, if one of them is thereafter, against the objection of the other, permitted to introduce further evidence, and if the cause is decided by the court with reference to such further evidence, without any waiver by the other party of his right to a jury trial thereupon, it will be error.⁵⁷ Where the defendant moved for a *continuance* to enable him to discredit the testimony of the plaintiff, in case she should be called as a witness in her own behalf; and thereupon her counsel, in order to avoid a continuance, announced that she should not be called, whereupon the court said that, upon that agreement, the continuance would be refused,—it was held that this circumstance did not preclude the counsel of the defendant from *commenting* in his *argument* upon the failure to call her as a witness.⁵⁸ A stipulation that a *stenographer's notes* of testimony taken on a trial of another cause may be used as evidence, subject to objections for immateriality, irrelevancy, or other matter of substance, is a waiver of the right to object that the witnesses were incompetent, or that the parties or issues were different than on the former trial.⁵⁹ An agreement to *amend* the issue and try the case on the *merits* has the effect merely of waiving exceptions to the matter of

S. 172. And one for report of referee to be submitted along with objections for determination by the court on the merits was held to preclude assignment of error for the trial judge setting aside the findings of the referee and substituting his own findings therefor. *Hodges v. Graham*, 71 Neb. 125, 98 N. W. 418. While stipulations in writing are for construction by the court, as see *Brickman v. Southern Ry. Co.*, 74 S. C. 306, 54 S. E. 553. Yet where only a part of the facts are embraced therein and other evi-

dence oral and documentary are somewhat inconsistent with the stipulation, it and all the facts are for consideration by the jury. *Hunt v. Van Burg*, 75 Neb. 304, 106 N. W. 329.

⁵⁵ *Jones v. Kimbrough*, 3 Humph. (Tenn.) 319.

⁵⁶ *Anderson v. White*, 27 Ill. 57.

⁵⁷ *Hewitt v. Week*, 51 Wis. 368.

⁵⁸ *Hurd v. Marple*, 10 Bradw. (Ill.) 418.

⁵⁹ *Weldon Hotel Co. v. Seymour*, 54 Vt. 582.

form, and does not, in any other respect, affect the legal rights of the parties.⁶⁰ A stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal and deliver it to the officer in charge and disperse, is equivalent to an agreement that the court may open the *sealed verdict* in their absence, and, if necessary, reduce it to proper form. It is also a waiver of the right to poll the jury if they should be in court.⁶¹

⁶⁰ *Banghart v. Flummerfelt*, 43 N. J. L. 28.

⁶¹ *Koon v. Insurance Co.*, 104 U. S. 106. Whether a suit at law and

one in chancery are to be tried as *one suit*. *King v. Chicago etc. R. Co.*, 98 Ill. 376.

CHAPTER VIII.

OF OTHER SUBJECTS OF JUDICIAL CONDUCT AND CONTROL.

SECTION

205. Establishing Rules of Practice.
206. Controlling the Intercourse between the Court and the Bar.
207. Protracting a Trial during a whole Night.
208. Allowing Members of the Family of the Prosecutrix to sit in court and weep.
209. Allowing one not an Attorney to appear.
210. Consolidating several Actions for Purposes of Trial.
211. Calling an Attorney to Preside.
212. Retiring from the Bench without Suspension of Trial.
213. Change of Judges during the Trial.
214. Who to sign Bill of Exceptions in such a Case.
215. Objection that the Judge presided on a previous Trial of the same Action.
216. Exclusion of Spectators when not a Violation of Right of Public Trial.
217. When Improper to grant Leave of Absence to Counsel.
218. Prejudicing the Minds of the Jurors.
219. [Continued.] Remarks Indicating Opinion as to Facts.
220. Asking Pertinent Question of Counsel.
221. Conversing privately with Witnesses.

§ 205. **Establishing Rules of Practice.**—While it is the undoubted province of judicial courts to establish reasonable rules of practice, yet a rule of court which operates to deprive a party of a legal right is void.¹ So held of a rule which empowered the court to disregard a motion to have the jury polled.²

¹Crotty v. Wyatt, 3 Bradw. (Ill.) 388. Reasonableness in subordination to statutory or other law being the limitation on regulation by a rule of court it is apparent that a rule valid in one state might be void in another. It would seem also that the policy of legislation is also a factor in determining whether or not a rule of court is valid. Thus in Missouri, a rule of court cannot put a peculiar burden on plaintiffs in actions involving titles to land, e. g. that there should

be attached to the petition an abstract of the title he claims as a condition to the introduction in evidence of the muniments in his chain of title, the policy of law in that state forbidding special legislation. Pelz v. Ballinger, 180 Mo. 252, 79 S. W. 146. In Wisconsin it was held against law to require of parties to give citations of authority to each request for an instruction, the statute meaning that, if a correct request is tendered, it is error to deny it. Odegard v. Wis-

§ 206. **Controlling the Intercourse between the Court and the Bar.**—It seems that the whole subject of the intercourse between the trial court and the bar is a matter committed to the discretionary control of the trial court and the sense of propriety of the members of the bar. “We presume not,” said the Supreme Court of Georgia, “to prescribe the manner of intercourse between the court and the bar. We leave that to the good sense and high breeding which so generally characterize both, except where we find that it affects the rights of parties; then it is within our corrective jurisdiction.”⁸

§ 207. **Protracting a Trial During a whole Night.**—In Kansas, where new trials are granted in cases appealed from justices of the peace, it has been held that it is an unusual and unjust proceeding and a great abuse of discretion for a justice of the peace, without special circumstances existing therefor, to proceed with the trial of an action during the whole night, against the objection and protest of one of the parties litigant. The court said: “Special circumstances might justify a court in proceeding with a trial until after midnight; but the mere fact that a criminal charge was pending against the defendant below, to which he was required to answer on November 12th, 1881, before a justice in another township, was not a sufficient excuse for keeping open the court all night, as the case might have been adjourned, if it were deemed necessary, until after the conclusion of the hearing of the criminal charge.”⁴

consin Lumber Co., 130 Wis. 659, 110 N. W. 659. In Pennsylvania it was, however, held proper to supplement the statute by a rule providing that executors and others sued in a representative capacity should file affidavits of defense, it being the theory, no doubt, that the court was directly responsible for litigation and delay in the administration of trusts and that such representatives should supply at all times proof deemed by the court *prima facie* evidence of honest action in the execution of their trusts. Helfrich v. Greenberg, 206 Pa. 516, 56 Atl. 45. And in New York the court's responsibility for regularity in the execution of process produced a ruling that on the

provision in a statute regarding the manner of advertising public sales should be added a requirement that in the sale of real estate a diagram of the property should appear on the face of the advertisement. Francis v. Watkins, 171 N. Y. 682, 64 N. E. 1120. A rule of court limiting argument and providing that not more than one-half of that allowed to the counsel who opens and closes, shall be used in closing is within the power of the court, being a reasonable regulation. Reagan v. St. L. Transit Co., 180 Mo. 117, 79 S. W. 435.

² Ibid.

³ Long v. St., 12 Ga. 295, 330.

⁴ McGowen v. Campbell, 28 Kan. 25, 30. Compelling counsel to pro-

§ 208. **Allowing Members of the Family of the Prosecutrix to sit in Court and weep.**—During the trial of an indictment for rape, certain members of the family of the prosecutrix sat within the bar of the court and occasionally wept during the argument of the prosecuting counsel, and withdrew when the prisoner's counsel began to address the jury. It was held that the failure of the judge to restrain such conduct was no ground for new trial.⁵

§ 209. **Allowing one not an Attorney to Appear.**—It has been ruled that, where the judge allows a person not a licensed attorney and counsellor, to appear for and conduct the trial on the part of one of the parties, notwithstanding the objection of the other party, the judgment will be reversed on appeal;⁶ but this is a very doubtful holding.

§ 210. **Consolidating several Actions for Purposes of Trial.**—It is within the discretion of the presiding judge to order several actions founded on the same subject matter, brought by the same party against several defendants, to be brought together, although the defendants employ different counsel and the evidence in the several causes is different.⁷ So, it is clearly within the discretion

ceed at an evening session over his protest that he was too ill to proceed, was not sufficient ground for new trial where it appeared the trial did not proceed as it otherwise would have proceeded. *Wildeckind v. Toulumne County Water Co.*, 83 Cal. 198, 23 Pac. 311. But where a case was called after 6 p. m. and counsel on both sides announced "ready," it was held error not to adjourn the court over until next day, where defendant's witness, who had been in attendance all day, had left. *Schwarzchild & Sulzberger Co. v. New York City Ry. Co.*, 90 N. Y. S. 374.

⁵ *St. v. Laxton*, 78 N. C. 564, 570; *St. v. Barringer*, 198 Mo. 23, 95 S. W. 235. Where decedent's widow made an unanticipated outbreak in denunciation of defendant and was

quickly required to withdraw there was no ground for a new trial. *Stevens v. Com.*, 20 Ky. Law Rep. 290, 98 S. W. 284. Breaking out of applause showing approval of the prosecution of defendant, where effort to suppress is immediately made, does not afford such ground. *Green v. Com.*, 26 Ky. Law Rep. 122, 83 S. W. 638; *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527; *St. v. Dusenberry*, 112 Mo. 277, 20 S. W. 461. Nor does laughter at discomfiture of defendant's counsel by a witness, where the court rebukes same. *Lax v. St.*, 46 Tex. Cr. R. 628, 79 S. W. 578.

⁶ *Newburger v. Campbell*, 9 Daly (N. Y.), 102, 58 How. Pr. (N. Y.) 313.

⁷ *Springfield v. Sleeper*, 115 Mass. 587. See also *Witherlee v. Ocean*

of the presiding judge to hold parties to an agreement to try together several petitions against different owners of land taken for the public use under a statute; and it seems that the court might so order without an agreement.⁸

§ 211. **Calling an Attorney to preside.**—It has been held manifest error for the trial judge, in a civil case, to call an attorney of the court to occupy the bench while the trial was proceeding. "Judicial functions," says Walker, J., speaking for the court, "cannot be delegated to or exercised by an agent or deputy. They must be performed by the persons who have been designated by law for the purpose. The attorney occupying the bench was not connected with or a part of the judicial department of the State, named in the third article of our constitution; and persons not of that department are prohibited from the exercise of such powers. The putting of the verdict in form and discharging the jury for the term were both judicial acts, and the first related to and affected the rights of appellants. Even if a person not a judge may, by consent of parties, act as such, still it is clear that the presiding judge, of his own motion, cannot substitute another to act for the court; and if it can be done, it must be by consent of the parties appearing on the record; and such consent does not appear, and will not be implied. It has been supposed by some that it would be error if the record showed that any one but the judge acted even with consent; but we refrain from deciding that question until it shall be presented."⁹

Insurance Co., 24 Pick. (Mass.) 67; Kimball v. Thompson, 4 Cush. 441; Com. v. Robinson, 1 Gray, 555; Com. v. James, 99 Mass. 438; Com. v. Powers, 109 Mass. 353; Walker v. Conn, 112 Ga. 314, 37 S. E. 403; Walters v. Rossi, 126 Cal. 644, 59 Pac. 143; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Cox Shoe Mfg. Co. v. Adams, 105 Iowa, 402, 75 N. W. 316.

⁸ Burt v. Wigglesworth, 117 Mass. 302

⁹ Davis v. Wilson, 65 Ill. 527, 530. Illustrative cases see Wheller v. St., 158 Ind. 687, 63 N. E. 975; St. ex rel. v. Judge, 41 La. Ann. 319, 6 South. 637. Where there are

statutes but the selection is not made in the statutory way, it has been held that consent of parties cannot vest the appointee with judicial power. McGarvey v. Hall, 7 Colò. 426, 43 Pac. 909. But if the statutes provides as one of the methods, selection by consent, parties going to trial without objection is held to signify consent. Tabor v. Armstrong, 30 Ky. Law Rep. 938, 99 S. W. 957. And on principle it has been ruled that objection must be made promptly to authority of a special judge to try a case. Lillie v. Trentman, 130 Ind. 16, 29 N. E. 405; Radford Trust Co. v. East Tenn. Lumber Co., 92 Tenn. 126, 21 S. W. 329; St. v. Mil-

§ 212. Retiring from the Bench Without Suspending the Trial.

In a capital case in Georgia it was said by the Supreme Court, speaking through Bleckley, J.: "When, during the trial of a case, the judge leaves the bench and withdraws from the bar, he should order a suspension of business until his return. His immediate presence tends to preserve the legal solemnity and security of the trial, and upholds the majesty of the law. Especially, while a witness for the State is under examination, should the judge not retire beyond the bar, without directing the examination to cease during his temporary absence, however necessary or however brief his absence may be. The guilty and the innocent are alike entitled to be tried according to law, in the immediate presence of one of the State's judges." ¹⁰

§ 213. Change of Judges during the Trial.—Where the judge who presides at the trial becomes sick, or is otherwise unable to proceed, after the evidence is all in and the instructions have been given to the jury, the trial, it has been held, should proceed under a *special judge*, before the same jury and without rehearing the testimony. Upon this question the Supreme Court of Arkansas speaking through Mr. Justice Eakin, said: "It is submitted as matter for arrest that the jury were not discharged upon the election of the special judge, and a new jury selected. The jury had heard the evidence and instructions, and had dispersed to await the argument of counsel. There is no reason why this should not be made under the presiding control of the special judge. The instructions had not been excepted to, and if it had been important to determine precisely what the evidence had been, the special judge might in sev-

ler, 111 Mo. 542, 20 S. W. 243. In West Virginia such a principle is held not applicable to a felony case. *St. v. Bennett*, 47 W. Va. 731, 35 S. E. 983. As to an appointee selected by judge being a *de facto* officer, see *Ball v. U. S.*, 140 U. S. 118, 35 L. Ed. 377; *McDowell v. U. S.*, 159 U. S. 596, 40 L. Ed. 271.

¹⁰ *Hayes v. St.*, 58 Ga. 35, 49; *Williams v. St. (Tex. Cr. R.)*, 99 S. W. 1000; *Miller v. St.*, 73 Ohio St. 195, 76 N. E. 823. In Illinois the rule appears to be that such absence creates a conclusive pre-

sumption of injury in a felony case, and in civil and misdemeanor cases it must be plainly apparent that no injury ensued. *Wells v. O'Hare*, 209 Ill. 627, 70 N. E. 1056. In a civil case, however, this court held that where there was neither request to suspend the trial nor objection to the absence and no motion for mistrial on the judge's return, there exists no reason for a reversal of the judgment. *Horne v. Rogers*, 110 Ga. 362, 35 S. E. 715, 49 L. R. A. 176.

eral ways sufficiently have advised himself of it, to have enabled him to regulate the discussion. Upon a difference among the attorneys as to testimony during an argument, it is no uncommon practice to call a witness, not for re-examination, but to state what he had testified. After the evidence has been admitted and the law settled, the presidency of the judge is more for the purpose of preserving the order in the discussion, and in the future conduct of the jury, than for anything else. It would be an unnecessary delay, expense and vexation to clients in such cases, to impanel a new jury and to recall witnesses. It is not demanded by the ordinary requirements of justice.”¹¹

§ 214. Who to sign Bill of Exceptions in such a Case.—A controversy having arisen as to which judge should sign a bill of exceptions in such a case, the court also said: “All matters of exception occurring whilst the regular judge was presiding should have been shown by the bill of exceptions, certified to be true under his signature. As to those matters, the special judge had no authority to sign a bill. If, however, the exceptions regarded any matter which occurred before the special judge, or was first brought to his notice, such as misconduct of the jury, newly discovered evidence, etc., he should have signed the bill himself, although he had vacated the bench. The object of the signature is to give verity to the statement of occurrences complained of as erroneous. As it is the duty of the presiding judge to consider them, he can most properly certify them. In doing so, he performs no judicial act, requiring him to have the present character and authority of a judge. He thereby orders nothing and determines nothing, not already ruled. The certificate has reference to past transactions. The honorable special judge was mistaken in basing his opinion, as to his incompetency to sign the bill of exceptions, upon the ground that he had vacated the bench. He might sign it as to all matters occurring before himself.”¹²

¹¹ Bullock v. Neal, 42 Ark. 278.

¹² Citing Watkins v. St., 37 Ark. 370; Shields v. Horboch, 40 Neb. 103, 58 N. W. 720. In Missouri a case was set down before one divisional judge of the circuit court of the city of St. Louis, and another divisional judge was applied to for a special jury and the application refused. The trial was had and

motion for new trial being made final disposition was made of the case at the following term. One bill of exception was presented to the judge trying the case, and another to the judge denying the application for a special jury. The Supreme Court held, that, if the application for a jury was independent of the trial exception should

As to matters arising before the regular judge, he was the only person competent to certify them, except in certain contingencies, when bystanders might do so.”¹³ Where there was thus a change of judges during the trial, after the evidence had been heard and the instructions given, the Supreme Court held that it could not regard any proceedings as before it for review which were not regularly certified in a bill of exceptions, signed by the regular judge who presided when the proceedings were had.¹⁴

§ 215. **Objection that the Judge presided on a previous Trial of the same Action.**—Generally speaking, it is no objection to the qualification of a judge that he presided upon a previous trial of the same cause, though of course a plain manifestation of prejudice against either party on the previous trial might, under statutory rules existing in various jurisdictions, afford ground of a *change of venue*. In a cause of some celebrity in New York, an action for libel against James Gordon Bennett, the publisher of the *New York Herald*, Chief Justice Oakley, of the New York Superior Court, before whom the cause had been previously tried, after consulting with his brethren, when the cause had been reached in its order on the calendar, declined to yield to the request of the plaintiff to have it tried before another judge of the same court. It was held that this was no ground of exception. Bosworth, J., in giving the opinion of the same court, said: “We know of no recognized principle which will justify a judge in holding a circuit court, to direct a cause on the calendar, when reached and ready to be tried, to be postponed and await its opportunity to be tried before another judge, merely because it had been previously tried before himself. The considerations of inconvenience and delay resulting from such a practice in the circuit courts, as they are generally constituted, would not, it is true, exist to the same extent with reference to a court organized as this court is. But that view cannot affect the legal rights of the parties, nor the legal duty of the presiding judge. The objection by either party to retrying a cause before a judge before whom it

have been saved before the judge refusing same and if not, it should have been brought to the attention of the judge who tried the case. *Haehl v. Wabash R. Co.*, 119 Mo. 324, 24 S. W. 737. In California it was held that where one judge settles the pleadings in a case and a

different one conducts the trial, there should be two bills. *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129. Practitioners see local statutes.

¹³ *Bulloch v. Neal*, 42 Ark. 278.

¹⁴ *Bulloch v. Neal*, 42 Ark. *supra*. Compare *Cowall v. Altchul*, 40 Ark. 172.

has been once tried would apply with nearly, if not quite as much force, to trying it before either of the judges who sat at General Term and heard the argument which resulted in granting a new trial. For it is to be presumed that they severally examined the evidence, and formed opinions of the merits according to such evidence, especially in a case where, as in this one, a new trial was sought as well on the ground of excessive damages as of erroneous decisions of questions of law. Even if such a presumption should not entirely and in all respects accord with the fact, yet it would be true that the judge who examined and scrutinized the evidence most closely, and made himself most familiar with its details, would be most obnoxious to such an objection; because the inference would be just that he had more decided views with respect to the whole merits, as developed by the evidence given on the first trial, than one who had given less attention to the evidence in all its particulars. It is no part of the province of a judge to find the facts, and there is no reason to suppose that, on a second trial, he will not apply any rules of law determined by the court which granted a new trial, with as much firmness and accuracy as if he were a stranger to the cause. Any judge would willingly be relieved from trying a cause which he knew either party was averse to trying before him. But although he might be disposed to gratify any such prejudice of either party, he is not at liberty to refuse to try a cause, when reached and ready to be tried, for any reason which the law does not recognize as sufficient. The ground of objection assigned will not warrant us in granting a new trial, either because it was erroneous to overrule it, or because, in the proper exercise of judicial discretion, it should have been sustained.”¹⁵

¹⁵ *Fry v. Bennett*, 3 Bosw. (N. Y.) 200. The point was affirmed on appeal and the above reasoning approved. 28 N. Y. 324, 329. Compare *Pierce v. Delameter*, 1 N. Y. 17. Merely forming an opinion on the merits of a case is generally held to possess nothing of a disqualifying nature. See *St. v. Parmenter*, 70 Kan. 513, 79 Pac. 123. Nor that the judge has tried the case any number of times and has made erroneous decisions against one. *Burke v. Mayall*, 10 Minn. 287. But in Kentucky it was held that a

judge, who tried the case before, was personally hostile to an accused and criticised very severely those who favoring defendant caused a mistrial, expressing the opinion that the crime was the most blood-thirsty ever committed, and did these things before crowds of people in an election campaign, where he was a candidate for re-election, should have vacated the bench upon objection to him being made. *Masie v. Com.*, 93 Ky. 588, 20 S. W. 704. It was held in New Hampshire, that the fact that a judge

§ 216. **Exclusion of Spectators when not a Violation of Right of Public Trial.**—During the progress of a trial for an assault with intent to commit murder, the court made an order directing that the lobby outside of the court-room should be cleared of spectators, and that no person except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial, should be allowed to remain; but no order was made requiring the doors to be closed, and the friends of defendant and reporters were permitted to come and go at will. The order of the court was made on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd in the court room tended to excite the defendant. It was held that the defendant's right to a public trial was not violated.¹⁶

§ 217. **When improper to grant Leave of Absence to Counsel.**—In Georgia it seems there was a statute regulation requiring counsel, under what circumstances the writer does not know, to obtain leave of absence from the court. It has been laid down in a case in that State that the granting of leave of absence by court to counsel, unless for providential cause, is of doubtful propriety when it affects the rights and interests of other parties, and should be exercised at all times with caution and circumspection by the court. But where the court had granted the claimant's counsel leave of absence, though the docket did not show him to be of counsel (such, however, otherwise appearing to be the fact), the Supreme Court would not control the *discretion* of the trial court in *continuing* the case because of such absence.¹⁷

§ 218. **Prejudicing the Minds of the Jurors.**—Undoubtedly, any remarks of the presiding judge made in the presence of the jury, which have a tendency to prejudice their minds against the un-

said to one of the attorneys of a street railway corporation, that, if it was proposed to try further cases by the methods pursued by the defendant in the case that preceded this case, it need expect no concession from the court, was not sufficient to show disqualification. *Hutchinson v. Manchester St. Ry. Co.*, 73 N. H. 271, 60 Atl. 1011.

¹⁶ *People v. Kerrigan* (Cal.), 14 Pac. 849; *St. v. Callahan*, 100 Minn. 63, 110 N. W. 342, contra.

Where in a rape case, the court held the session in a small room into which were allowed to be admitted only the judge, jury, accused, counsel, members of the bar, newspaper men and one witness for defendant. *St. v. Hendy*, 75 Ohio St. 255, 79 N. E. 462.

¹⁷ *Ross v. Head*, 51 Ga. 605. The statute referred to seems now obsolete. See Ga. Code, 1911, vol. II, § 990.

successful party, will afford ground for a reversal of the judgment. But it has been held that a mere complaint made by the presiding judge, of the *consumption of time* by counsel, does not fall within this category. Accordingly, it was no ground for a new trial that counsel for the defendant requested, before the concluding argument to the jury on their part was begun, and whilst the argument for the State was in progress, that they be furnished with the authorities relied upon by the State, and the court replied: "You shall be furnished with them before your concluding counsel commences his argument, and they shall be read too, if you desire to consume another hour of the time of the court."¹⁸

§ 219. [Continued.] Remarks Indicating Opinion as to Facts.—

During the progress of a criminal trial, the clerk of the justice of the peace who had taken down the testimony on the preliminary examination, testifying as a witness, was asked by the court: "Don't you ever make mistakes in taking down testimony in the justice's court?" To which the witness replied: "It may be possible, your

¹⁸ Long v. St., 12 Ga. 295, 330; Chicago City Ry. Co. v. Cooney, 196 Ill. 466, 63 N. E. 1029. So to warn counsel in endeavoring to overrule a ruling of the court. St. v. Drake, 128 Iowa, 539, 105 N. W. 54. But reproving counsel in a loud and angry tone and impugning his good faith is reversible error, where it turned out that counsel was correct in his misunderstanding had with opposing counsel. Dallas Consolidated etc. St. Ry. Co. v. McAllister, 41 Tex. Civ. App. 131, 90 S. W. 933. Requiring an accused in a murder case to stand up in the presence of a panel containing members who were of the trial jury and asking him if he had counsel and whether he or his relatives or friends were able to employ counsel was not error. Waggoner v. St., 49 Tex. Cr. R. 260, 98 S. W. 255. Bringing an accused, in a murder case, into presence of the jury manacled is not reversible error,

provided he is not manacled during trial. St. v. Temple, 194 Mo. 237, 92 S. W. 869; Powell v. St., 50 Tex. Cr. R. 592, 99 S. W. 1005. Nor to have a substantial guard attending him during trial, where there is evidence to show he is a desperate character. St. v. Rudolph, 187 Mo. 67, 85 S. W. 584. Where a judge in overruling a continuance asked in a liquor prosecution said in the presence of the jury: "There has been much complaint about failure to convict these criminals," this was held prejudicial error. Fuller v. St., 85 Miss. 199, 37 South. 749. If objectionable remarks are merely possibly but not probably injurious the case will not be reversed. Connell v. McNett, 109 Mich. 329, 67 N. W. 344; Chattanooga etc. R. Co. v. Palmer, 89 Ga. 161, 15 S. E. 34. Properly punishing counsel for direct contempt is not available as error. Pinkerton v. Bollinger, 87 Ill. App. 76.

honor, but we try not to." Whereupon the judge made the remark in the presence of the jury: "Well, if you don't, you are the first justice of the peace I ever heard of who does not make a mistake occasionally." It was held that these remarks were in substance and effect an instruction to the jury upon questions of fact, and were in violation of the constitutional rights of the accused.¹⁹ It is immaterial that a prejudicial remark of this kind is not embodied in the formal instructions, since it would have substantially the same effect upon the jury as if it were so given.²⁰ The same court in another case, said: "Under our practice the judge should intimate no opinion upon the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo; and the effect of such an opinion cannot be obviated by announcing in distinct terms the jury's independency of him in all matters of fact."²¹ The same court, straining this rule, reversed a judgment in a criminal trial, because the trial court, in overruling an objection to certain testimony, remarked in the presence of the jury, "that there was as much testimony that defendant had kicked the deceased upon the chest as upon the face;" although the court subsequently cautioned the jury that he did not wish to be understood as saying how much or how little testimony there was on any particular point, that the whole matter was for them to pass upon, and that they would observe for themselves what the testimony was,—without, however, in terms retracting this opinion formerly expressed.²²

¹⁹ *St. v. Tickel*, 13 Nev. 502, 508.

²⁰ *People v. Bonds*, 1 Nev. 33, 36.

²¹ *St. v. Ah Tong*, 7 Nev. 148, 152.

He cannot do this in the giving of his reasons for a ruling, in the presence of the jury. *St. v. Davis*, 136 N. C. 568, 49 S. E. 162. Nor give any impression of bias in the cross-examination of a witness. *O'Shea v. People*, 218 Ill. 352, 75 N. E. 981. Or intimate his doubt as to the credibility of the witness. *McIntosh v. St.*, 140 Ala. 137, 37 South. 223; *O'Donnell v. People*, 110 Ill. App. 250, 211 Ill. 158, 71 N. E. 842. Nor may he intimate what his conclusion is from manner and conduct of witnesses on the stand. *Davis v. Dregue*, 120 Wis. 63, 97 N. W. 512. Or the value

of the testimony of one intoxicated at the time of an occurrence as to which he testifies. *Chancey v. St.*, 50 Tex. Cr. R. 85, 96 S. W. 12. Or to say even jocularly, as the judge claimed, that he presumed a certain document was "manufactured." *Perkins v. Knisely*, 204 Ill. 275, 68 N. E. 486. To say a statement by a witness is "an ugly insinuation" is improper. *Levels v. St. Louis & Hannibal R. Co.*, 196 Mo. 606, 94 S. W. 275. An assumption by the court that a witness is attempting to evade a question on cross-examination is prejudicial error. *Schmidt v. St. L. R. Co.*, 149 Mo. 269, 50 S. W. 921.

²² *St. v. Harkin*, 7 Nev. 381.

Carrying out the same idea, the Supreme Court of California, where the judge had expressed his opinion as to the respectability of a witness under examination, said: "We should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing were thus indorsed."²³

§ 220. Asking pertinent Question of Counsel.—The judge may ask counsel a pertinent question during the examination of an expert, even though the effect be to put the witness on his guard by disclosing to him a fact which the counsel wished him not to know.²⁴

§ 221. Conversing privately with Witnesses.—The judge should not converse privately, either in or out of court, with a witness, to ascertain whether he has or has not knowledge of particular facts; nor should he suggest to the witness, after his examination, that there are facts other than those to which he has testified, within his knowledge.²⁵ But it is not ground for a new trial that the judge conversed with a witness upon the stand, after his examination was through, in an undertone.²⁶

²³ *McMinn v. Wheelan*, 27 Cal. 300,
319.

²⁴ *City Bank v. Kent*, 57 Ga. 285.

²⁵ *Sparks v. St.*, 59 Ala. 82, 87.

²⁶ *City Bank v. Kent*, 57 Ga. 285.

TITLE III.

OPENING THE CASE AND PRESENTING THE EVIDENCE.

- CHAPTER IX.—OF THE RIGHT TO OPEN AND CLOSE.
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JUDGE.
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REFRESH RECOLLECTION.
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CHAPTER IX.

OF THE RIGHT TO OPEN AND CLOSE.

ARTICLE I.—IN ORDINARY ACTIONS.

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ARTICLE I.—IN ORDINARY ACTIONS.

SECTION

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233. Doctrine of this Article Restated.

§ 225. **Preliminary.**—The right to open and close is strictly a branch of the discussion concerning forensic argument, and hence belongs in the next succeeding article; but as this right must be settled at the outset, before the opening statement is made or before any evidence is introduced, it is perhaps best to consider it here.

§ 226. **Importance of the Right.**—This right in a civil case has been deemed of such importance that it has been the subject of a distinct treatise by a distinguished law writer and judge.¹ It is the settled law in England,^{1a} and in most,² though not all,³ American

¹ Best on the Right to Begin.

^{1a} *Huckman v. Fernie*, 3 Mees. & W. 505; *Mercer v. Whall*, 5 Ad. & El. (N. S.) 447; *Geach v. Ingall*, 14 Mees. & W. 95; *Ashby v. Bates*, 15 Mees. & W. 589.

² *David v. Mason*, 4 Pick. (Mass.) 156; *Robinson v. Hitchcock*, 8 Met. (Mass.) 64; *Merriam v. Cunning-*

ham, 11 Cush. (Mass.) 40, 44; *Benham v. Rowe*, 2 Cal. 387, 408; *Singleton v. Millett*, 1 Nott & McC. (S. C.) 355; *Johnson v. Wideman*, *Dudley* (S. C.), 70; *Huntington v. Conkey*, 33 Barb. (N. Y.) 218; *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Hill v. Perry*, 82 Ind. 28; *Johnson v. Josephs*, 75 Me. 544;

jurisdictions, that a deprivation of this right is substantial *error*, which, if saved and properly presented by a bill of exceptions, will operate to reverse a judgment; while in still others there is a middle rule to the effect that it is a matter within the sound *discretion* of the trial court, which discretion will not be revised except in cases of manifest abuse.⁴ A statute prescribing which party shall have this right has been held mandatory.⁵

Ney v. Rothe, 61 Tex. 374; Millerd v. Thorn, 56 N. Y. 402; Claflin v. Baere, 28 Hun (N. Y.), 204; Johnson v. Maxwell, 87 N. C. 18, 22; Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 61; Millerd v. Thorn, 15 Abb. Pr. (N. Y.) 376, 56 N. Y. 402; Lindsley v. European Petroleum Co., 3 Lans. (N. Y.) 176; Elwell v. Chamberlain, 31 N. Y. 611, 614; Churchwell v. Rogers, Hardin (Ky.), 182; Goldsberry v. Stuteville, 3 Bibb (Ky.), 345; Blackledge v. Pine, 28 Ind. 466; Young v. Highland, 9 Gratt. (Va.) 16; Haines v. Kent, 11 Ind. 126; Cilley v. Preferred Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S. 282, 187 N. Y. 517, 79 N. E. 1102; Crabtree v. Atchison, 93 Ky. 338, 20 S. W. 260.

³ Montgomery v. Swindler, 32 Ohio St. 224, 226; Comstock v. Hadlyme Ecc. Soc., 8 Conn. 254; Scott v. Hull, 8 Conn. 296; Lexington etc. Ins. Co. v. Paver, 16 Ohio, 324, 330; St. v. Watham, 48 Mo. 55; Wade v. Scott, 7 Mo. 509, 514; Sodousky v. McGee, 4 J. J. Marsh. (Ky.) 267, 275; Day v. Woodworth, 13 How. (U. S.) 363; Hall v. Weare, 92 U. S. 728; Lancaster v. Collins, 115 U. S. 222; Denver Land & Security Co. v. Rosenfeld Const. Co., 19 Colo. 539, 36 Pac. 146; Laney v. Ingalls, 5 S. D. 183, 54 N. W. 572.

⁴ In Texas, a deprivation of this right is error for which the judgment will be reversed, unless it appear that the party complaining has not been injured thereby (Ney v.

Rothe, 61 Tex. 374, 376), and in Iowa (what is substantially the same thing), "while the right to review such a question is not absolutely denied, yet there must be a clear case of prejudice in order to justify a reversal upon this ground." Preston v. Walker, 26 Iowa, 205, 207; Fountain v. West, 23 Iowa, 9, 14; Goodpastor v. Voris, 8 Iowa, 335; Smith v. Coopers, 9 Iowa, 379; Woodward v. Laverty, 14 Iowa, 381; Viele v. Germaina Ins. Co., 26 Iowa, 9, 45. In Wisconsin, this is a matter resting in the sound discretion of the trial judge, which discretion is subject to review only in cases of outrage or abuse. Marshall v. American Express Co., 7 Wis. 1, 19. A similar doctrine was suggested in a case in New York (Fry v. Bennett, 28 N. Y. 324, 331); but, as seen by cases cited in the preceding note, the rule in that State is now the same as in England. This doctrine also prevails in Arkansas (Pogue v. Joyner, 7 Ark. 462) and in Missouri. Reichard v. Manhattan Life Ins. Co., 31 Mo. 518; Farrell v. Brennan, 32 Mo. 328; McClintock v. Curd, 32 Mo. 411; Wade v. Scott, 7 Mo. 509; Tibeau v. Tibeau, 22 Mo. 77. This was at one time the rule in England. Goodtitle v. Braham, 4 T. R. 497; Branford v. Freeman, 1 Eng. Law and Eq. 444; Geach v. Ingall, 14 Mees. & W. 97; Booth v. Millns, 15 Mees. & W. 669; Doe v. Brayne, 5 Com. Bench, 655; Edwards v. Matthews, 16 L. J. Exch.

§ 227. **Confusing Ideas upon the Subject.**—Prior to the time when the question became settled in England, as will be hereafter stated, the English books were full of confusing ideas upon this subject. These ideas were propagated in this country, and they still disfigure our jurisprudence to a considerable extent. One of them was an attempt to formulate the rule in the proposition that the party sustaining the burden of proof,⁶ or, as it is sometimes stated, the burden of the issue,⁷ or of the issues,⁸ or the affirmative of the

291. In New Hampshire, as late as 1850, it was regarded as an open question whether it was a matter of right or discretion merely (*Belknap v. Wendell*, 21 N. H. 175, 182); but, as above seen, it is now regarded in that State as a matter of right. The decided trend, if not substantial accord of American authority seem to support the middle rule, with the only divergence that in some of the cases it is required that injury is presumed, unless the case appears very clearly to have been determined correctly, and in others that it must be shown to be beyond the court's discretion, where the trial court errs in this regard. Thus in Missouri it is said, that, if there was no evidence to meet the burden cast on a party, no harm is done him by denial of his technical right. *Lay v. Rorick*, 100 Mo. App. 105, 71 S. W. 842. Where the verdict is clearly right the error is immaterial. *Robb v. Robb* (Tex. Civ. App.), 62 S. W. 125 (not reported in state reports). Or if the argument is before the court without the intervention of a jury and the conclusion is the only one consistent with law. *Greene v. Central of Georgia R. Co.*, 112 Ga. 859, 38 S. E. 360. If the case is close this error calls for reversal. *Masengale v. Pounds*, 100 Ga. 770, 28 S. E. 510. Where the verdict is merely advisory, as of an issue in an equity case, there is no preju-

dicial error. *Blanchard v. Blanchard*, 191 Ill. 450, 61 N. E. 481. In the federal circuit court the rule has been decided to be largely in the discretion of the court. *New York Dry Goods Store v. Pabst Brewing Co.*, 112 Fed. 381, 50 C. C. A. 295. If a verdict is more favorable to the party denied the right than he is entitled to, the error will not be regarded. *Walker v. Bryant*, 112 Ga. 412, 37 S. E. 749.

⁵ *Heffron v. St.*, 8 Fla. 73.

⁶ *Ransone v. Christian*, 56 Ga. 351; *Baker v. Lyman*, 53 Ga. 339; *Com. v. Haskell*, 2 Brewst. (Pa.) 491; *Hudson v. Wetherington*, 79 N. C. 3; *Bradley v. Clark*, 1 Cush. (Mass.) 293; *Patton v. Hamilton*, 12 Ind. 256; *Shank v. Fleming*, 9 Ind. 189; *Mason v. Croom*, 24 Ga. 211; *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48; *Bertody v. Ison*, 69 Ga. 317; *Judah v. Trustees*, 23 Ind. 272; *Baltimore etc. R. Co. v. McWhinney*, 36 Ind. 436; *Hyatt v. Clements*, 65 Ind. 12; *Hill v. Perry*, 82 Ind. 28, 31; *Wright v. Abbott*, 85 Ind. 154; *Goodwin v. Smith*, 72 Ind. 113; *Johnson v. Josephs*, 75 Me. 544; *Tobin v. Jenkins*, 29 Ark. 151, 153; *Yingling v. Hesson*, 16 Md. 112, 121; *Waller v. Morgan*, 18 B. Mon. (Ky.) 137, 144; 1 Greenl. Ev., § 74, and note.

⁷ *McLees v. Felt*, 11 Ind. 218.

⁸ *Rev. Stat. Ind.* 1903, § 562; *Iowa Rev. Stat.* (1886), § 2780; *Judah v. Trustees*, 23 Ind. 274, 283; distinguishing *Howard v. Kisling*.

issue or issues,⁹ possesses the right to open and close the argument. In cases where the question was free from difficulty, these propositions generally, though not always, conducted the courts to the right results; but the application of them has been attended with the difficulty which always attends in practice the application of general rules: by reason of their generality they have failed to supply a uniform test by which to decide every question of this kind whenever it arises—a thing which is extremely desirable when possible. The rule that the right rests with the party sustaining the burden of proof is not adequate, because in many cases the plaintiff sustains the burden as to some slight or almost formal matter, after which the burden shifts upon the defendant, and either remains with him throughout the case, or else, as sometimes happens, shifts back again upon the plaintiff. In these cases, how is the rule to be applied? The plaintiff sustains the burden at the threshold; he must go forward and produce *some* evidence, albeit slight or formal, such as the introduction of a written instrument, or the proof of a signature, while the substantial contest in the case grows out of defensive matter pleaded by his antagonist. The same may be said substantially as to the rule that the right rests with the party having the burden of the issue, which means the same thing as the burden of proof. Nor has the statutory rule in Indiana and Iowa, that the right rests with the party having the burden of the issues,

15 Ind. 83, and *Aurora v. Cobb*, 21 Ind. 492. Compare *McLees v. Felt*, 11 Ind. 218; *Ashing v. Miles*, 16 Ind. 329.

⁹ *Goss v. Turner*, 21 Vt. 440; *Dunlop v. Peter*, 1 Cranch C. C. 403; *Beale v. Newton*, 1 Cranch C. C. 405; *Van Cleave v. Beam*, 2 Dana (Ky.), 155 (compare *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 50); *Randolph Bank v. Armstrong*, 11 Iowa, 515; *Davies v. Arbuckle*, 1 Dana (Ky.), 525; *Goldsberry v. Stuteville*, 3 Bibb (Ky.), 346; *Latham v. Selkirk*, 11 Tex. 314, 322; *Auld v. Hepburn*, 1 Cranch C. C. 122. Compare *Sutton v. Mandeville*, 1 Cranch C. C. 187; *Buzzell v. Snell*, 25 N. H. 474, 478; *Chesley v. Chesley*, 37 N. H. 229; *Den d. Hopper v.*

Demarest, 21 N. J. L. 526, 530; *Denney v. Booker*, 2 Bibb (Ky.), 427; *Page v. Carter*, 8 B. Mon. (Ky.) 192; *Marshall v. Am. Express Co.*, 7 Wis. 1, 18; *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518; *Banning v. Banning*, 12 Ohio St. 437; *Ross v. Gould*, 5 Me. 210; *Belknap v. Wendell*, 21 N. H. 175; *Curtis v. Wheeler*, 1 Mood. & M. 493; *Montgomery v. Swindler*, 32 Ohio St. 224; *Jackson v. Heskete*, 2 Stark. N. P. 518; *Miller v. Thorn*, 56 N. Y. 402; *Clafin v. Baera*, 28 Hun (N. Y.), 204; *Colwell v. Brower*, 75 Ill. 517, 523. It has been said that the right is governed by the same rule as that which governs the production of testimony. *Perkins v. Ermel*, 2 Kan. 325, 330.

supplied an unvarying rule for the decision of the question; since in many cases the plaintiff will have the burden of a single issue, and the defendant will have the burden of many others. The same may be said concerning the rule that the right rests with the party having the affirmative of the issues. Although it is conceded that the question must be determined by the trial judge on an inspection of the pleadings,¹⁰ yet is the question to be determined by the *form* of the issues, as held in Texas,¹¹ or by the *substance* of them as held in New Hampshire,¹² Kentucky,¹³ and New York?¹⁴ Again, suppose that the defendant in his plea or answer admits everything which the plaintiff alleges as the ground of his right of action, except the amount of his damages, these being unliquidated,—as in actions for libel, where the fact of the publication is admitted,—is the burden of proof, or the burden of the issue or issues, or the affirmative of the issue or issues, to be held to be on the plaintiff or on the defendant? The general terms in which the rule has been variously formulated, as above given, do not furnish a uniform test by which to determine these questions.

§ 228. **The Plaintiff Begins where he has anything to Prove.**—The English decisions upon this subject being in a state of confusion,¹⁵ a decision was rendered in the Queen's Bench in the year 1845, which settled previous conflicts and established a rule which furnishes an absolute test for the decision of the question in all ordinary actions between plaintiff and defendant. That rule is this:

¹⁰ *Dahlman v. Hammel*, 45 Wis. 466; *Richards v. Nixon*, 20 Pa. St. 19, 23; *Beale-Royal Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S. W. 58; *Woodruff v. Hensley*, 26 Ind. App. 592, 60 N. E. 312.

¹¹ *Latham v. Selkirk*, 11 Tex. 314, 322.

¹² *Chesley v. Chesley*, 37 N. H. 229, 237. See also *Bills v. Vose*, 27 N. H. 215; *Thurston v. Kennett*, 22 N. H. 151.

¹³ *Daviess v. Arbuckle*, 1 Dana (Ky.), 525.

¹⁴ *Huntington v. Conkey*, 33 Barb. (N. Y.) 218, 228.

¹⁵ *Curtis v. Wheeler*, Mood. & M. 493; *Hoggett v. Oxley*, Mood. & Rob. 251; *Burrell v. Nicholson*, 1 Mood.

& Rob. 304; *Carter v. Jones*, 1 Mood. & Rob. 281, 6 Carr. & P. 64; *Staunton v. Paton*, 1 Carr. & Kir. 148; *Rowland v. Bernes*, 1 Carr. & Kir. 46; *Bird v. Higginson*, 2 Ad. & El. 160; *Huckman v. Fernie*, 3 Mees. & W. 505; *Mills v. Barber*, 1 Mees. & W. 425, Tyr. & G. 835; *Lewis v. Parker*, 4 Ad. & El. 838; *Bedell v. Russell*, Ry. & M. 293; *Bonfield v. Smith*, 2 Mood. & Rob. 519; *Pearson v. Coles*, 1 Mood. & Rob. 206; *Pole v. Rogers*, 2 Mood. & Rob. 287; *Reeve v. Underhill*, 1 Mood. & Rob. 440; *Wootton v. Barton*, 1 Mood. & Rob. 518; *Jackson v. Hesketh*, 2 Stark. N. P. 518; *Goodtitle d. Revett v. Braham*, 4 T. R. 497.

That where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him.¹⁶ This rule has been generally adopted in this country, as the decisions hereafter cited will show. The unvarying *test* furnished by this rule is to consider which party would, in the state of the pleadings and of the record admissions, get a verdict for substantial damages, if the cause were submitted to the jury without any evidence being offered by either. If the plaintiff would succeed, then there is nothing for him to prove at the outset, and the defendant begins and replies; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff begins and replies.¹⁷

§ 229. **What this Rule Decides.**—The advantage of this rule is that it *defines* the general propositions stated in the preceding paragraph and tells us the precise meaning of them. It tells us that

¹⁶ *Mercer v. Whall*, 5 Ad. & El. (N. s.) 447, overruling *Cooper v. Wakley*, Mood. & Malk. 248; *Du Bignon v. Wright*, 122 Ga. 263, 50 S. E. 65; *Ashland etc. St. Ry. Co. v. Hoffman*, 26 Ky. Law Rep. 778, 82 S. W. 556. Thus where the assignee of an account only had to prove the assignment. *Crapson v. Wallace*, 81 Mo. App. 680. Or to show delivery of bond sued on. *Stilwell v. Archer*, 64 Hun, 169, 18 N. Y. S. 888. In Kentucky this is held to mean any judgment which would carry costs. *Mattingly v. Shortell*, 27 Ky. Law Rep. 426, 85 S. W. 215. And in Texas defendant only becomes entitled to open and close, where he has a defensive pleading in the nature of a confession and avoidance. *Ferguson-McKinney D. G. Co. v. City Nat. Bank*, 31 Tex. Civ. App. 238, 71 S. W. 604.

¹⁷ *Huckman v. Fernie*, 2 Jur. 444; *Veiths v. Hage*, 8 Iowa, 163; *Robinson v. Hitchcock*, 8 Metc. (Mass.) 64; *Perkins v. Ermel*, 2 Kan. 325, 330; *Amos v. Hughes*, 1 Mood. & R. 464; *Ridgway v. Ewbank*, 3 Mood. &

R. 217; *McConnell v. Kitchens*, 20 S. C. 430; *Boyce v. Lake*, 17 S. C. 481; *Kennedy v. Moore*, 17 S. C. 464; *Burkhalter v. Coward*, 16 S. C. 435; *Brown v. Kirkpatrick*, 5 S. C. 267; *Pierce v. Lyman*, 28 Ark. 550; *Bertrand v. Taylor*, 32 Id. 470; *Camp v. Brown*, 48 Ind. 575 (with which compare *Heilman v. Shanklin*, 60 Ind. 424; *Johnson v. Josephs*, 75 Me. 544; *Rolf v. Polland*, 16 Neb. 21, 19 N. W. 615; *Fry v. Bennett*, 28 N. Y. 324, *aff'd* 3 Bosw. (N. Y.) 200; *Littlejohn v. Greeley*, 13 Abb. Pr. (N. Y.) 41, 45; *Huntington v. Conkey*, 33 Barb. (N. Y.) 218; *Hecker v. Hopkins*, 16 Abb. Pr. (N. Y.) 301, n.; *Opdyke v. Weed*, 18 Abb. Pr. (N. Y.) 223, n.; *Love v. Dickerson*, 85 N. C. 5; *Dille v. Lovell*, 37 Ohio St. 415; *Young v. Highland*, 9 Gratt. (Va.) 16; *Barker Cedar Co. v. Roberts*, 23 Ky. Law Rep. 1345, 65 S. W. 123; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 638, 25 N. E. 392; *Cortelyou v. Hiatt*, 36 Neb. 584, 54 N. W. 964; *Cammack v. Newman*, 86 Ark. 249, 110 S. W. 802.

the party sustaining the burden of proof, or the burden of the issue or issues, or the affirmative of the issue or issues, is in every case the plaintiff, where he has anything, however slight, to prove, in order to get a verdict for other than nominal damages; and that in every other case it is the defendant.¹⁸ It tells us that, although the burden of proof may *shift* during the trial, yet the right to open and close the argument does not shift with it, but that the right remains with the party on whom it primarily rested.¹⁹ It decides that where there are *several issues*, and the plaintiff has anything to prove under any one of them in the first instance, in order to a recovery, the right to open and close is with him.²⁰ It tells us that

¹⁸ Johnson v. Josephs, 75 Me. 544; Spaulding v. Hood, 8 Cush. (Mass.) 602; Thurston v. Kennett, 22 N. H. 151; Belknap v. Wendell, 21 N. H. 175; Lunt v. Wormell, 19 Me. 100; Sawyer v. Hopkins, 22 Me. 276; Washington Ice Co. v. Webster, 68 Me. 449; Page v. Osgood, 2 Gray (Mass.), 260; Dorr v. Tremont National Bank, 128 Mass. 359; Comstock v. Hadlyme Ecc. Soc., 8 Conn. 254, 261; Bills v. Vose, 27 N. H. 215; Chesley v. Chesley, 37 N. H. 229; Seavy v. Dearborn, 19 N. H. 351; Fettes v. Muncie National Bank, 34 Ind. 251; Baltimore etc. R. Co. v. McWhinney, 36 Ind. 436, 444; Hamlyn v. Nesbit, 37 Ind. 284; Thompson v. Mills, 39 Ind. 528; Williams v. Allen, 40 Ind. 295; Camp v. Brown, 48 Ind. 575; Aurora v. Cobb, 21 Ind. 493, 509; Shaw v. Barnhart, 17 Ind. 183; Buzzell v. Snell, 25 N. H. 474, 478; Hoxie v. Greene, 37 How. Pr. (N. Y.) 97; Carter v. Jones, 6 Carr. & P. 64, 1 Mood. & Rob. 281; Amos v. Hughes, 1 Mood. & Rob. 464; Rogers v. Diamond, 13 Ark. 474. Compare Pope v. Latham, 1 Ark. 66; Finley v. Woodruff, 8 Ark. 328. If the burden on all the material issues is on defendant, this entitles him to open and close. Degan v. Tufts, 8 Kan. App. 857, 56 Pac. 1126; Phoenix Ins.

Co. v. Gray, 113 Ga. 424, 38 S. E. 992.

¹⁹ Brooks v. Barrett, 7 Pick. (Mass.) 94, 100; Belknap v. Wendell, 21 N. H. 175; Judge of Probate v. Stone, 44 N. H. 593, 602; Ross v. Gould, 5 Me. 204. Compare Crerar v. Sodo, Mood. & M. 85; Weidman v. Kohr, 13 Serg. & R. (Pa.) 17, 24; Cothran v. Forsyth, 68 Ga. 560; Bender v. Terwilliger, 48 App. Div. 371, 63 N. Y. S. 260, 166 N. Y. 590, 59 N. E. 1118; Kentucky Wagon Mfg. Co. v. City of Louisville, 97 Ky. 548, 31 S. W. 130. Oral admissions are insufficient to change this rule. DuBignon v. Wright, *supra*; Palatine Ins. Co. v. Santa Fe Mercantile Co., 13 N. M. 241, 82 Pac. 363; Farrington v. Jennison, 67 Vt. 569, 32 Atl. 641. The rule, by force of statute, in Iowa is to determine the right to open and close the argument according to where the evidence of the whole cases places it. Shaffer v. Des Moines Coal & Hay Co., 122 Iowa, 233, 98 N. W. 111. An elastic statute in Minnesota gives the right to plaintiff unless for special reasons the court otherwise directs. C. Aultman Co. v. Falkum, 47 Minn. 414, 50 N. W. 471.

²⁰ Cent. Bank v. St. John, 17 Wis. 157; Davidson v. Henop, 1 Cranch C. C. 280; Churchill v. Lee, 77 N. C.

in every case where the *general issue*, or a general or special denial is pleaded, the right to open and close is with the plaintiff, no matter what may be the nature of the controversy, or what special defenses or counter-claims may be set up.²¹

§ 230. **In Actions for Unliquidated Damages.**—It decides that, in all actions for unliquidated damages, except where the defendant, by his plea or answer, admits not only the cause of action, but also the amount of damages claimed, the right is with the plaintiff; since he must introduce evidence showing the extent of his injury,²² —as where, in any action sounding in damages, the cause of action

341; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Jackson v. Hesketh, 2 Stark. N. P. 518; Ridgway v. Ewbank, 2 Mood. & Rob. 217; Burckhalter v. Coward, 16 S. C. 435, 442; Johnson v. Maxwell, 87 N. C. 18; Bertrand v. Taylor, 32 Ark. 470; Zehner v. Kepler, 16 Ind. 290; Bowen v. Spears, 20 Ind. 146; Viele v. Germania Ins. Co., 26 Iowa, 10, 45; Veiths v. Hagge, 8 Iowa, 163, 192; Sillivant v. Reardon, 5 Ark. 141, 157; Montgomery v. Swindler, 32 Ohio St. 224; Slauson v. Englehart, 34 Barb. (N. Y.) 198; Buzzell v. Snell, 25 N. H. 474. Compare Sodousky v. McGee, 4 J. J. Marsh. (Ky.) 267, 274. Where the subject is reasoned forcibly and at length by Robertson, C. J., taking some positions which are not in conformity with the above rule. As to the right of the court to sever the issues, and give the opening and closing to each party, see Central Bank v. St. John, 17 Wis. 157; Vuyton v. Brenell, 1 Wash. C. C. (U. S.) 467. This rule is confined to the status of the principal case, and an incidental matter, such as an attachment proceeding follows that, where it is not separately tried. Bell v. Fox, 37 Tex. Civ. App. 522, 84 S. W. 384.

²¹ Ayer v. Austin, 6 Pick. (Mass.) 225; Toppan v. Jenness, 21 N. H.

232; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Burroughs v. Hunt, 13 Ind. 178; Cox v. Vickers, 35 Ind. 27; Robinson v. Hitchcock, 8 Metc. (Mass.) 64, 66; Perkins v. Ermel, 2 Kan. 325, 330; Judge of Probate v. Stone, 44 N. H. 593, 602; Belknap v. Wendell, 21 N. H. 175; Thurston v. Kennett, 22 N. H. 151; Buzzell v. Snell, 25 N. H. 478; Brooks v. Barrett, 7 Pick. (Mass.) 94, 100; Chesley v. Chesley, 37 N. H. 227, 237. So, where matter is affirmatively pleaded which amounts merely to the general issue. Denny v. Booker, 2 Bibb (Ky.), 427. Compare, contra, the text, Bangs v. Snow, 1 Mass. 181; Muldoon v. Meriwether, 25 Ky. Law Rep. 2085, 79 S. W. 1183. If, following the form of code pleading, the denial is merely formal and of allegations not required to be proven, this would not take from defendant his right to open and close. Lewis v. Donohue, 58 N. Y. S. 319, 27 Misc. Rep. 514. It has been held to be no abuse of discretion to allow defendant to withdraw his plea of general issue and acquire, during the trial, the right to open and close the argument. Gardner v. Meeker, 169 Ill. 40, 48 N. E. 307.

²² Mercer v. Whall, 5 Ad. & El. (N. S.) 447, 461; Aurora v. Cobb, 21 Ind. 493, 509; Haines v. Kent, 11

is admitted, and a plea of confession and avoidance is filed, leaving the amount of damages claimed subject to affirmative proof.²³ Thus, in actions for *libel* or *slander*, where the defendant admits the writing or speaking and pleads justification, or claims privilege and denies malice, the right, according to the modern doctrine, is with the plaintiff. The reason is that the question of malice and of the extent of the damages are both in issue, and that the plaintiff has therefore something to prove in order to make out his case.²⁴ For the same reasons, in an action for *assault* and *battery*, where the plea is *son assault demense*, followed by a replication *de injuria*, or, as we would say in modern procedure, where the answer is a *justification*, the plaintiff begins and replies; since he must first go forward with his evidence.²⁵ So, in trespass *de bonis asportatis*, where

Ind. 126; *Young v. Highland*, 9 Gratt. (Va.) 16; *Steptoe v. Harvey*, 7 Leigh (Va.), 501, 544; *Cunningham v. Gallagher*, 61 Wis. 170; *Opdyke v. Weed*, 18 Abb. Pr. (N. Y.) 223, *n.*; *Hecker v. Hopkins*, 16 Abb. Pr. (N. Y.) 301, *n.*; *Brunswick & W. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551.

²³ *Cunningham v. Gallagher*, *supra*; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083; *Geringer v. Novak*, 117 Ill. App. 160.

²⁴ *Vifquain v. Finch*, 15 Neb. 505; *Burckhalter v. Coward*, 16 S. C. 435, 443; *Fry v. Bennett*, 3 Bosw. (N. Y.) 200, 232, affirmed, 28 N. Y. 324. The decision of Lord Tenterden, in *Cooper v. Wakley*, Mood. & M. 248, has been overruled in England, and has not been the law in that country since the decision of *Mercer v. Whall*, 5 Ad. & El. (N. s.) 447, 463, in which last case Lord Denman said: "If ever a decision was overruled on great deliberation, and by an undeviating practice afterwards, it was that in *Cooper v. Wakley*." The English judges, soon after the accession of Lord Denman to the office of chief justice of the Queen's Bench, met and discussed this troublesome question, and

adopted the following rule: "In actions for libel, slander and injuries to the person, the plaintiff shall begin, although the affirmative is on the defendant." A sketch of this rule is given by Lord Denman in his opinion in *Mercer v. Whall*, *supra*. Two American decisions (*Moses v. Gatewood*, 5 Rich. L. (S. C.) 234, and *Ransone v. Christian*, 56 Ga. 351) hold that, in actions for libel or slander, where the defendant pleads justification, he assumes the affirmative, and the right to begin and reply is with him; but these decisions are contrary to principle and entirely out of current with modern authority. *Parish v. Sun Printing & Pub. Co.*, 39 N. Y. S. 540, 6 App. Div. 585. *Contra*, *Hall v. Elgin Dairy Co.*, 15 Wash. 542, 46 Pac. 1049; *Palmer v. Adams*, 137 Ind. 72, 36 N. E. 695.

²⁵ *Young v. Highland*, 9 Gratt. (Va.) 16; *Johnson v. Josephs*, 75 Me. 544. *Contra*, and out of line with modern authority, are the following old cases: *M'Kenzie v. Milligan*, 1 Bay (S. C.), 248; *Goldsberry v. Stuteville*, 3 Bibb (Ky.), 345; *Downey v. Day*, 4 Ind. 531. Compare *Van Zant v. Jones*, 3 Dana (Ky.), 465, where, in such a state

the defendant pleads the general issue and files "a brief statement" justifying under his authority as an officer, the right is with the plaintiff.²⁸

§ 231. In Actions on Contracts which Liquidate the Damages. On the other hand, where the action is upon a contract which, by its terms, *liquidates the damages*—as upon a promissory note,²⁷

of pleading, the defendant offered no substantial evidence of justification, and it was held that the court might, in the exercise of a sound discretion, withhold from him the advantage, which the court supposed the form of the pleadings gave him, by giving the right to open and close to the plaintiff. In Georgia and Kentucky decision under force of statute is otherwise and the cases embrace assault and battery, libel and malicious prosecution, so as to make the rule different than as stated in the text. See *Horton v. Pintchunck*, 111 Ga. 355, 35 S. E. 663; *Berkner v. Dannenberg*, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559.

²⁸ *Lunt v. Wormell*, 19 Me. 100; *Ayer v. Austin*, 6 Pick. (Mass.) 225, overruling *Bangs v. Snow*, 1 Mass. 181. It has been held in old cases, contrary to the general principle stated in the text, that, in such an action, where justification only is pleaded, the defendant is entitled to open and close. *Kimble v. Adair*, 2 Blackf. (Ind.) 320; *Downey v. Day*, 4 Ind. 531. So, it has been held that, in an action of trespass *quare clausum*, where the defendant pleads freehold only, the right to begin and reply is with him. *Singleton v. Millet, Nott & McC.* (S. C.) 355; *Davis v. Mason*, 4 Pick. (Mass.) 156. And one English case holds that this is so, although the declaration alleges special damage. *Fish v. Travers*, 3 Carr. & P. 578.

But these two classes of decisions seem to be opposed to the modern rule stated in the text; since in either case, the damages being unliquidated and not admitted in the state of the pleadings, the plaintiff has something to prove in order to get a verdict. See *Haines v. Kent*, 11 Ind. 126.

²⁷ *Kimble v. Adair*, 2 Blackf. (Ind.) 320; *Bowen v. Spears*, 20 Ind. 146; *Harvey v. Ellithorpe*, 26 Ill. 418; *Tipton v. Triplett*, 1 Metc. (Ky.) 570; *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Huntington v. Conkey*, 33 Barb. (N. Y.) 218; *Hoxie v. Greene*, 37 How. Pr. (N. Y.) 97; *McShane v. Braender*, 66 How. Pr. (N. Y.) 294; *Hudson v. Weatherington*, 79 N. C. 3; *Blackledge v. Pine*, 28 Ind. 466; *Judah v. Trustees*, 23 Ind. 272; *Shank v. Fleming*, 9 Ind. 189; *Blackwell v. Coleman County* (Tex. Civ. App.), 60 S. W. 572 (not reported in state reports). For a surety to claim a release is merely an affirmative defense. *Columbia Finance & Trust Co. v. Mitchell's Admr.*, 24 Ky. Law Rep. 1844, 72 S. W. 350. Where two corporations are sued on a note, and one admits it was given for value and the other pleads it was an accommodation signer as between them the latter has the right to open and close. *Lone Star Leather Co. v. City Nat. Bank*, 12 Tex. Civ. App. 128, 12 S. W. 297. It was held discretionary with the court whether or not to give de-

bill of exchange,²⁸ bank check,²⁹ bill single,³⁰ policy of life³¹ or fire insurance,³² or any other written instrument which by its terms fixes the amount of the recovery,³³—and the defendant admits the execution of the instrument, but sets up an affirmative defense,³⁴ such as duress,³⁵ fraud,³⁶ want of jurisdiction,³⁷ usury,³⁸ a discharge under an insolvent debtor's act³⁹ or in bankruptcy,⁴⁰ want of title in the plaintiff,⁴¹ tender,⁴² or other affirmative matter of

defendant the opening and close where he pleaded failure of consideration and plaintiff replies that he was an innocent purchaser. *Perry v. Archard*, 1 Ind. T. 487, 42 S. W. 421.

²⁸ *Warner v. Haines*, 6 Carr. & P. 666; *List v. Kortepeter*, 26 Ind. 27.

²⁹ *Elwell v. Chamberlin*, 31 N. Y. 611.

³⁰ *Richards v. Nixon*, 20 Pa. St. 19, 23; *Scott v. Hull*, 8 Conn. 296. Compare *Robinson v. Hitchcock*, 8 Metc. (Mass.) 64.

³¹ *Brennan v. Security Life Ins. Co.*, 4 Daly (N. Y.), 296. Compare, contra, *Ashby v. Bates*, 15 Mees. & W. 589. Not as was held, where the question was of forfeiture. *Wright's Admr. v. Northwestern L. Ins. Co.*, 91 Ky. 208, 15 S. W. 342. Nor in accident policy, where the question was whether deceased came to his death as alleged or otherwise. *American Acc. Co. v. Reigart*, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374. If the defense is a violation of the conditions of a policy this is affirmative, giving defendant the right to open and close. *Belle v. Sup. Lodge K. P.*, 66 Mo. App. 449. But see *Woodward v. Iowa L. Ins. Co.*, 104 Tenn. 49, 56 S. W. 1020.

³² *Viele v. Germania Ins. Co.*, 2 Iowa, 10, 44; *Young v. Newark Fire Ins. Co.*, 59 Conn. 21, 22 Atl. 32.

³³ *Aurora v. Cobb*, 21 Ind. 492, 509.

³⁴ *Auld v. Hepburn*, 1 Cranch C. (U. S.) 122; *Montgomery v. Hunt*, 93 Ga. 438, 21 S. E. 59.

³⁵ *Hoxie v. Greene*, 37 How. Pr. (N. Y.) 97; *Heaton v. Tracy*, 24 Jones & S. 427, 3 N. Y. S. 824.

³⁶ *Elwell v. Chamberlin*, 31 N. Y. 611; *Brennan v. Security Life Ins. Co.*, Daly (N. Y.), 296; *Crabtree v. Atchison*, 93 Ky. 338, 20 S. W. 260.

³⁷ *Tipton v. Triplett*, 1 Metc. (Ky.) 570; *Hoxie v. Greene*, 37 How. Pr. (N. Y.) 97; *McShane v. Braender*, 66 How. Pr. (N. Y.) 294; *List v. Kortepeter*, 26 Ind. 27; *Oxtoby v. Henley*, 112 Iowa, 697, 84 N. W. 942.

³⁸ *Harvey v. Ellithorpe*, 26 Ill. 418; *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Huntington v. Conkey*, 33 Barb. (N. Y.) 218; *Elwell v. Chamberlin*, 31 N. Y. 611; *Seekell v. Norman*, 78 Iowa, 254, 43 N. W. 190; *Suiter v. Park Nat. Bank*, 35 Neb. 372, 53 N. W. 205. Where a note expressed to bear interest at 12 per cent was dated in Oklahoma and petition averred that this was lawful interest at the place of contract, the defense of usury did not give the right to open and close. *Hewitt v. Bank of Ind. Ter.*, 64 Neb. 463, 92 N. W. 741.

³⁹ *Warner v. Haines*, 6 Carr. & P. 666.

⁴⁰ *Richard v. Nixon*, 20 Pa. St. 19, 23.

⁴¹ *Hoxie v. Greene*, 37 How. Pr. (N. Y.) 97. Compare *Hudson v. Weatherington*, 79 N. C. 3, where it was held that, upon an issue upon a want of title in the plaintiff, the plaintiff must go forward with the evidence, and consequently has the right to begin and reply.

defense,⁴³ or pleads a set-off or counter-claim,⁴⁴—in all such cases the plaintiff has nothing to prove in order to recover; upon a default an inquiry of damages would be unnecessary; and therefore the right to begin and reply is with the defendant.

§ 232. In Actions on Contracts which do not Liquidate the Damages.—Outside of these lie a mass of cases, founded upon contracts, express or implied, where the contract itself does not liquidate the damages, and where, although the existence of the contract is admitted in the pleadings, the damages claimed are not admitted; or where defensive matter is set up, apparently in avoidance, but which really amounts to a denial of the grounds on which the right of recovery is predicated,—in all which cases the right to begin and reply is with the plaintiff. Among these may be mentioned actions of debt on penal bonds where the plea is *nil debit*, performance, set-off, etc.,—these pleas not dispensing with the necessity of proving the breaches and the damages;⁴⁵ actions for goods sold, answer admitting sale and delivery, but alleging that the goods were not equal to the quality agreed upon, and claiming a recoupment;⁴⁶ actions for the value of a physician's services and a plea in reconvention, admitting the services, but alleging damages by reason of want of skill, etc.;⁴⁷ actions on promissory notes providing for reasonable attorney's fees, defense of payment, set-off, etc., and an admission that a certain sum would be a reasonable

⁴² Auld v. Hepburn, 1 Cranch C. C. (U. S.) 122. Compare Buzzell v. Snell, 25 N. H. 474.

⁴³ Blackledge v. Pine, 28 Ind. 466; Judah v. Trustee, 23 Ind. 272; Shank v. Fleming, 9 Ind. 189; Brown v. Tausick, 20 N. Y. S. 369, 1 Misc. Rep. 16.

⁴⁴ Bowen v. Spears, 20 Ind. 146; Brown v. Kirkpatrick, 5 S. C. 267. Compare Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 61; Graham v. Gautier, 21 Tex. 112; Woodriff v. Hunter, 73 N. Y. S. 210, 65 App. Div. 404; Grant Quarry Co. v. Lyons Const. Co., 72 Mo. App. 530. Aliter, if by counterclaim it is endeavored to obtain a larger credit against the demand. Steel v. Stames (Ark.),

15 S. W. 17 (not reported in state reports).

⁴⁵ Sillivant v. Reardon, 5 Ark. 141, 157.

⁴⁶ Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 61; Starnes v. Schofield, 5 Ind. App. 4, 31 N. E. 480. And where defendant admitted an account as sued on, but set up, by way of a counterclaim, account matters arising antecedently in the course of dealing between the parties, and plaintiff admits the items of the counterclaim, but claims credits not appearing, the court's discretion in giving the opening and close to plaintiff was held properly exercised. B. F. Coombs & Bro. Com. Co. v. Block, 130 Mo. 668, 32 S. W. 1139.

attorney's fee if the plaintiff should recover the amount of the note,—the admission not agreeing what would be a reasonable fee in case he should recover a *part* only of the note; ⁴⁸ actions upon promises and pleas or answers alleging that the promise was a different promise from that sued on, since this leaves the burden upon the plaintiff of proving the promise which he has alleged; ⁴⁹ covenant for dismissing a servant, justification and replication *de injuria*,—since the damages are unliquidated and must be proved by the plaintiff; ⁵⁰ covenant broken, general issue, with notice (under Massachusetts statute) of special defense of discharge under insolvent law; replication admitting discharge, but denying its validity; action upon a policy of life insurance—plea, misrepresentation by the assured, replication *de injuria*,—the plea being in substance a mere denial of the averment in the declaration of the truth of the statement by which the assured had obtained the policy; ⁵² actions to foreclose mortgages, since the plaintiff must prove the mortgage debt and all other facts preliminary to his right of foreclosure; ⁵³ an action on bills of exchange with a count on an account stated, plea of payment as to the bills and *non-assumpsit* as to the account stated,—since the plaintiff must give some evidence in order to a recovery upon the account stated; ⁵⁴ assumpsit for the unworkmanlike execution of a contract, plea that the work was properly done; ⁵⁵ action on an account, cause of action not admitted, defense of pay-

⁴⁷ *Graham v. Gautier*, 21 Tex. 112.

⁴⁸ *Camp v. Brown*, 48 Ind. 575. If there is admission making the exact recovery certain, defendant has the opening and close. *Woodruff v. Henley*, 26 Ind. App. 592, 60 N. E. 312.

⁴⁹ *Davies v. Evans*, 6 Carr. & P. 619; *McConnell v. Kitchens*, 20 S. C. 430.

⁵⁰ *Mercer v. Whall*, 5 Ad. & El. (N. S.) 447 (leading English case). The following decisions are referred to as contrary to the principle of this case, and as having been wrongly decided. *Page v. Carter*, 8 B. Mon. (Ky.) 192; *Sutton v. Mandeville*, 1 Cranch C. C. (U. S.) 187.

⁵¹ *Robinson v. Hitchcock*, 8 Metc. (Mass.) 64.

⁵² *Ashby v. Bates*, 15 Mees. & W. 589. Compare *Viele v. Germania Ins. Co.*, 26 Iowa, 10, 44; *Brennan v. Security Life Ins. Co.*, 4 Daly (N. Y.), 296.

⁵³ *Mason v. Croom*, 24 Ga. 211. Where mortgagee intervenes in suit by creditors for appointment of receiver of an insolvent concern, asking for foreclosure, and they, by amendment, attack the validity of his mortgage, they have the opening and closing. *Fidelity Banking etc. Co. v. Kangara Valley Tea Co.*, 95 Ga. 172, 22 S. E. 50.

⁵⁴ *Smart v. Rayner*, 6 Carr. & P. 721.

⁵⁵ *Amos v. Hughes*, 1 Mood. & R. 464.

ment;⁵⁶ action upon a guaranty of payment of certain promissory notes, answer denying any indebtedness and setting up false and fraudulent representations, etc.,—the reason being that it is incumbent on the plaintiff to prove the original indebtedness evidenced by the notes;⁵⁷ action for goods sold, general issue except as to a part of the sum demanded, as to a plea of tender;⁵⁸ and many other similar cases which might be stated.

§ 233. **Doctrine of this Article Restated.**—The doctrine of this article cannot better be restated than in the language of Judge E. Darwin Smith at the conclusion of a learned opinion in the Supreme Court of New York: “1. The plaintiff, in all cases where the damages are unliquidated, has the right to open the case to the jury and of the reply. 2. Whenever the plaintiff has anything to prove, on the question of damages or otherwise, he has the right to begin. 3. In other cases where the damages are liquidated or depend on mere calculation—as the casting of interest—the party holding the affirmative of the issue has the right to begin. 4. The affirmative of the issue in such cases means the affirmative in substance, and not in form, and upon the whole record. 5. The denial of the right to begin, to the party entitled to it and claiming it at the proper time, is error, for which a new trial will be granted, unless the court can see clearly that no injury or injustice resulted from the erroneous decision.”⁵⁹ The foundation of this doctrine is, as before stated, the leading case of *Mercer v. Whall*,⁶⁰ to which most, though not all, American courts have conformed. While, as already stated, the rule of that case is sufficient for the decision of the question in every ordinary case, yet it must not be supposed that it furnishes the key to a decision of the question in every case. In a variety of special proceedings the question which the juror asked of the judge at the conclusion of his charge, “What does your

⁵⁶ *Wright v. Abbott*, 85 Ind. 154. See also *Ashing v. Miles*, 16 Ind. 329 (action for use and occupation). Some states hold payment to be purely an affirmative defense. *Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532; *Smalz v. Ryan*, 112 Pa. 423, 3 Atl. 772. See also *Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305,

where satisfaction of judgment was pleaded.

⁵⁷ *Dahlman v. Hammel*, 45 Wis. 466, citing *Second Ward Savings Bank v. Shakman*, 30 Wis. 333.

⁵⁸ *Buzzell v. Snell*, 25 N. H. 474, 479.

⁵⁹ *Huntington v. Conkey*, 33 Barb. (N. Y.) 218, 228.

⁶⁰ 5 Ad. & El. (N. S.) 447.

honor mean by the words plaintiff and defendant?" is constantly recurring. To this question, as well as to several other topics connected with the subject, the next article will be devoted.

ARTICLE II.—IN SPECIAL PROCEEDINGS.

SECTION

- 236. Purpose of this Article.
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 - (1.) What Rule upon Principle.
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- 248. Petitioner, Claimant, Administrator.
- 249. Miscellaneous Cases where the Right was held to be with the Plaintiff.
- 250. Miscellaneous Cases where the Right is with the Defendant.

§ 236. **Purpose of this Article.**—From the former article on this subject it would appear that there is no difficulty in determining, on principle and authority, with which party the right to open and close the argument rests, in ordinary actions between plaintiff and defendant. But, as was there suggested, in many special proceedings the situation of the parties is such that it is difficult to determine which is to be deemed to stand in the position of plaintiff and which in that of defendant. In these cases the courts have not been able to lay hold of and adhere to any governing principle, and the result is a great confusion and contrariety of holding; so that on perhaps no point can a uniform rule of procedure, applicable in all American jurisdictions, be said to exist.

§ 237. **The Governing Principle Stated.**—Recollecting the general principle, developed in the former article, that the right to open and close is generally coincident with the initiatory burden of proof, that is that it belongs to the one who, in order to succeed in his action or defense, must go forward and prove *something* in

the event of no proof being offered by the opposing party,—we arrive at a governing principle, which should furnish an adequate rule in every special proceeding, namely, that the right to open and close *belongs to the party who seeks to alter the existing state of things.*

§ 238. **On an Issue of Sanity.**—A simple illustration of the application of this principle is found in cases where the issue is whether a certain person is, or was at a certain time, sane or insane. The general presumption is in favor of sanity; because, according to human experience, men and women are commonly sane. The party asserting the sanity of the person whose sanity is in question has therefore at the outset nothing to prove; but the burden, and with it the right to open and close the contest, rests upon the person asserting the contrary. He is the one who seeks to overthrow the general presumption, or to alter the commonly existing state of things. Thus, on the hearing of a commission of lunacy in Pennsylvania, the burden of proof, and with it the right to open and close the argument, is with the commonwealth.^{60a} So, on an issue from an orphan's court, or court of probate, to ascertain the sanity of a testator, the party objecting to the probate of the will on the ground of the testator's insanity is the moving party, and the right is with him.⁶¹

§ 239. **On Issues of Devistavit vel non.**—(1.) *What rule upon principle.*—The principle already suggested⁶² would, if kept in view, furnish a uniform rule for determining with which party the right lies, in cases of contested wills. That rule would be that, when a will is first brought into court and exhibited for probate, the right is with the proponent or party affirming the will; and that, after the will has been admitted to probate in common form, in any future proceeding to contest its validity, whether in the same or in another tribunal, the right is with the contestant, called variously the plaintiff, the petitioner, the *caveator*, or the objector. The reason is that the executor, or other party who first presents the will in the probate court and seeks to prove it and have it ad-

^{60a} Com. v. Haskell, 2 Brewst. (Pa.) 491. A plea of insanity as a defense to an action in contract puts upon the defense a similar burden

and gives the like right. Rea v. Bishop, 41 Neb. 202, 59 N. W. 555.

⁶¹ Dunlop v. Peter, 1 Cranch C. C. (U. S.) 403.

⁶² Ante, § 237.

mitted to record, is the acting party; he seeks to move the court; he must bring forward some evidence, or the court will not grant his motion. He must at least produce a paper, testamentary in its character, and prove in a formal way that it was executed by the person whose last will and testament it purports to be. If, at this stage of the proceeding, he meets in court an objecting party, as he must produce *some evidence* in order to get what he seeks, he comes within the rule above stated and more fully developed in the former article, which gives the right to open and close to him.⁶³ On the other hand, if the will is admitted to probate on his motion, and the objecting party persists in his contest, either by an appeal to a higher tribunal,⁶⁴ by an issue of *devistavit vel non* triable by a jury in a court of law, by a bill in chancery,⁶⁵ or by some other mode of procedure, generally prescribed by statute, he will become the moving party, the party who seeks to alter the existing state of things. A presumption obtains that the decision of the court of probate was right; he must overthrow that presumption by evidence; and consequently the office of taking the initiative in the production of evidence, and with it the right to open and close the argument, rests with him. But, in the various conclusions at which the courts have arrived, neither the principle of the text, nor any other uniform principle, has been adhered to.

(2.) *Cases which Concede the Right to the Proponents.*—We gather from different jurisdictions a group of cases which, without reference to the stage or form of the proceeding, concede the right to the caveators, objectors or assailants of the will, sometimes called petitioners, and even plaintiffs. Thus, it is held in several of the New England States that, on an appeal from a decree of the probate court establishing a will (the ground of the contest in most

⁶³ McClintock v. Curd, 32 Mo. 411.

⁶⁴ Rogers v. Diamond, 13 Ark. 475, 480; McDaniel v. Crosby, 19 Ark. 533; Tobin v. Jenkins, 29 Ark. 151, 153; Edelen v. Edelen, 6 Md. 288 (following Brooke v. Townshend, 7 Gill. (Md.) 10. Distinguishing Stockton v. Frey, 4 Gill (Md.), 407. Compare Kearney v. Gough, 5 Gill & J. (Md.) 457).

⁶⁵ Contrary to the doctrine of the text, it was early held in Kentucky

that, in a statutory proceeding by a bill to contest a will which has been admitted to probate in the county court, the burden of proof, and with it the right to open and close, belongs to the proponents of the will, defendants in the proceeding. Vancleave v. Beam, 2 Dana (Ky.), 155; Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 48. The New England cases cited further on are also opposed to the conclusion of the text.

cases relating to the sanity of the testator), the burden of proof, and with it the right to open and close, belongs to the executor, or to the party affirming the will.⁶⁶ These courts apply this rule without reference to the question which party is the appellant, and without regard to the *form* of the issues as made up; reasoning that, according to the *substance* of the issues, the party assailing the will takes the affirmative. Whether this is true, where the sole ground of the contest is the alleged insanity of the testator, would seem to depend upon the view which is taken of the nature of the proceeding. If it is viewed as an original proceeding, instituted to set aside the judgment of another tribunal, then the rule is contrary to principle, for presumptively the judgment of the probate court is right. But if it is viewed as a new trial in the same proceeding, then the conclusion would be different. An appeal in cases of this kind is not in the nature of a writ of error; its purpose is not to correct errors of law committed by the original court of probate; but it merely secures to the appellant a new trial of the same controversy in a higher tribunal, upon the same or such other evidence as the parties may be able to produce. This being the nature of the case, the proceedings in the original court of probate may be disregarded; they may be treated as having been entirely vacated by the appeal; they may stand as though they had never taken place,—just as, in the case of appeals from justices of the peace to courts of record, in most American jurisdictions, in which cases the issues stand for trial exactly as they stood in the court below; and the party having the burden of proof, and with it the right to open and close in that court, has it in the appellate court. On this principle the New England rule may be vindicated; for, as already pointed out, in every case where a will is offered for probate in the first instance, the proponent assumes the initiatory burden of proof. Viewing the trial of such a contest, when appealed from the probate court, as merely a new trial of the same case before a different tribunal, the New England rule also conforms to another principle pointed out in a preceding article, namely, that the right to open

⁶⁶ Comstock v. Hadlyme Ecc. Soc., 8 Conn. 254; Buckminster v. Perry, 4 Mass. 593; Phelps v. Hartwell, 1 Mass. 71; Brooks v. Barrett, 7 Pick. (Mass.) 94; Ware v. Ware, 8 Me. 42, 53; Perkins v. Perkins, 39 N. H. 163, 167; Boardman v. Woodman,

47 N. H. 120, 132; Goss v. Turner, 21 Vt. 437, 440; Matthews v. Forniss, 91 Ala. 157, 8 South. 661; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; Pattee v. Whitcomb, 72 N. H. 249, 56 Atl. 459.

and close the argument does not shift with the shifting of the burden of proof. So that, although in the appellate court the objectors may be required to go forward with the production of evidence, the right to open and close the argument will remain with the proponents.⁶⁷ In Ohio, the contestants are at liberty to proceed either according to the forms of a suit of chancery or by petition under the code of civil procedure; but in either case it is laid down that an issue must in some form be made up, "whether the writing produced be the last will of the alleged testator or not;" and in either case, on the trial of such issue, the party or parties setting up the will hold the affirmative, and are entitled to open and close;⁶⁸ and this although the will, admitted to probate and recorded, is *prima facie* evidence of its validity, due execution and contents, so as to cast the burden of proof upon the contestant.⁶⁹ The rule is the same in Kentucky, where the proceeding is by a bill in chancery to set aside a will on the ground of the insanity of the testator after it has been admitted to probate in the county court.⁷⁰

§ 240. In Actions of Replevin.—Lord Tenterden said that, in respect of this question, he could make no distinction between replevin and other forms of action; the principles applicable to all were the same. The consequence was that the plaintiff was entitled to begin, as there was an affirmative issue upon him.⁷¹ The Supreme Court of New Hampshire, following this principle, held that, in replevin, where the plaintiffs alleged that the articles replevied were their property, upon which issue was joined, and also that the articles were mortgaged to them, which allegation was denied by the defendants, upon which denial issue was joined,—the affirmative of both issues was with the plaintiffs, and that they had the

⁶⁷ Brooks v. Barrett, 7 Pick. (Mass.) 94.

⁶⁸ Brown v. Griffiths, 11 Ohio St. 329; McCutchens v. Loggins, 109 Ala. 457, 19 South. 810. This rule was held to give to one, who asked that the probated will be set aside and a writing of later date set up in its stead, the position of a proponent, with the right to open and close. McBee v. Bowman, 89 Tenn. (5 Pick.) 132, 14 S. W. 308. And where the question was of revocation, he who assails a will has the right to open and close. In re Hop-

kin's Will, 97 App. Div. 126, 89 N. Y. S. 561.

⁶⁹ Banning v. Banning, 12 Ohio St. 437. See also Randebaugh v. Shelley, 6 Ohio St. 307.

⁷⁰ Van Cleave v. Bean, 2 Dana (Ky.), 155; Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 48. See Carroll's Ky. Code, 1906, § 317.

⁷¹ Curtis v. Wheeler, 1 Mood. & M. 493; Andrews v. Costigan, 30 Mo. App. 29; Haveron v. Anderson, 3 N. D. 540, 58 N. W. 340; Hacker v. Munroe, 56 Ill. App. 532.

right to open and close.⁷² But the Supreme Court of Indiana has held that, where the answer sets up, in avoidance, that the defendant is entitled to a lien upon the goods for freight, wherefore the plaintiffs are not entitled to the possession of them, and the reply is a denial of such new matter,—the burden of the issue is upon the defendant, and he is entitled to open and close.⁷³ The court, in so holding, recognize as correct doctrine the *dictum* of Professor Greenleaf, that whenever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case and is entitled to reply.⁷⁴ In Kentucky, where the answer admits that the possession of the chattel is in the plaintiff, but denies that the chattel was taken from plaintiff's possession as alleged in the petition, and then sets up that the defendant is the owner of the chattel,—it has been held that the right to open and close the argument to the jury is with the defendant. The ruling is based upon the provision of the Kentucky Code of Practice, § 347, that the party having the burden of proof has the right to conclude the argument. "It is evident," said Simpson, C. J., "that, on this state of pleading, if no evidence had been adduced by either party, the plaintiffs would have been entitled to a judgment for the slave. Their possession was *prima facie* evidence of title; and that being admitted by the defendant, it then devolved upon him to introduce evidence to repel that presumption, and if he failed to do it, a judgment should have been rendered against him. Consequently the burden of proof was upon him, and he had a right to the conclusion of the argument with the jury."⁷⁵ In Illinois it has been ruled that, in replevin for goods levied upon by officer, under an execution, as belonging to the defendant in the

⁷² Belknap v. Wendell, 21 N. H. 175, 182.

⁷³ McLees v. Felt, 11 Ind. 218. In Texas it was ruled in a case, where defendants caused one, who sold them the articles sued for, to be made the defendant, that a plea that he was a partner and had the right to sell, was but another mode of denying title, and the burden on the plaintiff of establishing his title was not shifted. Downtain v. Ray (Tex. Civ. App.), 71 S. W. 758 (not reported in state reports). In Kentucky where plaintiff sued for logs,

remaining in possession of defendant after a sale transaction, and defendant claimed this was induced by fraud, the defendant had the burden and the right to open and close. Rudy v. Katz, 23 Ky. Law Rep. 1697, 66 S. W. 18. Where defendant claims title through sale by plaintiff's agent, the defendant opens and closes. Absher v. Franklin, 121 Mo. App. 29, 97 S. W. 1002.

⁷⁴ 1 Greenl. Ev., § 74.

⁷⁵ Vance v. Vance, 2 Metc. (Ky.) 581.

execution, where the defendant pleads facts to estop the plaintiff in replevin from claiming the property or denying that it belongs to the defendant in execution, which facts are denied by the plaintiff, the defendant has the right to open and close.⁷⁶ These last decisions overlook the fact that the object of the statutory action of replevin is not merely the recovery of the possession of the chattel. The plaintiff seeks, in the event the chattel is not restored to him prior to the trial under his delivery order, or subsequently under execution issuing to enforce his judgment, an alternative judgment for its value; and in either event he also seeks a judgment for the damages which he has sustained in consequence of its detention by the defendant. Unless, therefore, the chattel has been restored to him prior to the trial, and unless he also waives his right to a recovery of damages for its detention, he must, if his action is brought in the usual form, *prove something* in order to the full relief which he seeks, notwithstanding the defendant may in his answer have made the admissions above stated. In conformity with Lord Tenterden's view, and with the settled rule as shown in the preceding article, the right to open and close would rest with him, and not with the defendant.

§ 241. In Cases of Replevin of Cattle Distrained for Rent with Avowry of Rent in Arrear.—Unless repealed by recent statutory enactments, an unjust rule of the common law still defaces the jurisprudence of two or three of the older American States, by which a landlord, whose tenant is in arrear for rent, may go upon the land occupied by the tenant and drive away and impound any cattle which he may find there, whether belonging to the tenant or to any innocent third person, and hold them until the rent is paid,—thus making himself not only a judge in his own cause, but, in a controversy between himself and his tenant, rendering judgment in his own favor without notice to the tenant, without the formality of a trial, and executing his judgment at the same instant, and equally without notice. The remedy of the tenant, if the cattle were his, and if no rent were arrear, or if the cattle were not on freehold of the landlord at the time of the distress, was an action of replevin. In this action the landlord filed a plea called an *avowry*, in which he admitted the possession of the plaintiff, but set

⁷⁶ Colwell v. Brower, 75 Ill. 517. But for defendant to plead prop-

erty in a third person does not shift the burden from plaintiff. Pinkstaff v. Cochran, 58 Ill. App. 72.

up that the cattle were distrained when upon his (defendant's) freehold, whereof the plaintiff was tenant, and that the plaintiff was in arrear for the rent. To this the plaintiff would ordinarily reply, either denying that he was in arrear for the rent, or alleging that the cattle, when distrained, were not upon the freehold of the defendant, but on the freehold of some other person, naming him.⁷⁷ There seems to be nothing to distinguish such a case from any other action of replevin, in respect of the right to begin and reply. The plaintiff would have something to prove, in order to establish the value of the chattels, or the amount of damage sustained by reason of their caption and detention, unless these allegations of his declaration, as well as that asserting his original right of possession, were admitted by the defendant's plea,—which would vest the right to begin and reply in him; and it has been so held.⁷⁸ Thus, in replevin for cattle alleged to have been illegally taken and impounded by the defendant, the defendant avowed the taking of the cattle upon a certain lot of ground, alleging that the same was his soil and freehold. The plaintiff replied that the soil and freehold were in one T., and tendered an issue thereon, which the defendant joined. It was held that the plaintiff had the right to open and close.⁷⁹

§ 242. **In Cases of Interpleader.**—In the case of a bill of interpleader in equity, or of the corresponding proceeding under codes of procedure, where a party has possession of a fund belonging to one or more of several parties who contend against each other for the possession of it, and, to exonerate himself, presents a bill or petition in court, praying that these rival claimants may be required to interplead for the fund and that he may pay it into court and be exonerated,—it is difficult to say with which one of the rival claimants the right to begin and reply rests, since all are equally plaintiffs and defendants; each is an actor and each defends against the contention of the others. It is supposed that such a case must yield to the sound discretion of the court, and that this discretion would be best exercised by giving each claimant a stated period in

⁷⁷ See the nature of the action and the form of the plea as stated in Chitty Pl. 618.

⁷⁸ *Kearney v. Gough*, 5 Gill & J. (Md.) 457; *Hungerford v. Burr*, 4 Cranch C. C. (U. S.) 349. See also

Greer v. Nourse, 4 Cranch C. C. (U. S.) 527.

⁷⁹ *Thurston v. Kennett*, 29 N. H. 151, 158 (following *Belknap v. Wendell*, 21 N. H. 175).

which to argue in support of his own claim and against the evidence adduced in support of the claim of his opponents. As all would be equally entitled to a reply and as all could not have a reply without giving the last word to some one of them, it would seem that none should be allowed to make a second argument. A case which presented less difficulty was a proceeding by garnishment, in which, under the issue as made up, it was held that the interpleading claimants had the affirmative and consequently the right to begin and reply.⁸⁰

§ 243. **In Criminal Cases.**—In criminal cases the defendant is presumed to be innocent until he is proved to be guilty. The burden rests upon the State to prove, beyond a reasonable doubt, every fact essential to a conviction. From this it necessarily follows that, in all cases, the right to open and close is with the prosecution, unless a different rule is declared by statute. This is so, although the accused offers no evidence;⁸¹ nor does the fact that the accused sets up the defense of insanity shift the right to him. Where counsel are employed by private parties to assist the prosecuting officer of the State in a criminal trial, it is within the discretion of the court to allow such counsel to make the concluding argument to the jury in the place of the prosecuting attorney, although the prosecution is for a felony⁸² which is capital.⁸³ But a statute which changes this rule and gives the right of concluding the argument in a particular event to the defendant, is not directory but mandatory; it clothes him with a substantial right, which the court is not at liberty to disregard or abridge, the denial of which will work a reversal of a conviction. It has been so held in respect of

⁸⁰ *Randolph Bank v. Armstrong*, 11 Iowa, 515; *Sorenson v. Sorenson*, 68 Neb. 483, 98 N. W. 837. Consolidated cases, also, often present questions of discretion to the court, as to who is entitled to open and close. Thus see *Henry Gans & Sons Mfg. Co. v. Magee etc. Mfg. Co.*, 42 Mo. App. 307. The rule is, that the court should endeavor, as far as possible, to preserve for the parties the right in this respect they would have were there no consolidation. *Boykin v. Epstein*, 94 Ga. 750, 22

S. E. 218. Wherever there is a matter before the court, and parties intervene by leave, they submit themselves to the court's discretion in respect to the right to open and close. *Temple Nat. Bank v. Warner* (Tex. Civ. App.), 44 S. W. 1025 (not reported in state reports).

⁸¹ *Doss v. Com.*, 1 Gratt. (Va.) 557; *St. v. Millican*, 15 La. Ann. 557.

⁸² *St. v. Waltham*, 48 Mo. 55; *Jarnagin v. St.*, 10 Yerg. (Tenn.) 529.

⁸³ *St. v. Hamilton*, 55 Mo. 526.

a statute giving the defendant this right in cases wherein he introduces no testimony.⁸⁴

§ 244. **In Cases of Fraud.**—A general presumption of right acting attends human conduct; and therefore fraud is never presumed, but must be affirmatively proved as a fact; and of course the burden of proving it lies upon the party alleging it. It does not follow from this that, where fraud is set up as a defense to an action on a contract, this necessarily shifts the burden of proof, and with it the right to open and close, to the defendant. If the fraud which is thus pleaded is what the civilians call *dolus dans locum contractui*, that is a fraud giving occasion to the contract itself, the pleading of it may be regarded as no more than a *special denial* of the facts on which the plaintiff predicates his right of action; since it is not very material in principle whether the defendant merely denies the existence of the contract, or affirmatively states certain specified facts which, if true, show that the contract, though formally made, was void. There is room, however, for the view that an answer setting up such a defense should be regarded as setting up an extrinsic defense; since fraudulent representations or concealments, whereby a party has been induced to enter into a contract, do not make the contract void *ab initio*, that is to say, non-existent from its inception, but merely give to the party thus induced to enter into it the right to disaffirm it within a reasonable time after discovering the fraud. He may affirm or disaffirm, but he cannot do both; he cannot keep the benefits which he may have received under the contract from the other contracting party, and at the same time disaffirm it so far as it imposes duties or obligations upon him. His right, therefore, when sued upon the contract, is at most a right of rescission,—that is, either a right to have it then rescinded for the fraud, or a right to plead and prove that, because of the fraud, he had, within a reasonable time after discovering the fraud, elected to rescind it. In this view the defense of fraud, set up in an action upon the contract, may well be regarded as an extrinsic defense; since it amounts to something more than a mere denial or traverse of the allegation of the existence of the contract. We find that courts have taken both views of this question, some treating such an answer as a special denial, and others treating it as the pleading of an affirmative defense. Whichever view is taken, the opening and closing is, on principle and author-

⁸⁴ *Heffron v. St.*, 8 Fla. 73.

ity,⁸⁵ to be given to the defendant in every case where the contract liquidates the damages. In other cases, if the allegation of fraud is to be regarded as a special denial, the right remains with the plaintiff; but if it is to be regarded as the pleading of an extrinsic defense, the right plainly rests with the defendant.

§ 245. [Continued.] **Opposing Views.**—When, therefore, the plaintiff sues to recover specific chattels and his right to recover is predicated on his establishing a *bona fide* ownership of the property, he cannot, it has been held, be deprived of his right to open and close, by reason of the fact that the defendant alleges that his title is fraudulent and void,—the court regarding this as in the nature of a special denial.⁸⁶ In like manner, it has been held that, in an action for the recovery of damages for the wrongful seizure and conversion of goods to which the plaintiff claims title, if the defendant answers, simply alleging fraud in the assignment under which the plaintiff claims, the plaintiff, on the trial, is entitled to open and close; because the effect of the answer is not to admit that the plaintiff ever had title to the goods, but it is in effect only a special denial of the title alleged in the petition. The court said: “Before the plaintiff would be entitled to recover at all, he would have to show a title in himself; but the answer admits nothing but a fraudulent assignment, which is not an admission of any title. This state of the pleadings, under the third clause of section 266 of the [Ohio] code, gave the affirmative of the issue to the plaintiff.”⁸⁷ On the contrary, and apparently on the view that the defense of fraud is an affirmative defense, it was held, in an action to recover the value of goods attached by a sheriff, where the defendant, before the trial, filed a pleading in which he admitted the plaintiff’s possession and that he had the right of possession at the time of the seizure, but alleged that his title was obtained by a transfer from the attachment debtor in fraud of his creditors,—that the burden, and with it the right to open and close, was with the defendant.⁸⁸

⁸⁵ *Elwell v. Chamberlin*, 31 N. Y. 611; *Brennan v. Security Life Ins. Co.*, 4 Daly (N. Y.), 296. Compare *Patton v. Hamilton*, 12 Ind. 256; *Auerbach v. Peetsch*, 18 N. Y. S. 452. If defendant claims a judgment sued on is fraudulent and void, he opens and closes. *Chronister v. Anderson*, 73 Ill. App. 524.

⁸⁶ *Churchill v. Lee*, 77 N. C. 341. See also *McRae v. Lawrence*, 75 N. C. 289; 1 Greenl. Ev., § 74.

⁸⁷ *Beatty v. Hatcher*, 13 Ohio St. 115, 119. See, Gen. L. Ohio 1910, § 11447.

⁸⁸ *Bixby v. Carskaddon* (Iowa), 29 N. W. 626.

So, in Georgia, it has been held that, where an insolvent debtor, arrested and held in execution under a *ca. sa.*, institutes a proceeding in the inferior court to obtain the benefit of the statute for the relief of insolvent debtors, and creditors appear and object on the ground of fraud, the burden of the issue which is made up is on the objecting creditors, and the corresponding right to open and close rests with them. The reason for this holding is that the debtor has no proof to make—nothing to do but to take the oath and be discharged, for which reason the creditor alleging the fraud assumes the substantial burden of proof, and is the movant within the meaning of the rule of court which governs the question.⁸⁹

§ 246. **In Proceedings on Reports of Commissioners, Auditors, Referees.**—In Indiana, on appeal from proceedings before a board of commissioners in reference to the location of a highway, where the remonstrance is for damages only, the remonstrant has the burden of proof, and is therefore entitled to open and close. The reason seems to be that if there is no remonstrance, no proof will be required from the petitioners, but the report of the viewers will be final.⁹⁰ Under the code of Georgia, the report of an auditor was *prima facie* evidence, and the burden is on the exceptor to show error in it and to make good his exceptions. When an order was made that the report be filed and granting leave and time to except thereto, the report became such evidence. The burden thus being on the exceptor, he was entitled to open and conclude, unless the other party introduced no testimony, in which case the right of conclusion shifted to the other party. To cross-examine a witness of the objector and to continue the cross-examination after a temporary suspension of it by the court, was not an introduction of testimony by the party so cross-examining, in such a sense as to give him the right to the conclusion.⁹¹ In Massachusetts, where the report of an auditor is in favor of the plaintiff, and the defendant files exceptions to it, the right to open and close, in the contest raised by the exceptions, remains with the plaintiff, although the report makes a *prima facie* case in his favor,—on the principle alluded to in the former article, that where the right once attaches to a party, it does not shift with the shifting of the burden of proof.⁹² The same conclusion has been reached in New Hampshire,

⁸⁹ Johnson v. Martin, 25 Ga. 269, 271.

⁹⁰ Peed v. Brennehan, 89 Ind. 252; Connell v. Tate, 107 Ind. 171.

⁹¹ Arthur v. Commissioners, 67 Ga. 221, 224. Rule amended. See Ga. Code 1911, Vol. 1, § 5141.

⁹² Snow v. Batchelder, 8 Cush.

in a case which was referred to commissioners under a statute, who had reported in favor of the plaintiff, the defendant electing to have the case afterwards tried by a jury, and filing, under the terms of the statute, a statement of the particulars in which he expected to change the result of the report. The court, on a consideration of the state of the case and the terms of the statute, being of opinion that the issue was in substance the general issue, in which case the opening and closing is always with the plaintiff, gave the right to him.⁹³

§ 247. In Proceedings to Condemn Land and Assess Damages.

In a proceeding to condemn land for public uses and for the assessment of the compensation to be made to the landowner, the petitioner holds the affirmative of the issue, and consequently has the right to begin and reply, both in the introduction of evidence and in the argument to the jury.⁹⁴ The reason is that the petitioner, the party seeking to condemn the land, is the moving party. Under the constitution the land cannot be taken without just compensation being made to the owner. The proceeding of the petitioner is therefore a proceeding to ascertain what is just compensation, and, should no proof be offered under this head, he would be defeated.⁹⁵

§ 248. **Petitioner, Claimant, Administrator.**—The right is with the applicant for a license to sell intoxicating liquors, under a statute of Indiana, in a proceeding to try his right to such a

(Mass.) 513; Rev. Laws Mass. 1902, ch. 165, § 55, p. 1485. Farmer v. Cloudt (Tex. Civ. App.), 59 S. W. 614 (not reported in state reports). Contra, Schmitt v. Mitchell, 117 Ga. 6, 43 S. E. 671.

⁹³ Chesley v. Chesley, 10 N. H. 327. But see Pub. Stat. N. H. 1901, p. 721, § 8.

⁹⁴ South Park Commissioners v. Trustees, 107 Ill. 489; McReynolds v. Burlington etc. R. Co., 106 Ill. 152; Neff v. Cincinnati, 32 Ohio St. 215.

⁹⁵ McReynolds v. Burlington etc. R. Co., 106 Ill. 152. The contrary is held in Arkansas, the court reasoning that the land-owner is the real actor. No matter which party

initiates the proceeding, the court say, the extent of the damage is the object of the inquiry, and the burden of proof is upon him. Springfield etc. R. Co. v. Rhea, 44 Ark. 258, 264 (citing Mansfield's Arkansas Dig., § 5131; Pierce on Railroads, 187; Mills on Eminent Domain, § 92). On principle the burden in these cases would, however, seem to be upon the petitioner, since the petitioner cannot succeed without introducing evidence. Mendocino County v. Peters, 2 Cal. App. 24, 82 Pac. 1122. Contra, Calvert etc. R. Co. v. Smith (Tex. Civ. App.), 68 S. W. 68 (not reported in state reports).

license;⁹⁶ with the claimant or creditor in case of a claim preferred against a decedent's estate which is contested;⁹⁷ with the administrator on the trial of exceptions filed to his final settlement.⁹⁸

§ 249. **Miscellaneous Cases where the Right was held to be with the Plaintiff.**—Passing from these we come to a number of miscellaneous cases, some of which appear to have been decided according to principle and others not, which, within the limits of this article, can only be referred to without explanation or discussion. The right rests with the plaintiff in a proceeding called "claim" under a statute of Georgia where land has been levied upon;⁹⁹ but in cases of "illegality," under another statute of the same State, it is with the defendant.¹ It is with the plaintiff a proceeding under a statute of Texas to try the right of property levied upon by execution,² and in an action against an administrator who pleads payment and *plene administravit*.³

§ 250. **Miscellaneous Cases where the Right is with the Defendant.**—In like manner the right has been held with the defendant on a plea in abatement to an action on bills of exchange, which sets up the *non-joinder* of a joint maker or promissor;⁴ in Alabama,

⁹⁶ Hill v. Perry, 82 Ind. 28; Goodwin v. Smith, 72 Ind. 113.

⁹⁷ Yingling v. Esson, 16 Md. 112, 121.

⁹⁸ Taylor v. Burk, 91 Ind. 252; Hallyn v. Nesbit, 37 Ind. 284; Brownlee v. Hare, 64 Ind. 311; Higgs v. Garrison (Tex. Civ. App.), 27 S. W. 34 (not reported in state reports). It is held, that one, contesting with a widow her right to property set apart for her year's support, has the burden and the opening and closing. Gunn v. Petty-grew, 93 Ga. 227, 20 S. E. 328.

⁹⁹ Baker v. Lyman, 53 Ga. 339. If property is in possession of claimant, plaintiff in execution opens and closes. Royce v. Gazan, 76 Ga. 79. Where the levy is on the chattels part in possession of claimant and part in possession of defendant in execution, the court in its discretion may direct the like course.

Johnson v. Palmour, 87 Ga. 244, 13 S. E. 637. If the claimant admits a prima facie case on plaintiff in execution this entitles him to open and close. Turner v. Elliott, 127 Ga. 338, 56 S. E. 434.

¹ Bertodi v. Ison, 69 Ga. 317. He must offer, however, to assume the affirmative at the beginning, and not wait until plaintiff in execution makes out a prima facie case. Cook v. Coffey, 103 Ga. 384, 30 S. E. 27.

² Latham v. Selkirk, 11 Tex. 314.

³ Clay v. Robinson, 7 W. Va. 350.

⁴ Fowler v. Coster, Mood. & M. 241, per Lord Tenterden, C. J. This case, though decided before the rule became settled in England, is in conformity with correct principle.

⁵ Persall v. McCartney, 28 Ala. 110, 125. Compare Worsham v. Goar, 4 Port. (Ala.) 441; Shearer v. Boyd, 10 Ala. 279; Grady v. Hammond, 21 Ala. 428; Edwards v.

where the defendant in a judgment applies for a *supersedeas* under a statute, the proceeding being a substitute for the common-law writ of *audita querela*;⁵ in Delaware, on the trial of a *caveat* filed against proceedings to locate vacant lands under a private act of assembly;⁶ and, as stated in the preceding paragraph, on the trial of an affidavit of "illegality" in Georgia.⁷

ARTICLE III.—CERTAIN SPECIAL RULES.

SECTION

253. Express Waiver of General Denial.

254. Failure of the Defendant to Offer Evidence.

255. Effect of Admitting Plaintiff's Cause of Action.

256. Admission of a Part of the Plaintiff's Cause of Action.

257. Right to Begin Carries with It Right to Reply.

258. Refusal of Right to Open not Cured by Granting Right to Conclude.

259. The Right to Reply how Affected by Waiving the Right to Begin.

§ 253. **Express Waiver of General Denial.**—As seen in the former article, in a suit on a contract which liquidates the damages, if the defendant files no denial but sets up an affirmative defense, the right to begin and reply is with him. It has been held that this rule is capable of application in an action upon such an instrument before a justice of the peace, where no formal *defensive* pleading is required, but where, by the terms of the statute, the case stands as though the defendant had pleaded the general denial; in which case he may, by filing of record an express waiver of the general denial, confine himself to an affirmative defense and acquire the right to open and to close.⁸

§ 254. **Failure of the Defendant to Offer Evidence.**—It is scarcely necessary to say that the failure of the defendant to offer evidence does not oust the plaintiff of his right to open and close the argument, if he otherwise has it under the rules already stated.⁹

Lewis, 16 Ala. 813; Bruce v. Barnes, 20 Ala. 219. So also where a defendant in execution sets up an exemption e. g. being the head of a family. Millburn Wagon Co. v. Kennedy, 75 Tex. 212, 13 S. W. 28. Where the grounds of attachment are traversed, it is ordinarily the case, that the burden is on plaintiff in attachment. Einstein v. Mun-

nerlyn, 32 Fla. 381, 13 South. 926; Oldswagon Co. v. Benedict, 25 Neb. 372, 41 N. W. 254.

⁵ Records v. Melson, 1 Houst. (Del.) 139.

⁷ Bertodi v. Ison, 69 Ga. 317.

⁸ Cross v. Pearson, 17 Ind. 612.

⁹ Worsham v. Goar, 4 Port. (Ala.) 441.

And where the defendant files a plea setting up an affirmative defense which would give him the right to begin and reply if evidence were offered under it, he does not have the right if he offers no evidence under it; for otherwise, by filing a sham plea, a defendant might acquire a right which the law does not intend to give him.¹⁰

§ 255. **Effect of Admitting Plaintiff's Cause of Action.**—But in Massachusetts, where the courts have been driven for the sake of convenience to adopt a uniform rule,¹¹ giving the plaintiff the right to open and close in all cases, the fact that the defendant admits the plaintiff's cause of action and that the only issue for the jury is on the defendant's declaration in set-off, does not shift the right to the defendant.¹² In New Hampshire, it is held, on somewhat doubtful grounds, that, although the defendant admits the plaintiff's claim, which he has formally denied in his answer, yet as the admission is only in the nature of evidence, it does not change the burden of proof, and does not entitle the defendant to begin and reply. "The right," says Bell, J., "depends on the form of the pleadings, and is determined by the fact that the affirmative of one of the issues is upon the plaintiff; and this is in no way affected by the circumstance that the plaintiff has greater or less facilities for making the required proof. Any material fact may be proved by the admissions of the adverse party; and it does not change the burden of proof upon the pleadings, that the defendant has admitted the claim which he formally denies by his plea. Nor is it in any way material in what form the admission is made, so long as he chooses to deny it upon the record, and join issue upon it."¹³ In Texas, where the defendant files a written admission, in accordance with a rule of court numbered 31, that the plaintiff has a good cause

¹⁰ *Daviess v. Arbuckle*, 1 Dana (Ky.), 525; approving *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 275, and qualifying *Goldsberry v. Stuteville*, 3 Bibb (Ky.), 346.

¹¹ 8 Cush. (Mass.) 603, note.

¹² *Page v. Osgood*, 2 Gray (Mass.), 260. Compare *Bradley v. Clark*, 1 Cush. (Mass.) 293; *Wigglesworth v. Atkins*, 5 Cush. (Mass.) 212; *Spaulding v. Hood*, 8 Cush. 602; *Merriman v. Cunningham*, 11 Cush. 40, 44,—which were decided under a rule of the Court of Common Pleas of that

State prior to the adoption of this uniform rule.

¹³ *Buzzell v. Snell*, 25 N. H. 474, 479. In a state where the rule by statute is to give defendant, who introduces no testimony, the right to open and close the argument, the form of pleading has nothing to do with this question. In such a state it has been held there must be an actual introduction of evidence to defeat this right. *Brown v. Southern Ry. Co.*, 140 N. C. 154, 52 S. E. 198. In *orgia* the rule by stat-

of action as set forth in his petition, except so far as it may be defeated, in whole or in part, by the facts constituting the defense which may be established on the trial, he is entitled to open and close, both in adducing evidence and in arguing the case.¹⁴ Under a rule of court, numbered 59, which has been in force for many years in South Carolina, the defendant is likewise entitled to begin and reply, when he admits upon the record the plaintiff's cause of action and takes upon himself the burden of proof.¹⁵

§ 256. Admission of a Part of the Plaintiff' Cause of Action.—

It is scarcely necessary to say that the admission by the defendant of a part only of the plaintiff's case, or of a part only of the evidentiary facts upon which the plaintiff relies for a recovery, will not give the right to begin and reply to the defendant. Thus, in ejectment where each party claimed as heir at law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate, he proposed to admit that, unless he was legitimate, the lessor of the plaintiff was the heir at law. It was held that the admission did not give him the right to begin.¹⁶ So, in an action of ejectment, the lessor of the plaintiff claimed as devisee under the will of J. S. At the trial the defendant admitted the seizin of J. S., and the due execution of that will, and that the plaintiff was *prima facie* entitled under it, and proposed to set up a subsequent will, revoking the first will. It was held, reversing the trial court, that the plaintiff was entitled to begin. The reasoning of the learned judge was, that the lessor of the plaintiff claimed as devisee under the will, that is, under the will that was a good and valid will at the time of the testator's death; therefore the defendants proposed to admit a part only of the plaintiff's case, and in fact did set up a case which denied that the plaintiff was such devisee.¹⁷

ute is for defendant to open and close where he submits no proof. *Moore v. Carey*, 116 Ga. 28, 42 S. E. 258.

¹⁴ *Ney v. Roth*, 61 Tex. 374; *Hallsell v. Neal*, 22 Tex. Civ. App. 26, 56 S. W. 137.

¹⁵ *Burckhalter v. Cowerd*, 16 S. C. 435, 441; *Thompson v. Security etc. Ins. Co.*, 63 S. C. 290, 41 S. E. 464.

¹⁶ *Doe d. Warren v. Bray, Mood. & M.* 166.

¹⁷ *Doe d. Bather v. Brayne*, 5 Com. Bench, 655, 670. The case was distinguished from cases where the plaintiff claims as heir at law, and where the defendant admits the whole title of the plaintiff, that is, that the ancestor died seized and that the plaintiff is his heir at law. *Doe d. Wollaston v. Barnes*, 1 Mood.

§ 257. **Right to Begin Carries with It Right to Reply.**—The right to begin, based upon this so-called primary burden of proof, carries with it the right to reply.¹⁸

§ 258. **Refusal of Right to Open not Cured by Granting Right to Conclude.**—The refusal to the party having the burden of proof, of the right to open his case to the jury, is an error which is not cured by according to him the right to have the concluding argument. In the opinion of the court so holding, Daly, C. J., said: "The opening of the case to the jury by the plaintiffs, and the laying before them of their evidence in the first instance, and confining the defendant to evidence in the way of reply, are a part of their legal right, of which they are deprived under exception; and I fail to see how the error is cured by allowing them afterwards what was their further right, the final address to the jury. Depriving a party of one part of his legal rights is certainly not cured by allowing another part." And the judgment was reversed for this error alone, although the case had been already tried three times.¹⁹

§ 259. **The Right to Reply how Affected by Waiving the Right to Begin.**—Where the plaintiff waives the opening argument to the jury, it has been thought that, on strict grounds, this might give the defendant the right to close; but it was said: "If such a waiver should still leave the closing argument to the plaintiff, it certainly confined it to a strict reply to the defendant's argument, excluding general discussion of the case. The sole object of all argument is the elucidation of the truth, greatly aided, in matter

& Rob. 386. The court also distinguish *Doe d. Corbett v. Corbett*, 3 Camp. 368. On the right of the devisee to begin. See also *Goodlittle d. Revett v. Braham*, 4 T. R. 498; *Doe d. Tucker v. Tucker*, Mood. & M. 536. Several other early cases were cited in the argument: *Doe d. Warren v. Bray*, Mood. & M. 166; *Doe d. Pill v. Wilson*, 1 Mood. & Rob. 323; *Doe d. Lewis v. Lewis*, 1 Carr. & K. 122. But, as several of these were nisi prius cases, decided at a period before the rule had become settled in England in the leading case of *Mercer v. Whall* (5

Ad. & El. (N. S.) 447), it is thought unnecessary to examine them in detail.

¹⁸ *Robinson v. Hitchcock*, 8 Metc. (Mass.) 64; *Judge of Probate v. Stone*, 44 N. H. 593, 606; *Elwell v. Chamberlin*, 31 N. Y. 611, 612.

¹⁹ *Penhryn Slate Co. v. Meyer*, 8 Daly (N. Y.), 61. But, if the error in ruling was merely in respect to who should proceed first with his proof, this may be cured by giving to the one entitled his right to open and close the argument. *McCalla v. American Freehold etc. Mortg. Co.*, 90 Ga. 113, 15 S. E. 687.

of fact, as well as in matters of law, by full and fair forensic discussion. And this is always imperiled when either party is able to present his views of the case to the jury without opportunity of the other to comment on them. And if the party entitled to the opening argument, relying on the strength of his case without discussion, waive the right to open, he waives the right to discuss the case generally, and should not be permitted to do so out of his order, and after the mouth of the other party is closed. His close, if permitted to close the argument, would be limited to comment on the argument of the other side. This is essential to the fairness and usefulness of juridical discussion at the bar.”²⁰ In a civil case, where the court, after the close of the evidence, directed counsel for the plaintiff to go on and state his points relied on for a recovery, which counsel did, and the defendant’s counsel then asked the court to charge the jury, but the plaintiff’s counsel insisted upon his right to argue the case to the jury, which was denied him by the court,—it was held that the ruling was erroneous. This holding was predicated upon the view that the court, in directing the plaintiff’s counsel to state his points, meant to restrict him in his opening to a naked statement of his points, to the exclusion of argument in support of them. The reviewing court did not hold that, where the plaintiff has the privilege of argument and declines it, he is entitled to make the closing argument, although the defendant declines argument.²¹ In a civil case, after the testimony is closed and the case is opened by the plaintiff’s counsel, if the defendant’s counsel submits the cause to the jury without argument on his part, the plaintiff is not entitled to make any further argument to the jury.²²

²⁰ *Brown v. Swineford*, 44 Wis. 282, 290, opinion by Ryan, C. J.

²¹ *Cartright v. Clopton*, 25 Ga. 85.

²² *Tyre v. Morris*, 5 Harr. (Del.)

3. If party having the right to open and close, waives his opening and the other waives his argument, this takes away the right to close. *St. L. & S. F. R. Co. v. Johnson*, 74 Kan. 83,

86 Pac. 156. If a party has the right to open and close as dependent upon the order of introduction of the proof, and he permits his adversary, without objection, to first introduce evidence, this constitutes a waiver. *Northington v. Granade*, 118 Ga. 584, 45 S. E. 78; *Edwards v. Murray*, 5 Wyo. 153, 38 Pac. 681.

CHAPTER X.

OF THE OPENING STATEMENT.

SECTION

- 260. Reading the Pleadings.
- 261. The Opening Statement.
- 262. Whether Anticipate Defense of Opposing Party.
- 263. No Right to rehearse Facts which cannot be Proved.
- 264. Nor Irrelevant and Prejudicial Matters.
- 265. Instructing the Jury to Disregard such Statements.
- 266. Abuse of Discretion in this Regard Revisable on Appeal.
- 267. Rehearsal of Testimony not Allowed.
- 268. Exhibiting Diagrams.
- 269. Dismissing the Cause on the Plaintiff's Opening Statement.
- 270. Defendant's Opening Statement.

§ 260. **Reading the Pleadings.**—The case is ordinarily opened by reading the pleadings. This is usually done thus: The counsel (or, if there be more than one, the *junior* counsel) of either party, beginning with the party who sustains the burden of proof, reads his own pleading to the jury. This formality may be dispensed with in the *discretion* of the court. On this subject it has been observed: "It was purely a matter of discretion with the judge whether he would allow the pleadings to be read. He might call upon the counsel to read them, or to state their substance, if it was necessary to enable the court to understand the issues which were raised and were to be tried. The pleadings, which are presumed to be statements in legal form of those facts which constitute the charge or defense of the parties, are for the consideration of the court. When evidence for the consideration of the jury is offered or given to sustain or establish those facts, it becomes necessary for the court to understand what issues are raised, and which are properly triable in the case. The facts stated in the pleadings, except so far as admitted, could not be considered by the jury until proved by competent testimony."¹ It should be kept

¹ Willis v. Forrest, 2 Duer (N. Y.), 310, 317. It is not necessary for the pleadings to be read to authorize opposing counsel to comment thereon in argument. Holmes v. Jones, 121 N. Y. 46, 24 N. E. 71.

Pleadings, to which exceptions have been sustained, should not be allowed read to the jury. Smith v. Boatmen's Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119.

in mind that matters concerning the pleadings are ordinarily addressed to the judge, whose duty it is to *state the issues* to the jury when he comes to deliver to them his *instructions*; and that comments on the pleadings to the jury are in general out of place, and sometimes unprofessional.

§ 261. **The Opening Statement.**—The counsel for the party sustaining the burden of proof next makes a short address to the jury, in which he states the nature of the issues to be tried and what he expects to prove, in order to sustain the action (or defense, as the case may be.) According to an approved writer, “the opening address usually states first, the full extent of the plaintiff’s claims, and the circumstances under which they are made, to show that they are just and reasonable; secondly, at least an outline of the evidence by which those claims are to be established; thirdly, the legal grounds and authorities in favor of the claim or of the proposed evidence.”²

§ 262. **Whether anticipate Defense of Opposing Party.**—As to the foregoing there is no difference of opinion; but the writer last quoted from adds: “Fourthly, an anticipation of the expected defense, and a statement of the grounds on which it is futile, either in law or justice, and reasons why it ought to fail.”³ That such is the English practice is shown by other authorities.* In some American jurisdictions this rule is denied, and it is laid down that each party should be confined to a legitimate and proper opening of his own case,—the plaintiff’s counsel to a statement of his cause of action, and the defendant’s counsel to a statement of his answer to the plaintiff’s case and the evidence he proposes to give to sustain it;

² 3 Chit. Pr. 880; O’Connell v. Dow, 182 Mass. 541, 66 N. E. 788. Statutes prescribing, that counsel may state his case and the evidence by which he expects to sustain same, are construed to forbid his stating to the jury the law applicable thereto. San Miguel Consol. Gold Min. Co. v. Bonner, 33 Colo. 207, 79 Pac. 1025. But a single argumentative assertion is not reversible error. Phoenix Ins. Co. v. Weeks, 45 Kan. 751, 25 Pac. 410. Nor a misstatement of the nature

of the action not calculated to mislead. Lee v. Campbell, 77 Wis. 340, 46 N. W. 497.

³ 3 Chit. Prac. 880. In Indiana it has been held, that the prosecuting attorney may not only anticipate the defense, but forecast his rebuttal evidence thereto. Reynolds v. St., 147 Ind. 3, 46 N. E. 31.

⁴ Meagoe v. Simmons, 3 Car. & P. 75; Brown v. Murray, Ry. & M. 254. See also Lacon v. Higgins, 3 Stark. 178, D. & R. 178.

and that it is improper for the counsel of the plaintiff in his opening to state the case as made by the defendant in his answer, or the evidence he expects to give in reply to the defense set up in the answer.⁵

§ 263. **No Right to Rehearse Facts which cannot be Proved.**—Counsel has no right in his opening statement, to rehearse before the jury facts which he is not in a condition to prove.⁶ It is the duty of the judge to see that this rule is not overstepped, and therefore he has a right to ask the counsel if he means to prove what he has stated.⁷ As was well said by Mr. Justice Graves: "The decisions unite in substantially denying the right to get before the jury a *detail* of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent."⁸

⁵ *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229, 234; *Elwell v. Chamberlin*, 31 N. Y. 611, 614. *Ayrault v. Chamberlain* was affirmed by the Court of Appeals, as stated in the opinion in *Elwell v. Chamberlin*, supra, but the decision affirming does not seem to have been reported. In a bastardy proceeding the counsel for the prosecution, in opening the case to the jury, stated, in effect, that the accused would introduce testimony as to the character of the complainant, and as to what he tried to prove on the former trial. Upon objection to these remarks, the court promptly ruled that he must confine himself to stating the case of the prosecution, and not the case of the accused. *Held*, that this ruling was sufficient protection to the accused from being prejudiced by anything thus stated. *Baker v. St.*, 69 Wis. 32, 33 N. W. 52. Statute prescribing plaintiff is to state his case forbids any contemptuous allusion to what it is assumed the defense will be. *Kansas City Southern Ry. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428. Though reference

made to a defense, the nature of which is disclosed by the record, is not prejudicial. *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

⁶ *Stevens v. Webb*, 7 Carr. & P. 60; *Duncombe v. Daniell*, 8 Carr. & P. 222; *Scripps v. Reilly*, 35 Mich. 371. He could not, therefore, under the old law, give his client's account of the transaction, where his client was not permitted to testify. *Duncombe v. Daniell*, supra; *Quincy Gas & Electric Co. v. Bauman*, 104 Ill. App. 600, 203 Ill. 295, 67 N. E. 807.

⁷ *Darby v. Ouseley*, 36 Eng. Law. & Eq. 518, 525, per Pollock, C. B. If there is no bad faith, failure to prove a particular thing will not ordinarily work a reversal. *People v. Gleason*, 127 Cal. 323, 57 Pac. 592; *St. v. Alten*, 100 Iowa, 7, 69 N. W. 274. The duty of adversary counsel is to move to strike out, or the matter may be alluded to in argument. *McFadden v. Morning Journal Association*, 28 App. Div. 508, 51 N. Y. S. 275.

⁸ *Scripps v. Reilly*, 35 Mich. 371, 388.

§ 264. **Nor Irrelevant and Prejudicial Matters.**—It is equally the duty of the trial court to restrain every effort on the part of counsel, in their statements to the jury, to introduce matters which are foreign to the issues, and especially matters which have a tendency to excite the prejudice of the jury. It was so held where it was charged, though not established, that the plaintiff's counsel, in his opening speech to the jury, had stated that, on a former trial of the cause, the defendants had *suborned* their little son, then a child of four years, to commit perjury, and that one of the defendants had committed perjury in his affidavit for a change of venue.⁹ So, in an action for *libel* it is held error to permit the plaintiff's counsel, in opening his case to the jury, to read at length, against objection, *other publications* by the defendant which are not relevant or admissible as evidence, and which, afterward on the trial are not offered as evidence.¹⁰

§ 265. **Instructing the Jury to disregard such Statements.**—Where counsel have overstepped the bounds of the preceding rule, it is the plain duty of the judge, as was done by Lord Denman, C. J., in one case,¹¹ to reprove the practice in the hearing of the jury, and afterwards, in *instructing* the jury, to admonish them to dismiss from their minds the statements thus made;¹² though where the

⁹ *Hennies v. Vogel*, 87 Ill. 242. But mentioning a matter merely irrelevant cannot be regarded as prejudicial. *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689. Nor inaccuracies not of an inflammatory nature. *Lewes v. John Crane & Sons*, 78 Vt. 216, 66 Atl. 60. If the objection goes to competency as proof, it will be overruled, unless it is clear that the matter is or will be incompetent. *Pritchard v. Henderson*, 3 Pennewill (Del.) 128, 50 Atl. 217.

¹⁰ *Scripps v. Reilly*, 35 Mich. 371.

¹¹ *Duncombe v. Daniell*, 8 Carr. & P. 222. Counsel in this case having referred in his opening to a document which he did not expect to prove, Lord Denman, by way of punishment, allowed *secondary evidence* to be given of its contents.

¹² In such a case Lord Denman,

C. J., in his charge to the jury, rebuked the conduct of Mr. Attorney-General Campbell (Lord Denman's successor as Lord Chief Justice), in his summing up, by saying: "With respect to the manner in which the plaintiff's case has been conducted, I must say that I do not recollect any case in which a statement was made of independent facts not drawn from the libelous matters themselves, but tending to disprove them, and in which the jury were addressed as to facts tending to establish the innocence of the plaintiff, without some proof being given of those facts by the counsel stating them; yet that has been done on the present occasion. I do not believe that the statement here will make any difference in your opinion; for you will no doubt regard

privilege of advocacy in opening the case has been greatly abused in this regard, such an instruction may not be sufficient to cure the irregularity, but it will be ground of new trial.¹³

§ 266. Abuse of Discretion in this Regard revisable on Appeal.—No doubt, the limits of privilege allowed to counsel in this regard are very much within the *discretion* of the trial court, but subject, as in other cases of the exercise of judicial discretion, to be revised on appeal in case of manifest abuse.¹⁴ In such a case the Supreme Court of Michigan, speaking through Graves, J., said: "There is no doubt of the right of this court to revise in such a case as this. If the trial court may pursue any course it pleases in relation to the opening statement, if it may act independently of all control, then the idea of a rule to be prescribed by this court, under the constitution and legislative enactment, for its guidance and government, is preposterous and absurd. But the point is too plain for argument. This court will not revise such matters unless there is plain evidence of action amounting to what is called an abuse of discretion, and calculated to injuriously affect the legal rights of a party; and where such is the case, whether the result of accident,

(as you ought) the evidence only as to facts, and listen to counsel only for their observation on the facts. Still, I think that the practice which has been adopted on this occasion is not one encouraged, and that counsel ought not to be instructed to go into a particular detail of circumstances, unless they are prepared to give some evidence of the truth of those circumstances." *Duncombe v. Daniell*, 8 Carr. & P. 222, 227.

¹³ Where counsel for the plaintiff, in his opening statement in a *Wibel* case, grossly abused the privilege of advocacy, by reading many irrelevant matters to the jury, prejudicial in their nature, which were not even offered in evidence, the court held that error had been committed by the trial court in allowing him to pursue this course; and, although the court had not instructed the jury to disregard such matters, the

reviewing court held that such an instruction, if made, would not have cured the error. "Because," said Graves, J., "it is quite impossible to conclude that the jury had not been influenced too far by the erroneous rulings and proceedings, to be brought into the same impartial attitude by the court's admonition, which they would have held if counsel for the defendant in error had been properly confined in his opening statement. The course of fair and settled practice was violated to the prejudice of plaintiff in error, and it is not a satisfactory answer to say that the court went as far as practicable afterwards to cure the mischief, so long as an inference remained that the remedy applied by the court was not adequate." *Scripps v. Reilly*, 35 Mich. 371, 391.

¹⁴ *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229, 235.

or inadvertence, or misconception, it will take cognizance. The error in this case was not cured, and is one subject to review, and is sufficient to require a reversal.¹⁵

§ 267. **Detailed Rehearsal of Testimony not allowed.**—In the case last cited, where this subject was much considered, it was said by Mr. Justice Graves: “A brief summary or outline of the substance of the evidence intended to be offered, with requisite clear and concise explanations, are considered proper. But a relation of expected oral testimony at length, or a reading of expected documentary proofs at large, or any other course fitted to mislead the triers, should not be tolerated. Of course, there may be cases and instances where the statement of the evidence itself, or a reading of a paper, may be convenient and harmless. Such, however, must be exceptional, and not within the spirit of the general requirement.”¹⁶ From this it would necessarily follow that counsel is not *confined*, in the introduction of evidence, to the statement which he makes in the opening of his case;¹⁷ since this would oblige him, at his peril, to announce to the jury each item of evidence which he intended to introduce,—a practice which would be a reversal of the rule above declared.¹⁸

¹⁵ *Scripps v. Reilly*, 35 Mich. 371, 392; *Hunter v. Milling Co.*, *supra*. Thus where counsel indulged in prejudicial statements as to extrinsic matters, and the court refused to withdraw them from the jury, *Perry, Matthews Buskirk Stone Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183.

¹⁶ *Scripps v. Reilly*, 35 Mich. 371, 388.

¹⁷ *Kelly v. Troy Ins. Co.*, 3 Wis. 254; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 229.

¹⁸ It has been held, in view of the provision of the English Common Law Procedure Act, which has been more or less adopted in this country (Stat. 17 & 18 Vict., ch. 125, § 18), that, where counsel announce their intention not to adduce evidence, they cannot alter their purpose at a subsequent stage of the trial and introduce evidence. *Dar-*

by v. Ouseley, 36 Eng. L. & Eq. 518, 525. Before the passage of this act, as stated by Pollock, C. B., “you never could compel a defendant’s counsel to say whether he would call witnesses or not, until he had concluded his address to the jury. That makes the defendant’s counsel bind himself on the subject before the plaintiff concludes his case.” *Ibid.*; *People v. Benham*, 160 N. Y. 402, 55 N. E. 11; *St. v. Kennedy*, 177 Mo. 98, 75 S. W. 979. The statement will not be more closely restricted, however, because of plaintiff’s presence in court and his being expected to testify. *Metro-politan St. Ry. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49. It should come within the complaint, as it is the complaint upon which the case is to be tried. *Douglas v. Marsh*, 141 Mich. 209, 104 N. W. 624.

§ 268. **Exhibiting Diagrams.**—In an action for damages for a negligent injury, where the exact location of the injury is material, it is the right of the counsel for either party to exhibit to the jury, in his opening statement, a diagram showing the place of the injury, the same being correctly drawn and admissible in evidence, and in fact afterwards admitted; and a denial of this right to counsel is error.¹⁹

§ 269. **Dismissing the Cause on the Plaintiff's Opening Statement.**—In jurisdictions where the court has power to order a nonsuit, it is the frequent practice of the judge, where the plaintiff's opening statement discloses no cause of action, without waiting for the introduction of evidence, to direct a nonsuit at once. The principles on which he should proceed in so doing are analogous to those relating to a demurrer to the evidence, or to a motion for a nonsuit or for a peremptory instruction in behalf of the defendant, at the close of the plaintiff's case. All the facts referred to in his opening, or offers of proof, should be considered, including facts not stated in the complaint, as well as those stated, unless objection to proof of such additional facts is made on the specific ground that it is not admissible under the pleadings, or some rule of evidence.²⁰

¹⁹ *Battishill v. Humphrey* (Mich.), 31 N. W. 894; *Hill v. Water & Sewers Com'rs*, 77 Hun, 491, 28 N. Y. S. 805.

²⁰ *Clews v. Bank* (N. Y.), 11 N. E. 814, 105 N. Y. 398; *Morrison v. McCullough*, 28 App. Div. 467, 51 N. Y. S. 128. In the federal Supreme Court it was held, that, where the opening statement showed that the contract relied on by plaintiff was void as against public policy, the trial court properly directed a verdict for defendant. *Ascanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. In Kansas it is ruled that a distinct admission of the existence of facts, which would preclude recovery, authorizes the granting of nonsuit. *Coffeyville Mining & Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635. But see *Fillingham v. St. L. Transit Co.*,

102 Mo. App. 573, 77 S. W. 314. In Washington it is said that the court would direct a verdict, if the statement shows affirmatively there is either no cause of action or a complete defense, or where insufficient facts being stated it is expressly stated these are the only facts. *Brooks v. McCabe & Hamilton*, 39 Wash. 62, 80 Pac. 1004. In Pennsylvania it was said, that an admission in the statement necessarily fatal should, if possible be treated as an inadvertence and the jury instructed not to regard it. *Nesbitt v. Turner*, 155 Pa. 429, 26 Atl. 750. In Wisconsin a distinct concession that a certain issue under the complaint was not an issue on the trial, this should be regarded as an abandonment thereof. *Rahr v. Manchester Fire Assur. Co.*, 93 Wis. 355, 67 N. W. 725. In Mon-

§ 270. **Defendant's Opening Statement.**—Regularly, the defendant's opening statement is not made until the evidence for the plaintiff has been heard and the plaintiff has rested. He then introduces his case by an opening statement.²¹

tana, if there are several causes of action set forth in the complaint and counsel says he relies only upon one, he will be confined to that. *Metlen v. Oregon Short Line Co.*, 33 Mont. 45, 81 Pac. 737. Where a landlord and tenants were sued, and the opening statement shows distinctly, that the entire case depended upon a certain fact and for that the landlord could not be held, it was proper to dismiss the case as to him. *Denenfield v. Bauman*, 40 App. Div. 502, 58 N. Y. S. 110. Mere lack of fullness will not avail to support a motion for non-suit. *Noble v. Frack*, 5 Kan. App. 786, 48 Pac. 1004.

²¹ Allowing defendant to read his answer is not an abuse of discretion, where statute says he must state his case. *Waid v. Hobson*, 17 Colo. App. 54, 67 Pac. 176. He may be prevented from making an argumentative statement, referring to

irrelevant matters or stating what could be shown by an incompetent witness, e. g. his wife. *Berry v. St.*, 102 Ga. 365, 30 S. E. 903; *Emery v. St.*, 92 Wis. 146, 65 N. W. 846. Mere neglect on counsel's part to mention a certain defense will not bar him from introducing evidence in support of it. *Petherick v. Order of the Amaranth*, 114 Mich. 208, 72 N. W. 202. In Missouri it was held, that allowing the prosecuting attorney to reply to defendant's opening statement and to make therein, over the objection and exception of defendant, an assault on his character, when that had not been put in issue, was reversible error. *St. v. Kennedy*, 177 Mo. 98, 75 S. W. 979. Defendant's counsel should not be permitted to make an offer of settlement in his opening, and refusal of court to strike same out, on objection, is error. *Hecht v. Metzler*, 14 Utah, 408, 48 Pac. 37.

CHAPTER XI.

EXCLUDING WITNESSES FROM THE COURT ROOM.

SECTION

- 275. The Practice Stated.
- 276. Discretionary with Trial Court.
- 277. Doctrine that it is a Matter of Right.
- 278. What Witnesses Exempt from the Rule.
- 279. Parties in Interest cannot be so Excluded.
- 280. Nor the Agent of a Party, when.
- 281. Consequences of Violating the Rule.
- 282. [Continued.] Illustrations.

§ 275. The Practice stated.—“In the trial of causes, both civil and criminal, it is a rule of practice, devised for the discovery of truth and the detection and exposure of falsehood, and well adapted to the ends designed, for the presiding judge, on the motion of either party, to direct that the witnesses shall be examined out of the hearing of each other. Such an order, upon the motion or suggestion of either party, it is said, is rarely withheld. But, by the weight of authority, the party does not seem entitled to it as a matter of right.¹ To effect this object, generally the respective parties are required to disclose the names of the witnesses intended to be examined, and then the witnesses are simply ordered to withdraw from the court room and directed not to return until called; or, as is sometimes the case, they are placed under charge of an officer of the court, to be kept by him out of hearing, in the jury room or some other convenient place, and brought into court when and as they may be severally needed for examination. If a witness, or the officer in charge, willfully disobeys or violates such order, he is liable to be punished for his contempt; and at one time, according to the English practice, it was considered that the judge, in the exercise of his discretion, might even exclude the testimony of such a witness. But now, it seems to be the practice to allow the witness to be examined, subject to observation as to his conduct in disobeying the order.”²

¹ Citing 1 Greenl. Ev., § 432.

² Hey v. Com., 32 Gratt. (Va.) 946, 948, opinion by Burks, J. No rule of separation should be allowed

to interfere with the right of a defendant, in a criminal case, to confer with his witnesses. Shaw v. St., 79 Miss. 21, 30 South. 42. If

§ 276. **Discretionary with the Trial Court.**—According to a much prevailing view, whether the court will thus sequester the witnesses, or, as it is sometimes called, “put them under the rule,” is a matter of sound judicial *discretion*, which discretion will not be revised on error or appeal in the absence of an appearance of abuse.³ Upon this question the Supreme Court of Alabama, speaking through Somerville, J., said: “The examination of witnesses in cases, civil or criminal, is, in a great measure, necessarily under the control of the presiding judge, and subject to a just, wise and sound judicial discretion. If he deem it necessary, in order to elicit the truth and promote justice, he may, *proprio motu*, or on the application of either party to the suit or proceeding, order all the witnesses, except the one under examination, to leave the court. This practice is thought to be coeval with judicature, having long been administered in the British Parliament, and the courts of both England and Scotland. When requested by counsel or parties, though not a matter of right, the order is rarely withheld.”⁴ Accordingly, it has been held not error, in the absence of a plain appearance of abuse of discretion and prejudice, to admit, against the objection of the defendant, the testimony of a witness for the State in a criminal case, who had not been put under the rule.⁵ In Georgia it has been ruled that, where

application for separation is not made until the taking of testimony has been begun, it may be refused. *Pritchard v. Henderson*, 3 Pennewill (Del.) 128, 50 Atl. 217.

³ *Errissman v. Errissman*, 25 Ill. 136; *McLean v. St.*, 16 Ala. 672; *Johnson v. St.*, 2 Ind. 652; *Benaway v. Conyne*, 3 Chand. (Wis.) 214; *Nelson v. St.*, 2 Swan (Tenn.), 237. *Powell v. St.*, 13 Tex. 244, 252; *Walling v. St.*, 7 Tex. App. 625; *People v. Sam Lung* (Cal.), 11 Pac. 673; *Avery v. St.*, 10 Tex. App. 199, 213; *Jones v. St.*, 3 Tex. App. 150; *Ham v. St.*, 4 Tex. App. 645; *Estep v. St.*, 9 Tex. App. 366; *Johnson v. St.*, 10 Tex. App. 571; *People v. O'Loughlin*, 3 Utah, 133. Compare Tex. Code Cr. Proc., art. 666; *Brown v. St.*, 3 Tex. App. 295; *Halbert v. Rosenbaum*, 49 Neb. 498, 68 N. W. 622; *Griffith v. Ridpath*, 38 Wash.

540, 80 Pac. 820; *Bromberger v. U. S.*, 128 Fed. 346, 63 C. C. A. 76. Even in a murder case it has been held to be no abuse of discretion to deny request for the rule, where no special reasons are given for its being enforced. *St. v. Davis*, 48 Kan. 1, 28 Pac. 1092. It is held to be discretionary with the court to except particular witnesses. Thus officers of court. *People v. Machen*, 101 Mich. 400, 59 N. W. 664; *People v. Considine*, 105 Mich. 149, 63 N. W. 196; *Murphey v. St.*, 43 Neb. 34, 61 N. W. 491.

⁴ *Ryan v. Couch*, 66 Ala. 244, 248; citing 2 Best Ev., § 636; 1 Greenl. Ev., § 432.

⁵ *Avery v. St.*, 10 Tex. App. 192, 213; *Com. v. Brown*, 90 Va. 671, 19 S. E. 447; *St. v. Hogan*, 117 La. 863, 42 South. 352; *Webb v. St.*, 100 Ala. 47, 14 South. 865; *Gilbert v. Com.*,

there is an order for the separation of the witnesses, *exceptions* therefrom as to witnesses not parties to the suit, are discretionary with the court, and in the particular case the discretion was not abused in refusing to make the exception requested.⁶

§ 277. **Doctrine that is a Matter of Right.**—In an English *nisi prius* case Mr. Baron Alderson said that it was “the right of either party at any moment to require that the unexamined witnesses shall leave the court.”⁷ But this was very different from holding that a judgment would be reversed because the trial court had refused to grant such an application. In 1881 the Supreme Court of Texas, in a heated decision delivered by the Commission of Appeals, a body organized to assist the Supreme Court in clearing its docket, held that it was error in a civil case, for which a judgment would be reversed, to refuse the application of a party thus to exclude witnesses from the court room. The reasoning of the learned commissioner appealed to general principles of law, but he failed to cite any common-law authorities which sustained the court in its conclusion. On the contrary, the text writers cited by him do not sustain the conclusion of the court.⁸ The opinion is capable of being sustained on the ground that, in the particular case, a suit to establish a nuncupative will it was an abuse of discretion not to grant such rule, and upon no other. In Tennessee the rule is favored as a mode of eliciting the truth, and may be demanded as a matter of right in all cases, upon affidavit of facts showing its necessity.⁹ In Georgia

23 Ky. Law Rep. 1094, 64 S. W. 846; Keller v. St., 102 Ga. 506, 31 S. E. 92. And even where they have been put under the rule and remained in court innocently after they had testified and are called in rebuttal or impeachment. St. v. Burton, 27 Wash. 528, 67 Pac. 1097.

⁶ City Bank v. Kent, 57 Ga. 285. Where defendant in a criminal case asked that his son be excepted from the rule, because he had taken a leading part in preparation of the defense, and upon the request being denied he is withdrawn as a witness, this ruling was held not reviewable in the absence of any showing as to what he would have testified to. Hinkle v. St., 94 Ga. 595,

21 S. E. 595. In Texas it was held that where all of the witnesses had been placed under the rule, there was no abuse of discretion in refusing to relax it in favor of defendant's medical experts, whom counsel desired his aid in cross-examination of plaintiff's medical experts, in personal injury suit. M. K. & T. R. Co. v. Smith, 31 Tex. Civ. App. 332, 72 S. W. 418.

⁷ Southey v. Nash, 7 Carr. & P. 632.

⁸ Watts v. Holland, 56 Tex. 54. But see Wilers & Bro. v. Nichols, 5 Tex. Civ. App. 154; Gulf C. & S. Ry., v. West, 36 S. W. 101.

⁹ Rainwater v. Elmore, 1 Heisk. (Tenn.) 363; Nelson v. St., 2 Swan

it has been ruled that the defendant may demand the separation of the witnesses.¹⁰ In New Jersey it is a strict rule of practice that the prisoner's witnesses shall not be in the court room while the State's witnesses are being examined.¹¹

§ 278. **What Witnesses exempt from the Rule.**—It has been said that ordinarily witnesses who are summoned as *experts*; as well as *attorneys* in the case, and witnesses called to testify to the *character* of another witness, are excepted from the rule and permitted to remain in the court room while the rest of the witnesses are sent out.¹² Accordingly, where the court exempted from the rule an *attorney* of the court, who was one of the prosecuting counsel in the case, it was held that there was nothing which could be assigned for error.¹³ When *medical experts* are called solely as such, the better practice is said to be to allow them to remain in the court room and hear the testimony of all the other witnesses, in order that, from the whole testimony, they may be able to determine, from the evidence itself, the matter upon which their opinion is desired.¹⁴ It is submitted by the writer, however, that this is not a sound reason for allowing expert witnesses to be exempt from the rule; since, as elsewhere seen,¹⁵ the weight of opinion is that such witnesses do not deliver their testimony from their own conclusions as to the evidence given by the other witnesses, but upon questions propounded to them by counsel, presenting hypothetical states of fact, which the jury are or are not to find true, accordingly as they may view the evidence. It is laid down in Texas that where expert witnesses have been put under the rule, and have not been permitted to hear the evidence of the other witnesses, a hypothetical case embracing the facts in evidence may, in all cases, be submitted to them for their opinions.¹⁶ And finally, it is laid down that the court does not abuse its discretion in the slightest by subjecting medical experts to the operation of the rule.¹⁷ The writer expresses the view, with

(Tenn.), 237; *Smith v. St.*, 4 Lea (Tenn.), 428, 430.

¹⁰ *Johnson v. St.*, 14 Ga. 55. Amended by statute giving either party right to have witnesses excluded. See Ga. Code 1911, Vol. II, § 1043.

¹¹ *St. v. Zellers*, 7 N. J. L. 220.

¹² *Brown v. St.*, 3 Tex. App. 295; *Boatmeyer v. St.*, 31 Tex. Cr. R. 473, 20 S. W. 1102; *St. v. Ward*, 61 Vt. 153, 17 Atl. 483. It has been

ruled that an attorney, as such, is not subject to the rule. *Bischoff v. Com.*, 29 Ky. Law Rep. 770, 96 S. W. 538.

¹³ *Powell v. St.*, 13 Tex. 244.

¹⁴ *Johnson v. St.*, 10 Tex. App. 571, 577; *St. v. Forbes*, 111 La. 473, 35 South. 710.

¹⁵ Post, ch. 22.

¹⁶ *Webb v. St.*, 9 Tex. App. 490; *Hunt v. St.*, 9 Tex. App. 156.

¹⁷ *Johnson v. St.*, 10 Tex. App.

confidence, that it is the better exercise of discretion to put such witnesses under the rule; since, where they are permitted to remain in court during the trial, they are apt to form theories from the evidence toward which their testimony will be directed, instead of its being directed in a colorless manner to the hypothetical states of fact which may be submitted to them by counsel on either side.

§ 279. **Parties in Interest cannot be so excluded.**—An order excluding witnesses from the court room ought not to be extended to parties in interest; since, although they are competent to testify as witnesses, it is their right to be present and to aid in or observe the progress of the trial.¹⁸ “It is obvious,” said Somerville, J., “that this rule of exclusion ought never to be applied so as to debar a *party* to a suit from being present during the progress of his cause. He has a right to be present, for the purpose of aiding and instructing his counsel in prosecuting or defending his suit. To order him from the court room while his case is in process of judicial investigation would be violative of the spirit, if, not of the very letter of the Declaration of Rights, which declares that ‘no person shall be debarred from prosecuting or defending, before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.’ ”¹⁹

571, 577; Vance v. St., 56 Ark. 402, 19 S. W. 1060. They come under the rule of discretion by the Texas statute, which does not, in terms, exempt any particular class of witnesses. Leache v. St., 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638. See also Atlantic & B. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 394.

¹⁸ Chester v. Bower, 55 Cal. 46; Smith v. Collins, 94 Ala. 394, 10 South. 334; Shaw v. Hews, 126 Ind. 474, 26 N. E. 483; Georgia R. & B. Co. v. Tice, 124 Ga. 459, 52 S. E. 916. That a party has been excluded is nothing, as to which his adversary has the right to complain. Seaboard Air Line R. Co. v. Scarborough, 52 Fla. 425, 42 South. 706. The fact, that the parties are numerous does not authorize the ex-

clusion of any of them. Rotan Grocer Co. v. Martin (Tex. Civ. App.), 57 S. W. 706 (not reported in state reports). The proponent of a will, who was also a beneficiary thereunder, was held to be excepted from exclusion. Heaton v. Dennis, 103 Tenn. 155, 52 S. W. 175. And an officer of a corporation representing its interest in a pending suit. Lenoir Car. Co. v. Smith. 100 Tenn. 127, 42 S. W. 879.

¹⁹ Ryan v. Couch, 66 Ala. 244, 248; McIntosh v. McIntosh, 79 Mich. 198, 44 N. W. 592; H. T. Schreider v. Haas, 14 Or. 174, 12 Pac. 236, 58 Am. Rep. 296; Bernheim v. Dibbrell, 66 Miss. 199, 5 South. 693. Court, however, may impose condition that plaintiff be examined before other witnesses. Smith v. Team (Miss.), 16 South. 492 (not

§ 280. **Nor the Agent of a Party, when.**—The Supreme Court of Alabama, while conceding that the exercise of this discretion is not revisable on error or appeal, nevertheless, in view of the practical importance of the question, have deemed it proper to indicate the correct rule of practice in cases of this character, as follows: “Where a judge is satisfied, from the statement of counsel in open court, or otherwise, that a witness in a cause has acquired such an intimate knowledge of the facts, by reason of having acted as the authorized agent of either of the parties, that his services are required by counsel in the management of the trial, he ought not, especially in the necessary absence of his principal, to be placed under the rule. * * * To exclude such a one from the valuable privilege of consultation with the attorney of his principal during the progress of the trial, is not required by the reason of this rule of evidence. The sounder and better practice is to permit him to remain in the court room.”²⁰

§ 281. **Consequences of Violating the Rule.**—The better opinion now is that the violation of the rule by a witness, although it will subject him to punishment for contempt of court, will not deprive the party, whose witness he is, of the benefit of his testimony, where

reported in state reports). A party does not include a defendant separately indicted and he may be excluded, in the court's discretion. *Parnell v. St.*, 51 Tex. Cr. R. 620, 98 S. W. 269. The rule of a party's presence was held not abusively extended to include a partner, who was not a party, but interested in the result as being liable for contribution. *Adolff v. Irby & Gilleland*, 110 Tenn. 222, 75 S. W. 710.

²⁰ *Ryan v. Couch*, 66 Ala. 244, 248. What witnesses may be allowed, in the court's discretion, to remain at request of parties are indicated in the following illustrative cases. In Tennessee, where there is a strict statute, it was held not error to allow a prosecutor, for the purpose of assisting the state's counsel, provided he be called first to testify. *Smartt v. St.*, 112 Tenn. 539, 80

S. W. 586. In Kentucky one of the state's witnesses. *Greer v. Com.*, 27 Ky. Law Rep. 333, 85 S. W. 166. In Kansas the husband of plaintiff. *First Nat. Bank v. Knoll*, 7 Kan. App. 352, 52 Pac. 619. As against defendants in criminal cases, witnesses were excluded, or allowed to be present, over objection, in the following instances and the court's discretion sustained. In a murder trial excluding the brother of defendant. *May v. St.*, 94 Ga. 76, 20 S. E. 251. And defendant's son, who had taken a leading part in the preparation of the defense, and no error was found, that the refusal caused him to be withdrawn as a witness, where there was no showing of what his testimony would have been. *Hinkle v. St.*, 94 Ga. 595, 21 S. E. 595. Permitting the father of prosecutrix in seduction case to remain. *St. v. Whitworth*.

the party himself is without fault, and that the court cannot lawfully refuse to permit the examination of the witness;²¹ although it will be a matter for observation to the jury upon his evidence.²²

126 Mo. 573, 29 S. W. 595. And a witness desired by commonwealth's attorney, whose presence was claimed to be intimidative of witnesses for defendant. *Baker v. Com.*, 106 Ky. 212, 50 S. W. 54.

²¹ 2 Tayl. Ev. (5th Am. ed.) 744; 1 Bish. Crim. Proc., §§ 1191, 1192; *Cobbett v. Hudson*, 1 El. & Bl. 11; *Cook v. Nethercote*, 6 Carr. & P. 741; *Rex v. Colley*, 1 Mood. & M. 329; *Thomas v. David*, 7 Carr. & P. 350; *Chandler v. Horne*, 2 Mood. & Rob. 423; *Nelson v. St.*, 2 Swan (Tenn.), 237; *Hey v. Com.*, 32 Gratt. (Va.) 946; *Burk v. Andis*, 98 Ind. 79; *Davis v. Byrd*, 94 Ind. 525 (overruling *Jackson v. St.*, 14 Ind. 327); *Davenport v. Ogg*, 15 Kan. 363; *Pleasant v. St.*, 15 Ark. 624; *St. v. Salge*, 2 Nev. 321; *Grimes v. Martin*, 10 Iowa, 347; *Bell v. St.*, 44 Ala. 393; *Keith v. Wilson*, 6 Mo. 435; *People v. Boscovitch*, 20 Cal. 436; *Gregg v. St.*, 3 W. Va. 705; *Smith v. St.*, 4 Lea (Tenn.), 428; *Keith v. Wilson*, 6 Mo. 435; *Lassiter v. St.*, 67 Ga. 739; *Rooks v. St.*, 65 Ga. 330 (citing Ga. Code, § 3863); *Thomas v. St.*, 27 Ga. 288; *Hubbard v. Hubbard*, 7 Ore. 42, 47. It was formerly held in Indiana to be a matter of discretion for the court trying the cause, whether the testimony of a witness who had willfully disobeyed the order of the court to remain out of the court room until called, should be rejected for that reason, and that this discretion would not be reviewed on appeal unless it appeared that it had been abused. *Porter v. St.*, 2 Ind. 435; *Jackson v. St.*, 14 Ind. 327. But in later cases the same court have adopted this as

the true rule: "Where a party is without fault, and the witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility." *Davis v. Byrd*, 94 Ind. 525; *Burk v. Andis*, 98 Ind. 59, 64; *St. v. Sumpter*, 153 Mo. 436, 55 S. W. 76; *Green v. St.*, 125 Ga. 742, 54 S. E. 724; *St. v. Ilomaki*, 40 Wash. 629, 82 Pac. 873; *Bow v. People*, 160 Ill. 438, 43 N. E. 593. If a witness in defendant's employment remains, this may give ground for rejecting his testimony. *Schloss-Sheffield Iron etc. Co. v. Smith*, 40 South. 91 (not reported in state reports). So, if witness is closely related to a party. *Bahrman v. Terry*, 31 Colo. 155, 71 Pac. 1118. Defendant's fault or connivance justifies court in rejecting his witness. *Com. v. Crowley*, 168 Mass. 21, 46 N. E. 415. It has been held that the court may require a showing of materiality and absence of connivance. *Mangold v. Oft*, 63 Neb. 397, 88 N. W. 507. In New Mexico it was ruled, that where no excuse was made for not having called a witness and put him under the rule, the party might be assumed to be at fault and his witness rejected. *Trujillo v. Ter.*, 6 N. M. 589, 30 Pac. 870. For connivance the court may reject the witness. *St. v. Gesell*, 124 Mo. 531, 27 S. W. 1101.

²² *Chandler v. Horne*, 2 Mood. & Rob. 423; *Phillips v. St.*, 121 Ga. 358, 49 S. E. 290.

After such an order has been made, it is no cause for a *new trial* that a witness, who had not gone out, but had remained and heard the other witnesses, was afterwards allowed to be examined; ²³ but it will be a matter of *discretion* with the trial court whether a new trial will be granted for such a reason, and this discretion is not reviewable.²⁴ In Illinois it is laid down that where a witness, after being put under the rule, converses with other witnesses, after they have testified, and with counsel calling him, in violation of the court's order, it is a matter of *discretion* with the court whether to allow him to testify as a witness, and hence not error to permit him to testify. Scholfield, J., said: "If witnesses, after an order of separation, upon being spoken to by third parties in violation of the order of court, would become thereby disqualified to testify, a wide door would be open to unscrupulous friends of those charged with crime to disqualify material prosecuting witnesses. There might probably be such an interference with witnesses, in disregard of the order of court, as would justify the court in setting aside a verdict based upon their evidence, the defendant being free of fault, and the facts

²³ *St. v. Sparrow*, 3 Murph. (N. C.) 487. In Maryland it was held, that it was not reasonable, that thereby the testimony of an important witness for an accused should be forfeited. *Parker v. St.*, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387. See also *St. v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103.

²⁴ *Purnell v. Purnell*, 89 N. C. 42; 1 Greenl. Ev., §§ 431, 432, and notes. *Hall v. St.*, 137 Ala. 44, 34 South. 680; *Creenshaw v. Gardner*, 25 Ky. Law Rep. 506, 76 S. W. 26. If the evidence relates to a collateral matter, discretion will not be reviewed. *Spalding v. New Hampshire Fire Ins. Co.*, 71 N. H. 441, 52 Atl. 558. Where this discretion has been exercised in favor of the state and then against accused under practically like circumstances, the appellate court will review and overrule it. *St. v. Fannon*, 158 Mo. 149, 59 S. W. 75.

Where witness permitted to testify did so as to matters not testified to by other witnesses, the court's discretion will not be reviewed. *Cook v. St.*, 30 Tex. App. 607, 18 S. W. 412; *Sharpton v. Augusta & A. R. Co.*, 72 S. C. 162, 51 S. E. 553. An unintentional violation by a witness being in court does not bar the state from having him testify. *St. v. Welch*, 191 Mo. 179, 89 S. W. 945. In Texas where a defendant in a civil case had invoked the rule and participated to a minor degree in its violation, by telling one of his witnesses what plaintiff had testified to on a certain question, it was an abuse of discretion to exclude his witness altogether, his testimony as to other matters being important. *Johnson v. Cooley*, 30 Tex. Civ. App. 576, 71 S. W. 34. See also as to abuse of discretion *Caviness v. St.*, 42 Tex. Cr. R. 420, 60 S. W. 555.

being brought to his attention for the first time after the examination of all the witnesses had concluded." ²⁵

§ 282. [Continued.] Illustrations.—In Tennessee, where, as already seen, the rule is a matter of right when the demand for it is supported by affidavit, if it has been asked for by both parties, and a witness is discovered who knows an important fact, who has been in court and heard the testimony of other witnesses, it will not be ground of refusing to allow him to testify that he was not under the rule with the other witnesses.²⁶ In Georgia, although at the request of the defendant's counsel in a criminal case, the witnesses had been sworn and put under the rule, yet it was no ground for a new trial that a witness who remained in the court room was allowed to testify merely as to the *correctness of a diagram* which he had made of the scene of the homicide.²⁷ In the same State it is held that, where objection is made to the witness on this ground, if the witness testifies that he heard none of the testimony nor the prisoner's statement, the court may admit him to testify.²⁸ It is further held in the same State that the fact that a witness for the State, after being put under the rule, and, after having testified, may have heard the prisoner's statement, would not disqualify him from being reintroduced as a witness.²⁹ The same court has also held that the fact that the bailiff in charge of the jury is a witness in a criminal trial and is put under the rule, but nevertheless retires with the jury (upon a call of nature) is no ground for a new trial.³⁰ In Louisi-

²⁵ Bulliner v. People, 95 Ill. 394, 399. To the same doctrine see St. v. Brookshire, 2 Ala. 203; Sidgreaves v. Myatt, 22 Ala. 617; Sartorius v. St., 24 Miss. 602; Laughlin v. St., 18 Ohio, 99; St. v. Fitzsimmons, 30 Mo. 236. In Mississippi it is held discretionary to permit a witness for the state, who had violated the rule, to testify. Taylor v. St. (Miss.), 30 South. 657.

²⁶ Smith v. St., 4 Lea (Tenn.), 428. In a civil case, it was ruled, that the court could reject a witness not put under the rule, where he has been listening to the testimony. Record v. Chickasaw Co., 108 Tenn. 657, 69 S. W.

334. In this state it was also held, that to reject witness of defendant, who remained in the court without any intention to violate the rule, his doing so being unknown to defendant or his counsel, was error. Pile v. St., 107 Tenn. 532, 64 S. W. 477.

²⁷ Betts v. St., 66 Ga. 508. In Georgia the court has more recently announced the broad proposition, that a witness violating the rule is not disqualified and it is not error to allow him to testify. Hoxie v. St., 114 Ga. 19, 39 S. E. 944.

²⁸ Lyman v. St., 69 Ga. 405.

²⁹ Lyman v. St., 69 Ga. 405.

³⁰ Wade v. St., 65 Ga. 756.

ana, it was held that the accused in a criminal trial could not be deprived of the testimony of some of his witnesses, who were not in court when the order was made, and who only presented themselves the day after. The court had no hesitation in saying that, when the witnesses made statements under oath that they had held no communication with the accused on the subject of the trial, they should have been permitted to testify.³¹ In general, it may be stated that, where a witness, who has been thus excluded, has *inadvertently* come into court in violation of the order, the court should have no hesitancy in receiving his testimony.³²

³¹ St. v. Gregory, 33 La. Ann. 737, 742. Witness for the state under the rule and violating same may nevertheless testify as to a formal matter. St. v. Goodson, 116 La. 388, 40 South. 771.

³² People v. O'Laughlin, 3 Utah, 133; Dyer v. Morris, 4 Mo. 214. See further, Anon., 1 Hill (S. C.), 251; St. v. McElmurray, 3 Strobb. (S. C.) 33; Blackwell v. St., 29 Tex. App. 194, 15 S. W. 597.

CHAPTER XII.

OF THE PRIVILEGES OF WITNESSES.

SECTION

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310. Compulsory Answer not Evidence against Witness.
311. Whether Refusal to Answer is Evidence against Witness.
312. Whether Court Bound to Instruct Witness.

§ 285. Preliminary.—It is supposed in this chapter that the witness is on the stand and undergoing examination, and that a question is put to him in respect of which he interposes a claim of privilege. It is not the design of this chapter to consider the subject of privilege in its relation to the *compulsory attendance* of witnesses, the service of subpoenas upon them under circumstances which

clothe them with a privilege;¹ or (except incidentally) their privilege in respect of the production of books and papers;² or the right of an *accused person*, testifying as a witness for himself, to refrain from answering certain questions on *cross examination*.³ These questions are elsewhere considered. The privilege which it is the purpose of this chapter to discuss relates to the claim which the witness may interpose against being compelled to answer *particular questions*.

§ 286. **Privilege Against Self-Crimination.**—It is a fundamental principle of Anglo-American jurisprudence, that a person, summoned as a witness before any inquisitorial body, judicial or legislative, is absolutely privileged from answering a question put to him, if he will state upon his oath, in answer to such question, that he refuses to answer the same, for the reason that his answer thereto, if given, would subject him to an indictment for a crime; and that, if such an answer be not deemed sufficient by the inquisitorial body, and the witness be imprisoned for contempt for refusing further to answer, he will be entitled to his discharge on *habeas corpus*.⁴

¹ Ante, ch. 6.

² Post, ch. 26.

³ Post, ch. 23.

⁴ Emory's Case, 107 Mass. 172. It was so held in this case, where the committing body was a legislative body,—the senate of the state of Massachusetts. See also *People v. O'Brien*, 66 Cal. 602; *Taylor v. McIrwin*, 94 Ill. 488; *Re Graham*, 8 Ben. (U. S.) 419; *Lister v. Boker*, 6 Blackf. (Ind.) 439; *Coburn v. Odell*, 30 N. H. 540; *Janrin v. Scammon*, 29 N. H. 280; *People v. Mather*, 4 Wend. (N. Y.) 229; *People v. Rector*, 19 Wend. (N. Y.) 569; *Poole v. Perrett*, 1 Spears (S. C.), 128; *Chamberlin v. Wilson*, 12 Vt. 491; *Robinson v. Neal*, 2 T. B. Mon. (Ky.) 212; *Neale v. Cunningham*, 1 Cranch C. C. (U. S.) 76; *Hayes v. Caldwell*, 10 Ill. 333; *U. S. v. Moses*, 1 Cranch C. C. (U. S.) 170; *U. S. v. Lynn*, 2 Id. 309; *Sanderson's Case*, 3 Id. 638; *Ex parte Lindo*,

1 Id. 445; *U. S. v. Strother*, 3 Id. 432; *Short v. St.*, 4 Harr. (Del.) 568; *St. v. Marshall*, 36 Mo. 400; *Fries v. Brugler*, 12 N. J. L. 79; *Southard v. Rexford*, 6 Cow. (N.-Y.) 254; *Wilson v. Ohio Farmer's Ins. Co.*, 164 Ind. 462, 73 N. E. 892; *Howard v. Com.*, 25 Ky. Law Rep. 363, 81 S. W. 704; *St. v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *St. v. Abbey*, 109 Iowa, 61, 80 N. W. 225, 46 L. R. A. 862; *St. v. Bond*, 12 Idaho, 424, 86 Pac. 43; *Alston v. St.*, 109 Ala. 51, 20 South. 81. This does no render invalid the provision of a local option law requiring detailed reports of druggists of liquor sold by them. *People v. Shuler*, 136 Mich. 161, 98 N. W. 986. Nor a provision in a law regulating the sale of liquor, that a person having no license to sell shall be presumed to be guilty unless he satisfactorily accounts for liquor in his possession. *Parsons v. St.*, 61

The rule, as stated by Chief Justice Marshall in Burr's Trial,⁵ is this: "It is the province of the court to judge whether any direct answer to the questions that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such case, the witness must himself judge what his answer will be; and if he say on his oath that he cannot answer without accusing himself, he will not be compelled to answer."⁶ Some of the constitutional provisions extending this immunity to witnesses are construed to apply only in cases where the person himself is prosecuted, and not merely where he is called upon to testify in a criminal proceeding against another. This construction has been placed upon the provision of the fifth amendment to the constitution of the United States, that "no person shall be compelled in any criminal action to be a witness against himself."⁷

§ 287. **Against Questions which tend to Degrade.**—The rule is that a witness is not bound to answer a question the answer to which will subject him to disgrace, unless the evidence is material to the

Neb. 244, 85 N. W. 65. See also *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, and *St. v. Wilson*, 15 R. I. 180, 1 Atl. 415. This is said not to apply to alien Chinese in deportation proceedings, as such are civil not involving punishment for crime. *Tom Wah v. U. S.*, 163 Fed. 1008.

⁵ 1 Burr Trial, 245.

⁶ This rule was declared by the supreme court of Missouri in 1829 to be the true rule of law. *Ward v. St.*, 2 Mo. 120, 123. See also *South Bend v. Hardy*, 98 Ind. 577, 583; *Mackin v. People*, 115 Ill. 312, 3 N. E. 222.

⁷ *U. S. v. McCarthy*, 18 Fed. 87, 21 Blatchf. (U. S.) 469. Under a statute of Maryland (Md. Acts of 1882, ch. 112), providing that, in case of the illegal sale of liquor by any company or corporation, "each

or any member of such company, corporation, or association, shall be liable, and shall suffer imprisonment as prescribed by this act,"—it is held that a member of an incorporated club cannot be compelled to testify to facts tending to prove the guilt of the club, in a prosecution against it by indictment for the illegal sale of intoxicating liquors. *Chesapeake Club v. St.*, 63 Md. 446. These identical words in Michigan constitution were held to secure the privilege to any witness in any criminal case, whether he or another be the defendant. *Re Mark*, 146 Mich. 714, 110 N. W. 61. *Semble*, *Ex parte Clark*, 103 Cal. 352, 37 Pac. 230; *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196; *Ex parte Boscowitz*, 84 Ala. 463, 4 South. 279, 5 Am. St. Rep. 384.

issue on trial,⁸ or unless it tends to impeach his credibility, under principles hereafter stated.⁹ In England the rule is said to be that the asking of questions which tend to degrade the witness is regulated by the discretion of the trial court in each particular case.¹⁰ It has been said by Mr. Justice Cooley: "When discreditable facts are aside from the issue, a witness may sometimes refuse to impair his evidence by a disclosure; but when they are relevant, it is no excuse for his refusal to testify concerning them that they may exhibit him in a light that is not creditable. His dishonesty or fraud, when not criminal, may as properly be proved by him as by any other person."¹¹ "If the answer," says Mr. Commissioner Black, "would tend merely to degrade the character of the witness, and if it be relevant and material to the issue, whether it will go to his credibility or not, he may not decline to answer, and the party cannot object. If, however, the answer to a question on cross-examination would be collateral and irrelevant, and would merely disgrace the witness, but would not affect his credibility, the witness may decline to answer; the court should in all cases sustain any objection made by counsel, and the court may, without objection made, interpose to protect the witness from the impertinence."¹² If the cross-

⁸ *Lohman v. People*, 1 Comst. (N. Y.) 379; *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; *St. v. Staples*, 47 N. H. 113. The court may, in its discretion, permit disparaging questions to be asked, but it is not error to exclude them even when they are irrelevant. *Conway v. Clinton*, Utah T. 215, 220; *St. v. Hill*, 52 W. Va. 296, 43 S. E. 160; *Crawford v. Christian*, 102 Wis. 51, 78 N. W. 406. Where an accused avails himself of the privilege of testifying, his becoming subject to cross-examination as an ordinary witness does not subject him to irrelevant questions merely tending to disgrace him. *Razee v. St.*, 73 Neb. 732, 103 N. W. 438. Nor is a witness bound to answer irrelevant questions which would be injurious to his business. *Ex parte Jennings*, 60 Ohio St. 819, 54 N. E. 262. It has been held by the supreme court of

Michigan, that, even where the evidence was relevant, a third person could not be called on to exhibit his person in the way of demonstrative evidence (no question of delicacy being involved). *McKnight v. Detroit R. Co.*, 135 Mich. 307, 97 N. W. 772. This seems opposed to authority. See contra, *King v. St.*, 100 Ala. 85, 14 South. 878; 4 Wigmore on Ev. sec. 2194. In cross-examination, however, the latitude is very wide, and such questions may be freed from irrelevancy as attacking credibility. *Warren v. Com.*, 99 Ky. 370, 35 S. W. 1028; *St. v. Pancoast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

⁹ Post, ch. 17, art. 3.

¹⁰ *Rex v. Pitcher*, 1 Carr. & P. 85.

¹¹ *Jennings v. Prentice*, 39 Mich. 421.

¹² Citing 1 Greenl. Ev., § 453.

examination tends merely to disgrace the witness, but relates to a collateral and independent fact, and goes clearly to the credibility of the witness, whether in such case he has the privilege to decline or not, the matter so far rests in the discretion of the trial court that, in the absence of a claim of privilege, if the question relate to a matter of recent date and would materially assist the jury or court in forming an opinion as to his credibility, the court will usually require an answer, over the objection of counsel, but may sustain an objection. When the answer would tend to criminate the witness, but would be collateral and irrelevant to the issue, and yet would affect his credibility, if he do not claim his privilege, no distinction, so far as the discretion of the court and the right of the party to call for its exercise by an objection are concerned, can be perceived between such a case and one differing from it only in that the answer would merely disgrace the witness. In short, where the question relates to a particular act which is collateral and irrelevant to the issue, it is proper for the party to object, and it is within the sound discretion of the court, where the witness does not exercise a privilege to decline, to permit an answer, if, by affecting the credibility of the witness, it will subserve justice, or to sustain the objection if such purpose will not be promoted by the answer; and if the answer would not affect the credibility of the witness, the court shall sustain the objection, and has no discretion to admit the evidence.”¹³ This immunity is not founded in *constitutions*, but rests on principles of the common law; therefore it is competent for the legislature to pass an act under which a witness may be compelled to answer questions which will involve him in shame and reproach.¹⁴

¹³ *South Bend v. Hardie*, 98 Ind. 577, 583, 584. For cases illustrating the rule, see *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; *Shepherd v. Parker*, 36 N. Y. 517; *Vaughn v. Paine*, 3 N. J. L. 728; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Campbell v. St.*, 23 Ala. 44; *U. S. v. Dickinson*, 2 McLean (U. S.), 325; *People v. Henneck*, 13 Johns. (N. Y.) 82; *Grannis v. Brandon*, 5 Day (Conn.), 260; *St. v. Bailey*, 2 N. J. L. 415; *U. S. v. Craig*, 4 Wash. C. C. (U. S.) 729; *Galbreath v. Eichelberger*, 3 Yeates (Pa.), 515.

¹⁴ *Kellar v. Roberts*, Bright. (Pa.) 109. A witness cannot be compelled to testify as to his *opinions* on matters of *religious faith*. *Dedric v. Hopson*, 62 Iowa, 562; 1 Greenl. Ev., § 370; *Com. v. Smith*, 2 Gray (Mass.), 516; *Odell v. Coppee*, 5 Heisk. (Tenn.) 88; *Arnd v. Amling*, 53 Md. 192; *The Queen's Case*, 2 Brod. & Bing. 284. And although he may have testified as to his belief in God, he does not thereby *wave* his right to refuse to testify as to his belief in a future life. *Dedric v. Hopson*, *supra*. Where there is a statute providing

Where the witness claims his privilege on this ground, he should not be obliged to disclose *why* he declines to answer the question; because so to do would of itself defeat his claim of privilege.¹⁵

§ 288. Against Questions Exposing to Penalty or Forfeiture.—

By the Code of Civil Procedure of New York,¹⁶ a witness shall not be required to give an answer which will tend to expose him to a penalty or forfeiture.¹⁷ An action brought against a party to recover a debt due by a manufacturing corporation, of which the defendant was a *trustee* or *director*, seeking to make him liable on the ground that he failed to make the annual report required of him by the statute, is not one for a penalty within the meaning of this statutory privilege.¹⁸ Aside from statutory provisions the rule is that the constitutional immunity does not extend to the mere protection of property, but to immunity from criminal prosecutions.¹⁹ Therefore, a liability to a *civil action* or to a *pecuniary loss* is no ground of privilege.²⁰

that no witness who shall give evidence in a prosecution touching any *unlawful gaming*, "shall be ever proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution,"—a witness cannot refuse to answer questions touching the unlawful gaming, on the ground that his testimony "might tend to disgrace him." *Kendrick v. Com.*, 78 Va. 490. Against objection, the court permitted a witness to be asked if he had ever been confined in jail; and then instructed him that he need not answer, and he did not answer. It was held that this ruling presented no prejudicial error. *Smith v. St.*, 64 Md. 25, 54 Am. Rep. 752.

¹⁵ *Merluzzi v. Gleeson*, 59 Md. 214.

¹⁶ § 837.

¹⁷ See *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Veeder v. Baker*, 83 N. Y. 156; *Stokes v. Stickney*, 96 N. Y. 326; *Re Dickinson*, 58 How. Pr. (N. Y.) 260. And he is not re-

quired to verify a pleading where he would be privileged from testifying as a witness on this ground. *Gadsden v. Woodward* (N. Y. Ct. of App.), 8 N. E. 653.

¹⁸ *Gadsden v. Woodward*, *supra*. Compare *Wiles v. Suydam*, 64 N. Y. 173; *Veeder v. Baker*, 83 N. Y. 156, 160; *Langhorne v. Com.*, 76 Va. 1012.

¹⁹ *Devoll v. Brownell*, 5 Pick. (Mass.) 448; *Keith v. Woombell*, 8 Id. 217.

²⁰ *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Baird v. Cochran*, 4 Serg. & R. (Pa.) 397; *Ward v. Shaw*, 15 Vt. 115; *Harper v. Burrow*, 6 Ired. L. (N. C.) 30; *Matter of Kip*, 1 Paige (N. Y.), 601; *Lowney v. Perham*, 20 Me. 235; *Hays v. Richardson*, 1 Gill & J. (Md.) 366; *Com. v. Thurston*, 7 J. J. Marsh. (Ky.) 62; *Tancey v. Kemp*, 4 Harr. & J. (Md.) 348; *Naylor v. Semmes*, 4 Gill & J. (Md.) 273; *Copp v. Upham*, 3 N. H. 159; *Alexander v. Knox*, 7 Ala. 503; *Judge of Probate v. Green*, 1 How. (Miss.) 146; *Zol-*

§ 289. **Against Questions forming Links in a Chain of Criminating Evidence.**—The better opinion is that it is not necessary, in order to bring the witness within the privilege, that the answer to the question might directly criminate him, but that it is sufficient if the court can see that it would probably form a link in a chain of criminating evidence against him.²¹

licoffer v. Turney, 6 Yerg. (Tenn.) 297; *Gorham v. Carroll*, 3 Litt. (Ky.) 221; *Black v. Coorgh*, Id. 226. In an action under a statute relating to copyright (Rev. Stat. U. S., § 4965) to recover penalties and for a forfeiture of certain photographic plates, the defendant cannot be compelled, under a subpoena duces tecum, to produce his books of account and plates to be used in evidence for the plaintiff. *Johnson v. Donaldson*, 18 Blatchf. (U. S.) 287. It was held that a postmaster could not be compelled to disclose what was forbidden by regulations of Post Office department on pain of removal from office. *Nye v. Daniels*, 75 Vt. 81, 53 Atl. 150.

²¹1 *Burr's Trial*, 245; *Printz v. Cheeney*, 11 Iowa, 469; *Lea v. Henderson*, 1 Coldw. (Tenn.) 146; *Rogers v. Superior Court*, 145 Cal. 88, 78 Pac. 344. Thus the federal Supreme Court held, that the possibility of a cash book showing witness, the owner thereof, to be the abettor of an embezzler, excused him from answering any questions propounded by a grand jury, with the view of ascertaining its present possession, in order that said book might be brought before them. *Bollman v. Fagin*, 200 U. S. 186, 50 L. Ed. —. But this same court affirmed the New York Court of Appeals in holding, that a defendant could not prevent the use of documents, unlawfully taken from him, in convicting him of crime. *People v. Adams*, 176 N. Y.

351, 68 N. E. 636, 63 L. R. A. 406. Affirmed 192 U. S. 585, 48 L. Ed. 575. See also as to taking shoes from prisoners and placing them in the impression of footsteps leading to the scene of a crime. *People v. Van Wormer*, 175 N. Y. 188, 76 N. E. 299; *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741. While in Wisconsin it was held, that, where a defendant gave an officer his shoe, when asked for it, testimony of its being used to identify tracks was competent (see *Thomson v. St.*, 117 Wis. 338, 93 N. W. 1107). Yet, as held in Alabama, if he refused to consent to his shoe being taken for any such purpose, evidence of such refusal would be incompetent, as in violation of defendant's constitutional right. *Davis v. St.*, 131 Ala. 10, 31 South. 569. It has been held that an accused cannot be compelled to go with a jury on a view of the scene of the crime. *St. v. Mortensen*, 26 Utah, 312, 73 Pac. 562. Nor could a paper containing incriminating evidence be demanded of him in the presence of the jury, though no order for its production is made, and the demand is solely to comply with a supposed necessity for the introduction of secondary evidence. *McKnight v. U. S.*, 115 Fed. 972. As seemingly opposed to the holding by the federal Supreme and New York courts, *supra*, it was held in Maryland, that books of account in the hands of a receiver, appointed

§ 290. **Disclosing the Names of Accomplices.**—But a witness is not protected from giving evidence, from the mere fact that the evidence which he will be obliged to give in answer to the questions propounded, may disclose the names of *other witnesses* whose testimony may convict him of a pending criminal charge, or may furnish the means of procuring other evidence to convict him of such charge.²² Thus, a person may be compelled to disclose to a grand jury the names of persons whom he has seen betting at an unlawful game, although by so doing he may disclose the names of witnesses who may be called to testify that he himself also bet at the same game.²³ But it has been held that a statute²⁴ which provides that any person concerned in a trespass may be compelled to testify against any other person therein concerned, is in direct contravention of the provision in the constitution of that State that “no person in any criminal prosecution, shall be compelled to testify against himself.”²⁵

in consent proceeding, could not be used in a criminal prosecution against the owner thereof, because they were not out of his possession for any such purpose. *Blum v. St.*, 94 Md. 375, 51 Atl. 26. Held otherwise in the case of a trustee in bankruptcy producing the books before a grand jury. *St. v. Strait*, 94 Minn. 384, 102 N. W. 913. See *Shafer v. U. S.*, 24 App. D. C. 417, where photograph of prisoner, taken while in custody, was used for the purpose of identification. Where defense is insanity the evidence of state's medical experts violates no constitutional privilege of accused. *People v. Truck*, 170 N. Y. 203, 63 N. E. 281; *St. v. Eastwood*, 73 Vt. 205, 50 Atl. 1077. To require that automobiles should be registered and carry a number is not violative of the constitutional guaranty, that no person shall be compelled to be a witness against himself in any criminal case. *People v. Schneider*, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345.

²² *La Fontaine v. Southern Underwriters*, 83 N. C. 132, 141; *Ward v.*

St., 2 Mo. 120; *Kiernan v. Abbott*, 1 Hun (N. Y.), 109, 3 Thomp. & C. (N. Y.) 755. See also *Ex parte Butt*, 78 Ark. 262, 93 S. W. 992. In Mississippi it was held, that the possible constraint upon a coindictee to testify against himself relieves him from being compelled to testify. *Holman v. St.*, 72 Miss. 108, 16 South. 294.

²³ *Ward v. St.*, *supra*, where the question was reasoned at length by McGirk, J.; followed and its reasoning approved in *La Fontaine v. Southern Underwriters*, 83 N. C. 132, 141; *Re Briggs*, 135 N. C. 118, 47 S. E. 403. And a buyer of liquor sold contrary to law may be compelled to testify. *Wakeman v. Chambers*, 69 Iowa, 69, 28 N. W. 498, 58 Am. Rep. 218. But see note 23, § 293, *infra*, where it appears that such a provision does not protect the constitutional privilege, the statutes there referred to being those on gaming.

²⁴ Rev. Stat. Ind. 1876, ch. 463, § 14.

²⁵ *St. v. Enoch*, 69 Ind. 314.

§ 291. [Continued.] **Application of this Rule.**—A grand jury caused a subpoena to be issued for one Ward to appear before them and testify generally, without specifying the particular matter or cause about which he was to testify. Ward appeared and was sworn to give evidence before the grand jury. He went before the grand jury to testify. The first question asked by the foreman of the grand jury was this: “Do you know of any person or persons having bet at a faro table in this county within the last twelve months?” To which the witness answered, “I do.” The foreman then desired the witness to tell what person or persons had so bet, other than himself, and not naming himself. The witness declined to answer, saying that he could not answer without implicating himself. He was then directed by the court to answer, but not to name himself as a better. This he refused to do, alleging that to answer would implicate himself; whereupon the court committed him to prison until he should consent to give the evidence required, and until the further order of the court. He sued out a writ of error; and on an application to the Supreme Court for a *superse-deas*, this relief was refused. The court, applying the foregoing rule, held that the answer to the question would not necessarily criminate the witness, and that the witness could not refuse to answer a question on the ground that it might excite the vengeance of other malefactors against him.²⁶ In an action to enjoin the defendant from surreptitiously obtaining and communicating to another certain foreign news dispatches, sent by the Atlantic cable exclusively to the plaintiff the defendant, after testifying that the foreign news which he so furnished was obtained by him several times each day directly by cable from London, and that the dispatches came to a banking house in New York, from whom he received them, was asked, “What banking house was that?” It was held that this question was proper and pertinent, since the plaintiff had a right to contradict the statement and to test its accuracy in any legal manner; and accordingly that the defendant was in contempt for refusing to answer it.²⁷

§ 292. **Compelling Witness to Exhibit his Body.**—The privilege of not giving self-criminating evidence extends so far that a witness on trial for a crime will not be compelled to exhibit to the jury a portion of his body, where this might disclose a fact prejudicial

²⁶ Ward v. St., 2 Mo. 120.

²⁷ Kiernan v. Abbott, 3 Thomp. & C. (N. Y.) 755; 1 Hun (N. Y.), 109.

to him. Accordingly, on the trial of an indictment for murder where it became material to disclose the extent of an amputation of one of the prisoner's legs, it was held error to compel him to exhibit his leg to the jury.²⁸ Contrary to this, it was held on a criminal trial, where the identity of the accused was in question, that no error was committed in compelling him to exhibit his arm to the jury, which disclosed certain tattoo marks tending to identify him as the person who committed the crime.²⁹

§ 293. Effect of Statutes Preventing Answer from being used against Witness.—As a general rule, a witness will not be protected in refusing to give testimony on the ground that the testimony, if given, would furnish evidence on which he might be convicted in a criminal prosecution, where there is a statute which expressly provides that the testimony so given shall not be used as evidence against the witness in a criminal proceeding;³⁰ but there are holdings to the contrary.³¹ But in order to have this

²⁸ *Blackwell v. St.*, 67 Ga. 76, 44 Am. Rep. 717. So too he could not be required to put a cap on his head, so that prosecutrix in a rape case might say, if she could identify him. *Turman v. St.*, 50 Tex. Cr. R. 7, 95 S. W. 533.

²⁹ *St. v. Ah Chuey*, 14 Nev. 79 (Leonard, J., dissenting). See post, ch. 27. And in a forgery case to write in the presence of the jury so that comparison may be made. *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013.

³⁰ *La Fontaine v. Southern Underwriters*, 83 N. C. 132; *U. S. v. McCarthy*, 18 Fed. 87, 21 Blatchf. (U. S.) 469; *Kendrick v. Com.*, 78 Va. 490; *Kain v. St.*, 16 Tex. App. 282; *St. v. Warner*, 13 Lea (Tenn.), 52; *Wilkins v. Malone*, 14 Ind. 153. Compare *Temple v. Com.*, 75 Va. 892; *Kneeland v. St.*, 62 Ga. 395. But he is not protected from a prosecution for false swearing, but the guaranty is, that his testimony shall not be used against him in es-

tablishing the offense it indicates he has committed. *Edelstein v. U. S.*, 149 Fed. 636, 79 C. C. A. 328.

³¹ *St. v. Nowell*, 58 N. H. 314. Thus, the statutes of Tennessee, existing from an early day, give the grand juries in case of gambling, inquisitorial powers. Those statutes also contain a provision which forbids the indictment or prosecution of any witness for any offense as to which he has testified before the grand jury. Code of Tenn., 1895, § 7048. In view of this provision, it is held that, where a person is summoned before the grand jury, and is asked if he knows of any persons playing cards for a wager within the last six months, within the county, and he refuses to answer, upon the ground that if he makes any disclosures upon the subject, he will be obliged, in criminating others also to criminate himself,—he may be required by the court to answer, upon pain of imprisonment for contempt. *Hirsch v. St.*, 8 Baxt.

effect, the protection of the statute must be complete. A statute providing that testimony which a witness may give upon an investigation shall not be used against him, is ineffectual to deprive the witness of his constitutional privilege of exemption from being compelled to accuse himself, or to furnish evidence against himself, unless it is so broad that it secures him from future liability and from exposure to prejudice, in any criminal proceeding against him, as fully and extensively as would be secured by availing himself of the constitutional privilege.³² So, if a prosecution for the

(Tenn.) 89. In *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, it is held, that the statute is insufficient, unless it prevents the use of such testimony in searching out other testimony to be used against the witness. After this decision was rendered the federal statute was amended so as to give complete immunity in respect to the transaction, and its constitutionality was upheld. *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819.

³² *Emery's Case*, 107 Mass. 172; *Ex parte Carter*, 166 Mo. 604, 66 S. W. 540; *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 43 Am. St. Rep. 127, 26 L. R. A. 423. This is well illustrated by two cases decided by the New York Court of Appeals. In the one first decided it was held, that a statute relative to gaming, which provided that no person shall be excused from giving testimony on any investigation for a violation thereof, because such testimony would tend to convict him of a crime, but that such testimony cannot be received against him in any criminal investigation or proceeding, was insufficient to afford absolute immunity, in that for a witness to be compelled to answer made him disclose circumstances which would aid his prosecution. See *People v. O'Brien*, 176 N. Y.

253, 68 N. E. 353. Thereupon the statute was amended, so that such a witness should not "be prosecuted or subjected to any forfeiture on account of any transaction concerning which he may so testify or produce evidence." As so amended the statute was held sufficient, and a witness, called to prove an offense thereunder, could be compelled to answer. *People v. Court of Gen. Sessions etc.*, 179 N. Y. 594, 72 N. E. 1148. For statute providing, that the witness "shall be altogether pardoned of the offense so done or participated in by him," see, *St. v. Morgan*, 133 N. C. 743, 45 S. E. 1033. An Illinois statute relating to stock gambling promised immunity upon a condition subsequent to wit: the repayment of money won in such a transaction. It was held that such condition invalidated the statute. *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781. It may be said, that the decided tendency of later cases is on the line of a most jealous preservation of the constitutional privilege and to hold the witness not compelled to give any testimony whereby any clue may be secured, that may be used in the obtaining of means to discover his own crime, but if the prosecution wishes his aid he must be fully absolved on giving that aid.

offense is barred by the *statute of limitations*, the witness must answer.³³

§ 294. [Continued.] **Illustration under Massachusetts Statute.**—A statute of Massachusetts enacted as follows: “No person who is called as a witness before the Joint Special Committee on the State Police shall be excused from answering any question, or from the production of any paper relating to any corrupt practice or improper conduct of the State police, forming the subject of inquiry by such committee, on the ground that the answer to such a question, or the production of such paper, may tend to criminate himself, or to disgrace him, or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee, upon the subject aforesaid, or any statement made, or paper produced by him upon such examination, shall not be used as evidence against such witness, in any civil or criminal proceeding in any court of justice, *provided however*, that no official paper or record produced by such witness on such examination shall be held or taken to be included within the privilege of said evidence, so to protect such witness in any civil or criminal proceeding as aforesaid, and that nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.”³⁴ With this statute in force, a person was summoned to appear as a witness before a joint special committee of the Senate and House of Representatives of the General Court of Massachusetts appointed “to inquire if the State police is guilty of bribery and corruption,” and, in obedience to the summons, appeared before the committee at the State house when interrogatories were propounded to him which he declined to answer. These facts being reported to the Senate, that body ordered the sergeant-at-arms to arrest the witness and bring him before the Senate to answer for contempt in refusing to answer the interrogatories. The sergeant-at-arms arrested him and brought him to the bar of the Senate, whereupon the Senate passed the following order: “That the President propound to Henry Emery, now arraigned at the bar of the Senate, the following questions: ‘Are you ready and willing to answer

³³ Floyd v. St., 7 Tex. 215; Welton v. Burch, 12 Ill. 374; Moloney v. Dows, 2 Hilt. (N. Y.) 247; Wolfe v. Goulard, 15 Abb. Pr. (N. Y.) 336;

Mahanke v. Cleland, 76 Iowa, 401, 41 N. W. 53.

³⁴ Mass. Stat. of 1871, ch. 91.

before the joint special committee appointed by this Senate and House of Representatives of Massachusetts to "inquire if the State police is guilty of bribery and corruption," the following questions namely: First, whether, since the appointment of the State constabulary force, you have ever been prosecuted for the sale or keeping for sale of intoxicating liquors? Second, have you ever paid any money to any State constable and do you know of any corrupt practices or improper conduct of the State police? If so, state fully what sums and to whom you have thus paid money, and also what you know of such corrupt practices and improper conduct.' " The President of the Senate then and there propounded the questions ordered by the Senate to the petitioner, and he answered in writing as follows: "Intending no disrespect to the honorable Senate, I answer, under the advice of counsel, that I am ready and willing to answer the first question; but I decline to answer the second question, upon the ground, first, that the answer thereto will accuse me of an indictable offense; second, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense." The Senate thereupon passed an order that, whereas the witness, "in contempt of the authority of this Senate, did give an unsatisfactory answer to the second question," he "be committed to the custody of the sergeant-at-arms, to be by him confined in the jail of the county of Suffolk for the space of twenty-five days, or until the further order of the Senate, unless he shall sooner signify his willingness to appear and purge himself of his contempt, and testify before the joint special committee and this Senate, and satisfactorily answer the questions propounded to him by the joint special committee and this Senate, and the President of the Senate is hereby authorized to issue his warrant to commit said Henry Emery to the custody of the sergeant-at-arms, to be imprisoned in the common jail of the county of Suffolk;" and "whenever the said Henry Emery, under the foregoing order, shall inform the sergeant-at-arms that he is willing to testify before the said joint special committee and this Senate, it shall be the duty of the sergeant-at-arms immediately to take the said Emery before the Senate and hold him subject to its order." In conformity with this order, the President of the Senate issued his warrant for the arrest of the witness; whereupon the witness sued out a writ of *habeas corpus* in the Supreme Judicial Court. The sergeant-at-arms returned the warrant of commitment as his justification for holding the petitioner restrained of his liberty. The

Supreme Judicial Court, after able argument and full consideration, announced its decision which bore "the approval and unanimous concurrence of all the members of the court," discharging the prisoner from custody. The court held that the statute did not furnish the prisoner with an exemption from criminal prosecution in case he should answer the question propounded to him, as broad and effectual as the constitutional provision that "no one shall be * * * compelled to accuse or furnish evidence against himself," furnished him in the event of his refusal to answer it. In giving the opinion of the court upon this point, Wells, J., after discussing at length the constitutional provision, said: "It follows from the considerations already named that, so far as this statute requires a witness who may be called, to answer questions and produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from liabilities, for protection against which the privilege is secured to him by the constitution. The statute does undertake to secure him against certain of those liabilities, to wit, the use of any disclosures he may make as admissions of direct evidence against him in any civil or criminal proceeding. In the case already referred to,³⁵ it was held that such a provision by statute removed all the liability against which the witness was secured by the constitutional exemption, and that, being thus otherwise furnished with all the protection to which the constitution entitled him, he had no further occasion and therefore no right to set up the claim of privilege as a protection against that to which he was not exposed. But this decision was made upon the ground that the terms of the provision relied on in the constitution of New York protected the witness only from being compelled 'to be a witness against himself,' and did not protect him from the indirect and incidental consequences of a disclosure which he might be called upon to make. The terms of the provision in the constitution of Massachusetts require a much broader interpretation, as has already been indicated; and no one can be required to forego an appeal to its protection, unless first secured from future liability and exposure to be prejudiced in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect

³⁵ People v. Kelley, 24 N. Y. 74.

of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that it can not and was not intended so to operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its privileges were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein secured to them. The result is, that, in appealing to his privilege as an exemption from being exposed to answering inquiries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer upon that ground was not and could not be considered as disorderly conduct, or a contempt of the authority of the body before which he was called to answer. There being no legal grounds to authorize the commitment upon which he is held, he must be discharged therefrom. He is discharged accordingly." ⁸⁶

§ 295. **Effect of Promise not to Prosecute.**—The privilege which a witness may have to refrain from answering a particular question on the ground of self-crimination, is not removed by the promise of the State's attorney not to prefer an indictment against him.⁸⁷

§ 296. **Privileged Communications between Attorney and Client.**—Professional communications between attorney and client are regarded as confidential, and are protected on grounds of public policy.⁸⁸ But this is a privilege of the client; it may be waived by him; if the client sees fit to be a witness, he makes himself liable to full cross-examination in respect of communications made by himself to his counsel.⁸⁹ Moreover, the rule extends merely to commu-

⁸⁶ *Emery's Case*, 107 Mass. 172, 185, 186.

⁸⁷ *Muller v. St.*, 11 Lea (Tenn.), 18.

⁸⁸ *Mobile etc. R. Co. v. Yeates*, 67 Ala. 164; *Jackson v. French*, 3 Wend. (N. Y.) 337; *Kauffman v. Rosenstine*, 97 App. Div. 514, 90 N. Y. S. 205, 186 N. Y. 562, 76 N. E. 1098; *People v. Heart*, 1 Cal. App. 166, 81 Pac. 1018. Confidential communication by prosecuting

witness to prosecuting attorney is privileged. *Gabriel v. McMullin*, 127 Iowa, 426, 103 N. W. 355. And so a letter by the general attorney of a railroad to his associate counsel, a local attorney. *M. K. & T. R. Co. v. Williams*, 43 Tex. Civ. App. 549, 96 S. W. 1087.

⁸⁹ *Woburn v. Henshaw*, 101 Mass. 193; *Landsberger v. Gorham*, 5 Cal. 450. If the client is dead his legal representative may

nications which the attorney and client have themselves seen fit to entrust only to each other; if they make the communication in the presence of a *third person* the privilege is waived, and he may disclose it on the witness stand.⁴⁰ Obviously, the rule does not extend to statements made by the client to *other persons*, or to statements made by other persons to the client, in the presence of the attorney.⁴¹ It is said in Connecticut, by Sanford, J.: "No reason of necessity requires that any witness (*save an interpreter*) should ever be present at a consultation between a client and his attorney; and if the client procures or submits to the presence of such a witness, he voluntarily confides his secrets, not to his attorney only, but also to the witness, in whose custody the law cannot protect them when the interests of justice require that they should be dis-

waive. *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552; *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802. A third person has no right to object to disclosure by an attorney. *Appeal of McNulty*, 135 Pa. 210, 19 Atl. 936. Client opens the matter in controversy with her attorney by testifying he deceived her as to her rights. *Hunt v. Blackburn*, 128 U. S. 464, 32 L. Ed. 488.

⁴⁰ *Jackson v. French*, 3 Wend. (N. Y.) 337; *Hoy v. Morris*, 13 Gray (Mass.), 519; *Hatton v. Robinson*, 14 Pick. (Mass.) 416; *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *Mobile etc. R. Co. v. Yeates*, 67 Ala. 164. See also *Martin v. Anderson*, 21 Ga. 301; *Brown v. Payson*, 6 N. H. 443. See also *Doe v. Jauncey*, 8 Carr. & P. 99; *Barnes v. Harris*, 7 Cush. (Mass.) 576; *Scott v. Aultman Co.*, 211 Ill. 612, 71 N. E. 1112. The communication must not be merely incidentally connected with the matter, so as to suggest casual mention only, e. g. where an attorney was employed to prepare articles of incorporation and his client stated he intended giving an employee a certain amount of the stock. This state-

ment was not privileged. *Denunzio's Receiver v. Schaltz*, 25 Ky. Law Rep. 1294, 77 S. W. 715. See also *Mueller v. Batcheler*, 131 Iowa, 650, 109 N. W. 186. But see *Fox v. Spears* 78 Ark. 83, 93 S. W. 562.

⁴¹ *Gallagher v. Williamson*, 23 Cal. 331, 334. See also *Coveney v. Tannehill*, 1 Hill (N. Y.), 33; *Rochester City Bank v. Suydam*, 5 How. Pr. 254; *Bramwell v. Lucas*, 2 Barn. & Cres. 745; *Caldwell v. Davis*, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599; *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482; *Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356. If an attorney acts for several parties and a controversy arises afterwards either may call him as a witness. *Mitchell v. Mitchell*, 212 Pa. 62, 61 Atl. 570; *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290; *In re Seip's Estate*, 163 Pa. 423, 30 Atl. 226, 43 Am. St. Rep. 403. A statement by a wife to the husband's attorney in his presence is not privileged. *St. v. Cummings*, 189 Mo. 626, 88 S. W. 706. And where one's brother goes with him to employ an attorney in the matter of the brother's assignment to

closed.”⁴² In like manner it is said by Merrick, J., in a Massachusetts case: “The privilege of exemption from testifying to facts actually known is extended only to an attorney or legal adviser who derives his knowledge from a communication by the client who applies and makes disclosures to him in his professional character, and to those other persons whose intervention is strictly necessary to enable the parties to communicate with each other.”⁴³ The rule is therefore carried to the extent of holding that a statement to an attorney in the presence and at the instance of his client, by a third party, is not privileged.⁴⁴ Nor does the privilege extend to any facts within the attorney’s knowledge or to any information acquired by him in any other way than through the channel of a confidential communication from his client.⁴⁵ *Papers* intrusted to an attorney in professional confidence are not necessarily to be deemed confidential communications; and if he asserts that he is ignorant of their contents, he may be ordered to produce them for the inspection of the court, and if he refuse to do so, he will be guilty of a contempt.⁴⁶

his creditors, what he says to the attorney is not privileged. *Mackel v. Bartlett*, 33 Mont. 123, 82 Pac. 795.

⁴² *Goddard v. Gardner*, 28 Conn. 172, 175. See also *Gainsford v. Grammar*, 2 Campb. 9; 2 Stark. Ev., § 239; 1 Phil. Ev. 162.

⁴³ *Hoy v. Morris*, 13 Gray (Mass.), 519, 521; *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483.

⁴⁴ *Perkins v. Guy*, 55 Miss. 153, 167. See also *Ripon v. Davies*, 2 Nev. & M. 310; *Shore v. Bedford*, 5 Man. & G. 271; *Griffith v. Davies*, 5 Barn. & Ad. 502. But statements made to an attorney to be communicated and acted on are never privileged. *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. 563; *Koeher v. Somers*, 108 Wis. 497, 84 N. W. 991.

⁴⁵ *Hunter v. Watson*, 12 Cal. 363, 377; *King v. Ashley*, 179 N. Y. 281, 72 N. E. 106; *Bischoff v. Com.*, 29 Ky. Law Rep. 770, 96 N. W. 538; *Boyle v. Robinson*, 129 Wis. 567,

109 N. W. 623. While an attorney may, from what he observes, give his opinion on sanity of his client, he cannot as basing same upon a confidential communication made by the client. *Sheehan v. Allen*, 67 Kan. 712, 24 Pac. 245. The privilege does not embrace an arrangement as to the attorney’s compensation. *Strickland v. Capital City Mills*, 74 S. C. 16, 54 S. E. 220. It has been held, however, that where accused went to an attorney in behalf of the attorney’s client and made an affidavit to be used in a motion for a new trial, what was said between them with reference thereto was privileged. *Rosebud v. St.*, 50 Tex. Cr. R. 475, 98 S. W. 859.

⁴⁶ *Mitchell’s Case*, 12 Abb. Pr. (N. Y.) 249; *St. v. Gleason*, 19 Ore. 159, 23 Pac. 817; *Turner v. Warren*, 160 Pa. 336, 28 Atl. 781; *C. Aultman & Co. v. Ritter*, 81 Wis. 395, 51 N. W. 569. There is no legal claim

§ 297. [Continued.] **History of the Privilege.**—In a very well considered case before Daly, F. J., in the New York Court of Common Pleas, the following sketch was given of the history of the privilege of an attorney, in respect of *producing documents* belonging to his client, or making disclosures of matters communicated by his client to him in professional confidence: “Before the important change in the law requiring a party to an action to be examined as a witness at the instance of the adverse party, the general principle was recognized that no one in a court of law could be compelled to give evidence against himself.⁴⁷ This principle had its most extensive application where the question put to the witness would or might have a tendency to expose him to a criminal charge or penal liability, or to any kind of punishment; and so far as protecting a party from an inquiry that may have such a tendency, this broad principle of the common law remains untouched. In such a case, as the witness knows what the court does not know, and which he could not communicate without becoming his own accuser, he is permitted to judge for himself what the effect of his answering the inquiry would be; the power of the court being limited simply to determining whether the question is one that might admit of an answer having such a tendency.⁴⁸ The shelter of the principle extends also to everything confidentially communicated by the party to his attorney; and it is for the attorney, as it would be for the party, to judge what would be the effect of the inquiry. Thus in *Rex v. Dixon*,⁴⁹ it was held that an attorney was justified

of privilege concerning any proposed infractions of law, and the theory, upon which such claim is denied, is, that the existence of the privilege presupposes both professional employment and professional confidence. If a client has a criminal or fraudulent object in view in his communication with his counsel, one of these elements is necessarily absent. If he avows his object he does not consult, says the court, his adviser professionally. If that is not disclosed he reposes no confidence. *Matthews v. Hoagland*, 48 N. J. Eq. (3 Dick) 455, 21 Atl. 1054. See also *Hickman v. Green*, 123 Mo. 165, 22 S. W.

455, 29 L. R. A. 39; *St. v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *Orman v. St.*, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662. It must be manifest, however, that it was a fraudulent or illegal purpose. *Alexander v. U. S.*, 138 U. S. 353, 34 L. Ed. 954.

⁴⁷ Citing *Cook v. Corn*, 1 Tenn. (Overt.) 340. See also *Owings v. Low*, 5 Gill & J. (Md.) 134; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174. So ball were not compellable to testify against their principal. *Shotwell v. Maurice*, 1 N. J. L. (Coxe), 224.

⁴⁸ Citing 1 Burr Trial, 245.

⁴⁹ 3 Burr 1687.

in disobeying a subpoena *duces tecum*, directing him to bring before a grand jury certain papers which had been placed in his hands confidentially by his client, where the object in requiring him to do so was to found a prosecution against his client for forgery.”⁵⁰

§ 298. [Continued.] Rule Limited where Question of Crime not Involved.—“But the principle that a party could not be compelled to give evidence against himself, was far more limited in its application when no question of crime was involved, both in relation to the obligations of the witness and the power of the court in determining whether he should be absolved from answering or not. The principle of exemption was applied, in its broadest extent, to parties to actions at law, who could not be compelled to give evidence; and in respect to the production of documentary testimony, as a party to an action was not bound to give evidence, he could not be required to produce papers to be used against him as evidence; and if a paper had been deposited by him with his attorney, the attorney’s possession was deemed the possession of the party, and the attorney could not be required to produce it, nor even any other person having the temporary possession of it in right of the party.⁵¹ If a document was in the possession of a party to an action at law, or in the possession of his attorney, all that could be done was to give him notice to produce it; and if he failed to do so, the other party was at liberty to give secondary evidence of its contents; or if the production of the document itself was essential, and he would not produce it, the court would, if he was a defendant, strike out his answer, or, if a plaintiff, non-suit him⁵²—a practice introduced into courts of law from the court of chancery. But the attorney might be called and was bound to answer whether or not he had the paper in his possession, that the other party might be enabled to give secondary evidence of its contents, which he could not do until

⁵⁰ Mitchell’s Case, 12 Abb. Pr. (N. Y.) 249, 257. An attorney could not be made to testify as to money of certain denominations being paid him by his client in a criminal case, when the purpose is to show larceny of money. Holden v. St., 44 Tex. Cr. R. 382, 71 S. W. 600.

⁵¹ Citing Bank of Utica v. Pil-lard, 5 Cow. (N. Y.) 419; Jones v. Reilly, 174 N. Y. 97, 66 N. E. 649.

The defendant’s answer admitting possession in the attorney, the latter can be made to produce. Allen v. Ins. Co., 72 Conn. 693, 42 Atl. 955 Or testify to its contents. Lindahl v. Spreme Court I. O. O. F., 100 Minn. 87, 110 N. W. 358.

⁵² Citing 3 Rev. Stat. N. Y. (5th ed.) 293, 294; 4 Cow. & Hill’s notes (3rd ed.) 648.

he had first shown that he was unable to produce it; and though the attorney could not be required to disclose the contents of the paper, his examination might be carried at least so far as to show, with reasonable certainty, that the document introduced was the one respecting which the other party proposed to give evidence.⁵³ The protection of this rule was also applied, to a certain extent, in favor of witnesses called on behalf of third persons. Neither they nor their attorneys, if called as witnesses, could be required to produce documents to be used in evidence, if the production of the paper might materially affect the rights or prejudice the interests of the persons to whom it belonged, which was a question which the court would determine upon the inspection of the document."⁵⁴

§ 299. [Continued.] Confidential Communications.—“The rule was also well established, that neither party nor his legal adviser would be compelled in a court of justice to disclose the confidential communication which had passed between them in respect of the matter upon which the party had sought professional advice. The principle, which appears to have been recognized as far back as the days of Elizabeth,⁵⁵ was not confined to courts of law but was equally acted upon by the court of chancery, where the aid of the

⁵³ Citing *Bevan v. Waters*, 1 Mood. & M. 235; *Eicke v. Nokes*, Id. 303; *Rhoades v. Selin*, 4 Wash. C. C. (U. S.) 715, 718; *Coveney v. Tannahill*, 1 Hill (N. Y.), 33; *Jackson v. McVey*, 18 Johns. (N. Y.) 330; *Brandt v. Klein*, 17 Id. 335; 1 Greenl. Ev., §§ 241, 245; Cow. & Hill's notes (3rd ed.), Part 2, note 152. It has been ruled, that an executed instrument in the hands of an attorney, by whose terms the rights of others accrue or are evidenced, is not a privileged communication, and the court may inquire whether or not an alleged instrument was executed, but the attorney cannot be required to state the transactions or conversations leading up to its execution. *Fayerweather v. Ritch*, 90 Fed. 13.

⁵⁴ *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249, 259. Citing *Copeland v.*

Watts, 1 Stark. 95; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *Amey v. Long*, 9 East, 473; *Bateman v. Phillips*, 4 Taunt. 157; *Field v. Beaumont*, 1 Swanst. 209; *Cowan & Hill's Notes* (3rd ed.), Part 2, note 316; 1 Greenl. Ev., § 246; *Dunlap Pr.* 607. Where an attorney is in possession of a document, on the terms of which the rights of both parties depend, it having been placed in his possession by the defendant, his client, he may be required to produce same in evidence. *Allen v. Hartford L. Ins. Co.*, 72 Conn. 693, 45 Atl. 955. Where a document is shown to an attorney by his client, he cannot be called on to testify as to its then condition, e. g. whether a note was indorsed at that time or not. *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095.

⁵⁵ Citing *Cary*, 127, 88, 89.

court was sought to compel a discovery of evidence. On an application for a discovery, a court of equity would neither compel nor permit a solicitor to disclose what his client had communicated to him in professional confidence, nor compel the production of letters which had passed between them, or through intermediate agents on the business, containing or asking legal advice or opinions, nor cases prepared at the instance of the client for the opinion of counsel.⁵⁶ Both courts of law and of equity recognized the necessity of a free and unrestricted intercourse between the client and his professional adviser, which would not exist if what was imparted to the former in professional confidence could be afterwards used against him. Everything of this nature was regarded, therefore, as inviolate, and neither the client to a certain extent, nor his professional adviser, would be required, either at law or in equity, to disclose it. As this was a rule, however, susceptible of great abuse, it was always kept within just and rational limits. As it has, in the language of Chief Justice Shaw,⁵⁷ 'a tendency to prevent the full disclosure of the truth, it is to be construed strictly;' to which may be added the very pertinent observation of Lord Langdale, M. R.,⁵⁸ upon what he deemed a too extensive application of it: 'It seems strange to say that justice can be promoted by concealing the truth, by suppressing the knowledge of any fact or any statement of the parties which bears upon the question to be decided. It is often easier to exclude evidence than to determine what weight ought justly to be attributed to it when received. A bad cause may suffer, and the evasion of justice may be prevented by compelling a party to disclose a material fact; but the object is not to save the trouble or lessen the responsibilities of the judge to protect a bad cause, or to facilitate the evasion of justice, but, if possible, to do justice, and for that purpose to get at the whole truth; and I confess I have yet to learn how the concealment of the truth or hiding from the court

⁵⁶ Citing *Lord Walsingham v. Goodricke*, 3 Hare, 122; *Mayor of Dartmouth v. Holdsworth*, 10 Sim. 476; *Bolton v. Corporation of Liverpool*, 3 Id. 467; *Hughes v. Bidulph*, 4 Russ. 190; *Nias v. Northern & Eastern R. Co.*, 2 Keen, 76; *Bunbury v. Bunbury*, 2 Beavan, 173; *Greenough v. Gaskell*, 1 Myl. &

K. 98; *Holmes v. Baddeley*, 1 Phil. Ch. 476; *Walker v. Wildman*, 6 Madd. 37, 48; *Bank of Utica v. Mersebau*, 3 Barb. Ch. (N. Y.) 528; *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35.

⁵⁷ In *Foster v. Hall*, 12 Pick. 89.

⁵⁸ In *Nias v. Railway Co.*, supra.

that which is known to any of the parties, and relates to the matter in question, can in any way promote justice.' ”⁵⁹

§ 300. [Continued.] **Witness not Exclusive Judge of Privilege.**—“Whenever, in the practical application of these rules, the question of privilege arose, it was not * * * the right of the witness to judge, except where the matter might criminate him, whether the matter inquired of was privileged or not. That was the province of the court. If the production of a document was called for, and the witness declined to produce it, upon the ground that the reading of it in evidence would be prejudicial to his interests, or to the interests of the party for whom the witness acted as attorney, the witness was required to submit the document to the inspection of the court, and if the judge, after perusing it, differed from the witness, he would direct it to be read;⁶⁰ or if a witness swore that a question put to him could not be answered without a disclosure of secrets communicated to him by his client, it was for the court to determine, from the nature of the inquiry, whether the principle of protection extended to it or not;⁶¹ and if the court decided that it did not, the witness, should he refuse to answer, would be guilty of a contempt, nor would the court even hear counsel upon the plea of the witness’ objection.”⁶²

§ 301. [Continued.] **These Principles how far Changed by Statute Compelling Parties to Testify.**—“Such was the state of the law before the enactment of the provision compelling parties to actions to be examined as witnesses at the instance of an adverse party. That provision has brought about a very material change. * * * The provision in question declares that a ‘party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be compelled to testify in the same manner and subject to the same rules of examination as any other witness.’ This sweeps away the rule of the common law, that parties to actions could not be compelled to give evidence against

⁵⁹ Mitchell's Case, 12 Abb. Pr. 249, 259, 260.

⁶⁰ Copeland v. Watts, 1 Stark. 95; Bradshaw v. Bradshaw, 1 Russ. & Myl. 358; Walsh v. Trevanion, 15 Sim. 578.

⁶¹ Citing Morgan v. Shaw, 4 Madd. 57; Parkhurst v. Lawton, 3

Id. 121; Beer v. Ward, Jacob, 77; Com. v. Braynard, Thach. Cr. Cas. (Mass.) 146.

⁶² Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, 260 (citing to the last proposition Doe v. Earl of Egremont, 2 Moody & Rob. 386).

themselves; and every privilege, either of the party or of his attorney, that was founded upon it, is gone. I suppose that the protection that was extended to the confidential communications between attorney and client remains unaffected, as the reason upon which that rule was founded is as applicable now as it was before; but, with this exception, a party to an action or his attorney is no longer privileged to withhold testimony. A party to an action may now be compelled by a subpoena *duces tecum*, to produce papers and documents upon the trial, to be read in evidence.⁶³ The contrary was held by Justice Rosevelt in a previous case;⁶⁴ but the construction he put upon the statute was repudiated, after a careful examination, by Justice Wells; and I entertain no doubt but that the conclusion arrived at by the latter was the correct one. If a party, then, may be compelled to produce documents, the attorney, whose privilege can be no greater than his client, must be equally bound. *In Doe dem. Courtail v. Thomas*,⁶⁵ which was an action at law, an attorney was called upon to produce a lease, who declared that he had received it from his client in the character of his attorney, and that he held it in that character; but, it appearing that the client had been ordered, by the court of chancery, to deposit the lease for the inspection of the plaintiff, in a suit brought by the plaintiff against the client in the court of chancery, the court ordered the attorney to produce the lease; and, when the case came up for review, Lord Tenterden held that the client might have been subpoenaed upon the trial and compelled to produce the lease, and that if he could be compelled to produce it, then the attorney, who stood in the same situation as his client, was equally bound to do so. If this were not so, all that a party would have to do, to evade the production of papers, would be to put them into the custody of his attorney. 'The production of written, as well as oral testimony,' said Lord Ellenborough,⁶⁶ 'is essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them;' holding that the writ of subpoena *duces tecum* was as essential and of as compulsory obligation as the ordinary writ by which a witness is commanded to appear and testify. The object sought in the examination of a witness is to obtain from

⁶³ Citing *Bonesteel v. Lynde*, 8 How. Pr. (N. Y.) 226.

⁶⁴ *Trotter v. Latson*, 7 Id. 261.

⁶⁵ 9 Barn. & Cress., 288.

⁶⁶ In *Amey v. Long*, 9 East, 47.

him, not only the evidence which he may give orally, but the written evidence which may be in his possession or under his control. One is as much a part of what he is called upon to furnish, and in respect to which he may be examined, as the other. When the code, therefore, declares that a party to an action may be compelled to testify in the same manner and subject to the same rules of examination as other witnesses, it is obvious that the meaning is that whatever may be required of other witnesses may be required of him. If they must produce books and papers, so must he; and if he has placed them in the possession of his attorney, agent, or any other person, the one who has them in actual custody may be compelled to bring them before the court, to be used as evidence. In courts of equity, the principle of protection was never extended to all papers belonging to the client which he may have put into the hands of his solicitor. But the general rule was, that whatever the client was bound to produce for the benefit of a third person, his solicitor, if the document or paper was in his possession, was also bound to produce;⁶⁷ and if the solicitor was not a party to the suit, he might be compelled, by a subpoena *duces tecum* to produce it.⁶⁸ Indeed, the principle of protection, recognized in courts of equity, does not appear to have extended, so far as the adjudged cases show, beyond letters or other communications passing between a client and his solicitor or their intermediate agents, or papers or documents prepared by the solicitor at the client's request, and in certain cases to the title deeds of the client in the hands of his solicitor,⁶⁹ or to a general application upon a solicitor to produce his client's papers.⁷⁰ The general rule of courts of equity, that whenever the client may be called upon to produce papers, the attorney, if they are in his possession, may be required to produce them, is the proper rule, now that parties to communications are made witnesses. There may possibly be cases in which the deposit of a document with an attorney, for advice and counsel, may bring it within the rule of protection; though I can conceive of none, if the client would himself be bound, if he had it in his possession, to produce it as a witness."⁷¹

⁶⁷ Citing *Furlong v. Howard*, 2 Sch. & Lef. 115; *Fenwick v. Reed*, 1 Meriv. 114.

⁶⁸ Citing *Burk v. Lewis*, 6 Madd. 29.

⁶⁹ Citing *Stratford v. Hogan*, 2

Ball & B. 164; *McCann v. Beere*, 1 *Hogan*, 129.

⁷⁰ Citing *Wright v. Mayer*, 6 *Ves.* 280.

⁷¹ *Mitchell's Case*, 12 *Abb. Pr.* 249, 264.

§ 302. [Continued.] **Attorney has no Greater Privilege than Client has.**—“The exemption of an attorney was never regarded as his personal privilege, but as existing purely for the protection of his client;⁷² and, even though willing or desirous to do so, he would not be allowed, unless by his client’s consent, to reveal anything entrusted to him in professional confidence.⁷³ He was, in this respect, in the language of Chief Baron Gilbert, ‘considered as one, and the same person with his client;’⁷⁴ and if, by a change of the law, a party to an action has no longer any privilege, it follows as a matter of course, that his attorney would have none.”⁷⁵

§ 303. **Trade Secrets Privileged.**—Although the rule does not extend to the protection of *property*,⁷⁶ yet in an action to restrain the use of the plaintiff’s *trade-mark*, the plaintiff will not be compelled to disclose the ingredients of which his goods are made, merely because the defendant in his answer alleges that they contain injurious materials.⁷⁷

§ 304. **Refusing to Expose Defense.**—A person who has been indicted, and also made a defendant in a civil action in respect of

⁷² Buller N. P. 284.

⁷³ Petrie’s Case, cited, 4 T. R. 756.

⁷⁴ Gilbert Ev. 138.

⁷⁵ Mitchell’s Case, 12 Abb. Pr. (N. Y.) 249, 262, opinion by Daly, F. J.

⁷⁶ Ante, § 288.

⁷⁷ Tetlow v. Savournin, 15 Phil. (Pa.) 170. Compare Burnett v. Phalon, 21 How. Pr. (N. Y.) 100,—where a similar question was allowed, but only on the ground that the plaintiff in his examination in chief had opened the question, and thus had made it relevant on cross-examination. This does not seem to be an absolute privilege, but the courts will refuse, except it be indispensable for the ascertainment of what is necessary to decide a controversy conducted with no ulterior purpose. The cases are few, and, in this country, they have generally arisen in the federal courts. In Moxie Nerve Food Co.

v. Beach, 35 Fed. 465, a witness for complainant was on cross-examination held not obliged to testify as to the ingredients of a proprietary medicine. The privilege was allowed also in Dobson v. Graham, 45 Id. 17, infringement of a patent, where defendant’s workmen were asked to explain the difference between defendant’s machine and that of plaintiff, but the court said, if there were reliable evidence going to show the difference was a mere cloak to conceal an infringement, the answer would be compelled. For other illustrative cases see Johnson Steel Rail Co. v. North Branch Steel Rail Co., 48 id. 191; Gorham Mfg. Co. v. Emery R. T. D. Co., 92 id. 774, and the Sugar Trust case in Congress sub nom. U. S. v. Chapman, Smith’s Digest of Precedents of Congress, pp. 797, 810.

the same matter, and who is brought out of jail on an order of court to testify as a witness in the civil case, is not privileged to refuse answering relevant questions which are put to him, on the ground that his answers thereto will expose his defense in the criminal case, and put him "in the hands of his enemies,"—that is, in the hands of the complainant in the civil case and of the prosecuting attorney in the criminal case. He can only escape answering the questions, by putting himself upon his privilege, and claiming that the answers which he would be bound to give would furnish evidence on which he might be convicted of a crime. In so holding, the court said: "It is true, that in the ordinary course of criminal proceedings, the defendant is enabled to conceal the grounds of his defense until the prosecution has made a *prima facie* case before the jury; but this is merely incident to the course of those proceedings, and not in any true sense a privilege. As a defendant in the criminal action, he can stand upon the presumption of his innocence, and is not bound to offer any defense until a case has been proved against him; but, as a party to a civil action, his privilege is just the same, whether he has been indicted or not; he can only refuse to answer when his answers would tend to criminate or degrade him, and he must himself invoke his privilege."⁷⁸ This is the plain rule of the statute, and there is no public policy superior to the rule. To conceal his defense until the day of trial is, no doubt, a valuable privilege to the criminal; for it will often deprive the State of all opportunity of exposing its falsity; but it is difficult to see how it is to benefit an innocent defendant, who relies upon the truth for his vindication, unless it is assumed that the State will suborn false witnesses for the purpose of destroying him."⁷⁹ There is a statute in New Hampshire providing that a party testifying as a witness shall not be compelled to disclose his witnesses nor the manner of proving his case.⁸⁰ This does not excuse him from testifying as to all he knows upon the issue.⁸¹

§ 305. Testimony of the Judge as to Former Trials.—On grounds of public policy, the judge of a court is excused from tes-

⁷⁸ Comp. Laws Nev., § 4653.

⁷⁹ Maxwell v. Rives, 11 Nev. 213, 220.

⁸⁰ Rev. Stat. N. H. 1901, ch. 224, § 14. This statute also provides that in giving a deposition not taken in his own behalf a party shall not be compelled to produce any writ-

ing which is material to his case or defense.

⁸¹ Penniman v. Jones, 59 N. H. 119. It is ground for demurrer to a bill of discovery in aid of an action at law, that it calls on defendant to disclose matters, which would tend to incriminate him.

tifying as to what witnesses have testified to on former trials before him; but it has been held that he may *waive* the privilege and testify without furnishing just ground of exception.⁸²

§ 306. **Privilege must be Claimed by Witness himself.**—The privilege in respect of self crimination or disgrace is *personal* to the witness, and cannot be claimed by the party whose witness he is.⁸³ "Where the answer would thus tend to expose the witness to a criminal charge, if it be material and relevant to the issue, the privilege belongs to the witness alone, and must be claimed by him; the objection cannot be interposed by a party, but the witness, advised of his privilege, will be permitted to answer if he choose to do so."⁸⁴ The general rule is that, where a question is put tending to *criminate* or *degrade* the witness, the claim of privilege from

Noyes v. Thorpe, 73 N. H. 481, 62 Atl. 787.

⁸² Welcome v. Batchelder, 23 Me. 85. It has been held in a criminal case, that the judge should not be allowed to testify, because there is no one to control his testimony or keep him in proper bounds, and, if his testimony be against the defendant, it gives an undue advantage. Rogers v. St., 60 Ark. 76, 29 S. W. 894. In a Washington case many reasons are instanced, why he should not testify, with the result of holding, that the embarrassment and difficulty are such that another judge ought to be called in, if his testimony is desired. See Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117. In Georgia he has been held incompetent. Shockley v. Morgan, 103 Ga. 156, 29 S. E. 694. See also St. v. DeMaio, 69 N. J. L. 590, 55 Atl. 644. In some states there are statutory provisions relating to this subject.

⁸³ Ingalls v. St., 48 Wis. 647, 4 N. W. 785; Clark v. Reese, 35 Cal. 89; Com. v. Shaw, 4 Cush. (Mass.) 594; Soudusky v. McGee, 5 J. J. Marsh. (Ky.) 621; St. v. Bilansky,

3 Minn. 246; Newcomb v. St., 37 Miss. 383; St. v. Patterson, 2 Ired. (N. C.) 346; Beauvoir Club v. St., 148 Ala. 643, 42 South. 1040. An accused may claim it personally or through his counsel. St. v. Shockley, 29 Utah, 25, 80 Pac. 865. It cannot be claimed until the witness has been sworn. In re Eckstein, 148 Pa. 509, 24 Atl. 63.

⁸⁴ South Bend v. Hardie, 98 Ind. 577, 583. If he makes such claim in regard to documents, he must claim, that the incrimination respects himself and not another. Kanter v. Clerk Circuit Court, 108 Ill. App. 287. Nor is it sufficient to claim, that the evidence sought might be used against him in a pending criminal prosecution. He must claim, that it will tend to incriminate him. Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552. If testimony is given before a grand jury without witness claiming his privilege, he cannot by plea in abatement to the indictment claim he was compelled to give testimony. People v. Lauder, 82 Mich. 109, 46 N. W. 956.

answering it must be made by the witness himself, and is not available when made merely by the party whose witness the witness is. It is merely a question between the witness and the court, with which the party has nothing to do, and with which the counsel for a party has no right to interfere.⁸⁵ Thus, on a trial for murder, the accused, testifying for himself, was asked on cross-examination, whether he had not been arrested for an assault with intent to kill. The question was objected to, the objection was overruled, and the accused answered without claiming his privilege. It was held that the ruling was not erroneous.⁸⁶ Where, upon cross-examination, a witness refuses to answer a question which, although upon collateral matter, is not otherwise objectionable, but the answer to which may tend to criminate or degrade him, the cross-examining party may further ask him his *reason* for refusing to answer, and thus *compel him to claim* his privilege, if his refusal is based upon that ground.⁸⁷

§ 307. **Privilege may be Waived.**—The refusal to answer a question on the ground that the answer might subject the witness to a criminal prosecution is a privilege which the witness is at liberty to *wave*. It therefore follows that a question can never be *objected* to upon this ground, if it is otherwise proper. The extent of the rule is that a witness can never be compelled by compulsory process to answer such a question.⁸⁸ Where a co-defendant in a criminal case “*turns State’s evidence*” and attempts to convict others by proof which would also convict himself, he has no right to claim any privilege concerning any of the facts bearing upon the issue. He has *waived* all privilege which would permit him to hold anything.⁸⁹ Such a waiver covers *confidential communications* made

⁸⁵ Cloyes v. Thayer, 3 Hill (N. Y.), 564; Southard v. Rexford, 6 Cow. (N. Y.) 254; People v. Brown, 72 N. Y. 571, 573.

⁸⁶ Hanoff v. St., 37 Ohio St. 178, 41 Am. Rep. 496.

⁸⁷ New v. Fisher, 11 Daly (N. Y.), 309.

⁸⁸ People v. Arnold, 40 Mich. 710; St. v. Morgan, 133 N. C. 743, 45 S. E. 1033; Williams v. Dickenson, 28 Fla. 90, 9 South. 847. An insurance company charged with rebating cannot object, that its agent does

not claim his privilege. N. Y. L. Ins. Co. v. People, 195 Ill. 430, 63 N. E. 264. It has been held, however, that it is sometimes discretionary to allow a question asking plainly for an incriminating answer. City of South Bend v. Hardy, 98 Ind. 577, 49 Am. Rep. 792.

⁸⁹ Hamilton v. People, 29 Mich. 173, 184; Foster v. People, 18 Mich. 266; Lockett v. St., 63 Ala. 5; Alderman v. People, 4 Mich. 414; Com. v. Price, 10 Gray (Mass.), 472.

to attorneys; since there is no more reason for saving these than for saving the privilege of a witness from criminating himself. Each may be waived, and each is, by such criminating disclosures, conclusively waived. Both client and attorney may be compelled to disclose the client's statements which are pertinent to the issue.⁹⁰ If a witness discloses a *part* of a criminal transaction, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline cross-examination on the ground that his answer may criminate or disgrace him.⁹¹ So, if he voluntarily states that he knows a fact, he may be compelled to state *how* he knows it.⁹² One who *volunteers his testimony* in behalf of the defendant in a criminal case, cannot refuse to submit to a cross-examination on the ground that his answers will expose him to a criminal charge growing out of the transaction concerning which he has volunteered to testify.⁹³ And it seems that a witness, by voluntarily answering as to a transaction, where his answer tends to criminate him, waives the privilege of refusing to answer which he might have had at the outset if he had seen fit to claim it.⁹⁴ But the fact that the witness testified before the *grand jury*, and that it was on his testimony that the indictment was found, does not deprive him of his privilege of declining to testify *on the trial*.⁹⁵

§ 308. [Continued.] Illustrations.—Thus, a witness in a bastardy case testified for the defendant that a person other than the defendant had had sexual intercourse with the prosecutrix. He was required by the court, on cross-examination, to state who that person was, and thereupon he said that it was himself. It was held that this was no error; since, by appearing for the defendant to testify to such a fact, he waived his privilege of not criminating

⁹⁰ Alderman v. People, 4 Mich. 414; Hamilton v. People, *supra*.

⁹¹ People v. Freshauer, 55 Cal. 575; Com. v. Pratt, 126 Mass. 462; Foster v. Pierce, 11 Cush. (Mass.) 437; Norfolk v. Gaylord, 28 Conn. 309; St. v. Foster, 23 N. H. 348; Coburn v. Odell, 30 N. H. 540; People v. Carroll, 3 Park. Cr. (N. Y.) 73; Chamberlain v. Wilson, 12 Vt. 491; East v. Chapman, Mood. & M. 47, 2 Car. & P. 570; Dixon v. Vale, 1 Car. & P. 278.

⁹² St. v. K——, 4 N. H. 562.

⁹³ State v. Hall, 20 Mo. App. 397, per Hall, J. See Whart. Crim. Ev., § 470 and cases cited.

⁹⁴ Youngs v. Youngs, 5 Redf. (N. Y. Surr.) 505. In re Mark, 146 Mich. 714, 110 N. W. 611; St. v. Faulkner, 175 Mo. 546, 75 S. W. 116.

⁹⁵ Temple v. Com., 75 Va. 892. Aliter if he makes affidavit on which the information is based. Samuel v. People, 61 Ill. App. 186.

himself.⁹⁶ In a proceeding to revoke letters of administration granted upon an estate on the ground that the supposed decedent was alive, a witness swore that he himself was the supposed decedent; that he left the place in 1875 and did not return until 1880; but he declined to disclose his whereabouts in the meantime, on the ground of self-crimination,—adding that he had neither been in prison nor under arrest. It was held, (1) that he had not waived his privilege; but, (2) that he did not disclose a sufficient basis to enable him to claim it.⁹⁷ A physician testified without objection as to the condition of his patient, and then refused to give his opinion as to the cause of the symptoms discovered, unless he should receive an expert's fee. It was held that he must answer.⁹⁸

§ 309. **Question decided by Court, not by Witness.**—The question of privilege must be decided by the judge, and not by the witness.⁹⁹ The rule under this head was thus stated in a case in Wisconsin by Dixon, C. J.: “Although the witness is the judge of the effect of his answer, and is not bound to disclose any facts or circumstances to show how the answer would affect him, as that would defeat the rule and destroy the protection afforded by the law, yet the court is to determine, under all the circumstances of the case, whether such is the tendency of the question put to him, and whether he shall be required to answer; as otherwise it would be in the power of every witness to deprive parties of the benefit of his testimony, by the merely colorable pretense that his answers to questions would have a tendency to implicate him in some crime or misdemeanor, or would expose him to a penalty or forfeiture when it is clear * * * that the questions have no such tendency.”¹ This was decided by Chief Justice Marshall in *Burr's*

⁹⁶ *St. v. Nichols*, 29 Minn. 357, 13 N. W. 153.

⁹⁷ *Youngs v. Youngs*, 5 Redf. (N. Y. Surr.) 505.

⁹⁸ *Wright v. People*, 112 Ill. 540.

⁹⁹ *U. S. v. Burr*, 1 Burr T. 245; *U. S. v. Miller*, 2 Cranch C. C. (U. S.) 247; *U. S. v. Devaughn*, 2 Id. 501; *Sanderson's Case*, 3 Id. 638; *St. v. Duffy*, 15 Iowa, 425; *Richman v. St.*, 2 G. Greene (Iowa), 532; *Com. v. Braynard*, Thach. Cr. (Mass.)

146; *Floyd v. St.*, 7 Tex. 215; *Hughes v. Boone*, 102 N. C. 137, 7 S. E. 286; *St. v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838; *Harris v. Dougherty*, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

¹ *Kirschner v. St.*, 9 Wis. 140 (reaffirmed in *St. v. Lonsdale*, 48 Wis. 348, 368, 4 N. W. 390; *Rosendale v. McNulty*, 23 R. I. 465, 50 Atl. 850.

trial, as shown by the quotation in a preceding section; and there is a general concurrence of authority to the same effect. "The court must," said Smith, C. J., "in the first instance, determine whether the question is such that it may be reasonably inferred that the answer made is criminating; and the nature of the answer, as it is known to the witness alone, he alone must decide. If the information sought *may* be self-accusing, and the witness says it is, he need not answer."² In like manner Prof. Greenleaf says: "Whether it [the answer] may tend to criminate or expose the witness, is a point which the court will determine under all the circumstances of the case."³ It is accordingly said by Marcy, J., in a case in New York: "My conclusion is that where the witness claims to be excused from answering a question because the answer may disgrace him or render him infamous, the court must see that the answer *may*, without the intervention of other facts, fix on him moral turpitude. Where he claims to be excused from answering because his answer will have a *tendency* to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then the court is to determine whether the answer he may give to the question *can* criminate him directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts which, together, may constitute a chain of testimony sufficient to warrant his conviction, but which one fact, of itself, could not produce such result."⁴ Considering these authorities, the Supreme Court of North Carolina holds the rule to be: "That to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is *no reasonable ground* to apprehend danger to the witness from his being compelled to answer."⁵ So, it has been said in Iowa: "It is not left alone to the witness to determine whether the answer would tend to criminate him. He is not required to explain how he would be criminated; for this would or might annihilate the protection secured by the rule. But it is for the court to determine whether the answer can criminate him, directly or indirectly, by furnish-

² La Fontaine v. Southern Underwriters, 83 N. C. 132, 138; Ex parte Green, 86 Mo. App. 216.

³ 1 Greenl. Ev., § 451.

⁴ People v. Mather, 4 Wend. (N. Y.) 254. See also Ward v. St., 2

Mo. 123; 1 Whart. Crim. L., § 807. See Osborne v. London Dock Co., 10 Exch. (H. & G.) 701.

⁵ La Fontaine v. Southern Underwriters, 83 N. C. 132, 141.

ing direct evidence of his guilt, or by establishing one of many facts which, together, may constitute a chain of testimony sufficient to warrant his conviction, but one part of which, by itself, could not produce such result.”⁶ If the *production of a document* be called for, and the witness decline to produce it, upon the ground that the reading of it in evidence would be prejudicial to his interests, or to the interests of a person toward whom he stands in a confidential relation respecting the instrument, the witness may be required to submit the document to the *inspection of the court*. In so holding Daly, C. J., said: “It was a contempt wilfully to deprive the court of the means of determining whether the principle of protection extended to the papers in his possession or not; and it would not be the less a case of contempt, even assuming that, by what was stated to the court, a case of privilege was shown; for though the judge should decide erroneously upon the question of privilege, the order he makes is nevertheless to be obeyed. If it were otherwise, it will always be in the power of a witness to withhold evidence wherever he thought fit to consider himself privileged.”⁷

§ 310. Compulsory answer not Evidence against Witness.—

This question was considered in England by the judges, when a majority were of the opinion that, if a witness claims the protection of the court on the ground that his answer would tend to criminate himself, and there appears to be ground for believing that it would do so, he is not compellable to answer; and, if obliged to answer

⁶ St. v. Duffy, 15 Iowa, 425, 427, per Wright, J.

⁷ Mitchell's Case, 12 Abb. Pr. (N. Y.) 249; U. S. v. Collins, 145 Fed. 709; In re Hark, 136 Fed. 986. See also In re Edward Hess & Co., 136 Fed. 988. The subject of compelling the production of documentary evidence in prosecutions of corporations under anti-trust laws has been before the courts often of late years, and under immunity provisions of such law the officers of corporations have been denied the right to claim personal privilege. The leading case on this subject is that of Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652, in which the pro-

duction was compelled. This case holds that while the witness could neither set up his own privilege, nor that of the corporation, whose officer he was and having custody for it, yet the corporation did sustain such relation to the subpoena duces tecum as to secure modification of its sweeping provisions, as being against the constitutional guaranty against unreasonable search and seizure. A case in which the production was compelled, because the officer was not connected with the corporation at the time of its alleged criminal acts. See In re Moser, 138 Mich. 302, 101 N. W. 588.

notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot afterwards be given in evidence against him. The judges also held that it made no difference in the right of the witness to protection, that he had before answered in part; on the contrary, they were of the opinion that he was entitled to claim the privilege at any stage of the inquiry, and that no answer forced from him by the presiding judge after he had claimed such privilege could afterwards be given in evidence against him.⁸

§ 311. **Whether Refusal to Answer is Evidence against Witness.**—It has been held that the refusal of a *party to a civil suit*, when testifying as a witness, to answer a material question on the ground of self-crimination, is a circumstance which may be considered against him in such civil suit.⁹ The rule is otherwise where the witness is not a party.¹⁰ But in a *criminal case* where the accused, testifying as a witness, claims his privilege on the ground of self-crimination, this cannot be shown as a circumstance against him on a subsequent trial for the same offense.¹¹

§ 312. **Whether Court bound to Instruct the Witness.**—It has been held that the court is bound to instruct the witness whether, as matter of law, his answer would tend to criminate him.¹² But, while this is proper, it would seem to be rather a matter of discretion. It is not error to refuse to instruct a witness that, if he would avail himself of his privilege, he must make the objection before answering anything upon the subject.¹³

⁸ Reg. v. Garbett, 2 Car. & Ker. 474; Grundy v. Com., 8 Ky. Law Rep. 876.

⁹ Andrews v. Frye, 104 Mass. 234.

¹⁰ Rose v. Blakemore, Ry. & M. 383.

¹¹ St. v. Bailey, 54 Iowa, 414, 6 N. W. 589.

¹² Lea v. Henderson, 1 Coldw. (Tenn.) 146. Compare Rutherford v. Com., 2 Metc. (Ky.) 387; Point-dexter v. Davis, 6 Gratt. (Va.) 481;

Ivy v. St., 84 Miss. 264, 36 South. 265; Starr v. St. (Tex. Cr. R.), 86 S. W. 1023 (not reported in state reports.) In Texas it was ruled, that failure to warn a witness called before a grand jury prevented what he said from being used against him. Bowen v. St., 47 Tex. Cr. R. 137, 82 S. W. 520.

¹³ Com. v. Howe, 13 Gray (Mass.), 26.

CHAPTER XIII.

PRELIMINARY QUESTIONS OF FACT FOR THE JUDGE.

SECTION

318. Judge must Decide all Questions of Fact Preliminary to the Admission or Exclusion of Evidence.
319. What if the Decision of the Preliminary Question would Decide the Main Issue.
320. [Illustration.] Admissibility of Copy of Instrument Sued on, Existence of Original in Dispute.
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323. [Illustration.] Competency of Witnesses.
324. Competency of Documentary Evidence.
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329. Similar Instances.
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332. [Continued.] Such Evidence Admissible to Show Guilty Purpose, Plan, System, etc.
333. [Continued.] Instances in the Cases of Forgery and Uttering Forged Paper.
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335. [Continued.] Other Instances where such Evidence has been Admitted.
336. Usage of Trade or Business.
337. Leading Questions.
338. Further Illustrations.

§ 318. Judge must decide all Questions of Fact preliminary to the Admission or Exclusion of Evidence.—“Whether there be any evidence or not, is a question for the judge; whether it is sufficient evidence, is a question for the jury.”¹ It is the exclusive province

¹ 1 Greenl. on Ev. § 49; Buller, J., in *Company of Carpenters v. Hayward*, Dougl. 360; Campbell, J., in *Chandler v. Von Roeder*, 24 How. (U. S.) 227; *Witkowsky v. Wasson*, 71 N. C. 451; *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac.

973; *Mortimer v. Beaver Valley Traction Co.*, 216 Pa. 326, 65 Atl. 758. This is not to say, however, that the issue is so narrow as thus expressed, for few, if any, of the courts adopt the *scintilla* rule. Notably among others, it is re-

and duty of the court to decide upon the admissibility of evidence, and it is none the less so where, in order to make such determination, the court is obliged to examine and pass upon questions of fact.² In all cases, whether civil or criminal, where objection is made to the competency of evidence offered, and the question depends upon facts which may be proved or disproved, it is the duty of the judge to hear all proper evidence offered on either side touching the question of competency, before letting the challenged evidence go to the jury; and it is error to do otherwise.³

jected by the federal courts. Late Circuit Court of Appeal cases, following the rule in these jurisdictions hold, that, at the close of the evidence, it is for the judge to say whether there is any *substantial* evidence produced by the party upon whom rests the burden of proof. See *First Nat. Gold Min. Co. v. Altvater*, 149 Fed. 393, 79 C. C. A. 213; *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625; *Crookston Lumber Co. v. Bontin*, 149 Fed. 625, 79 C. C. A. 368; *Berry v. Chase*, 146 Fed. 625, 77 C. C. A. 161. The rule is thus expressed by the Supreme Court of North Carolina: "The measure and quantity of proof and its sufficiency in law is a question for the court, while its weight and sufficiency to establish a fact is for the jury." *Kearns v. So. Ry. Co.*, 139 N. C. 470; 52 S. E. 131. See ch. 63, post.

² *Robinson v. Ferry*, 11 Conn. 460; *Carter v. Bennett*, 6 Fla. 214; *Scott v. Coxe*, 20 Ala. 294; *Gorton v. Hadsell*, 9 Cush. (Mass.) 508; *Claytor v. Anthony*, 6 Rand. (Va.) 285; *Carrico v. McGee*, 1 Dana (Ky.), 6. So, in Massachusetts, where a jury is impaneled by an officer, in pursuance of statutes respecting the laying out of a highway, it is the province of the officer, and not that of the jury, to de-

termine as to the admissibility of testimony. *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *Semple v. Callery*, 184 Pa. 95, 39 Atl. 6.

³ *Bartlett v. Smith*, 11 Mees. & W. 483. See also *Reg. v. Garner*, 2 Carr. & K. 920, and note; *People v. Fox*, 121 N. Y. 449, 24 N. E. 923; *Burton v. St.*, 107 Ala. 108, 18 South. 285; *St. v. Jones*, 171 Mo. 407, 71 S. W. 680. During such an inquiry the jury may be sent out of the court room. *St. v. Gruff*, 66 N. J. L. 287, 53 Atl. 88; *Omaha Coal & Coke etc. Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *McDonald v. McDonald*, 142 Ind. 55, 14 N. E. 336; *Kirk v. Ter.*, 10 Okla. 46, 60 Pac. 797; *St. v. Shaffer*, 23 Ore. 555, 32 Pac. 545. And this has been ruled to be the better practice. *St. v. Furney*, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262. If there is a dispute between the parties as to whether evidence offered applies to the controversy, e. g. an admission, the court will receive the admission and refer such dispute to the jury as a question of fact. *Von Rieden v. Evans*, 52 Ill. App. 209. A familiar illustration of a laying of the predicate to the question of competency is found in the case of *Mower v. McCarthy*, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.)

§ 319. **What if the Decision of the Preliminary Question would decide the Main Issue.**—An exception, sometimes admitted to this rule is, that the judge is not bound to decide the preliminary question of fact where the state of the case is such that, for the judge to decide this question would be equivalent to deciding the main issue.⁴ Embarrassments surround the situation of the judge where the question is thus presented, as will be seen by the observations of Lord Penzance in a case where he took the course of admitting the evidence upon a *prima facie* showing, although his conclusion did decide the main issue,—at the same time cautioning the jury that his ruling was a preliminary ruling upon imperfect evidence, and was not in the least degree to influence their verdict. The question at issue was whether Murhall Daniels, through whom the defendants claimed, was legitimate. The defendants, after producing *prima facie* evidence of the legitimacy of Murhall Daniels, tendered his declarations in evidence. The plaintiffs objected to the admissibility of these declarations, and tendered evidence on the *voir dire*, for the purpose of showing that the declarant was not a member of the family. Lord Penzance, being of opinion that the defendants had made out a *prima facie* case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on the *voir dire* tendered by the plaintiffs. His lordship gave an interesting opinion, pointing out the inconvenience of hearing the whole of the evidence on both sides, touching the question of legitimacy, before admitting the declarations; and added, evidently with the view of admonishing the jury, that his decision, based upon imperfect evidence, would not have the slightest effect upon their verdict.⁵ In an action of ejectment, where this question was reserved for the judgment of the Court of Queen's Bench, it was similarly decided. The ultimate question for the decision of the jury was whether Elizabeth Stephens was

418, where it was ruled, that, before admissions of an alleged conspirator may be received, *prima facie* proof of the fact of the conspiracy must precede evidence of such admissions. It has often been held, that there is no absolute right of cross-examination in this kind of inquiry. *Com. v. Hall*, 164 Mass. 52, 41 N. E. 133; *City of Chi-*

cago v. Lonergan, 196 Ill. 518, 63 N. E. 1018; *Birkle v. Chandler*, 26 Wash. 241, 66 Pac. 406. But see *Woodworth v. Brooklyn El. R. Co.*, 22 App. Div. 501, 48 N. Y. S. 80.

⁴ *Stowe v. Querner*, L. R. 5 Exch. 155, 39 L. J. (Exch.) 60.

⁵ *Hitchins v. Eardley*, L. R. 2 Prob. & Div. 248, 40 L. J. (Prob. & Mat.) 70.

legitimate. A certificate of the marriage of her alleged father, J. D., to her mother was produced by a witness, who said he received it from the said Elizabeth. The question was then put, whether Elizabeth made at that time any statement respecting her mother's marriage. The admissibility of this statement, if any, depended, as in the previous case, upon the question whether she was a member of the family,—that is the question called for a declaration concerning pedigree. It was held, on the authority of a leading case already cited,⁶ that this question was for the judge, and that is made no difference that the fact which the judge was thus called upon to decide was identical with the issue on which the opinion of the jury would be ultimately taken. Lord Denman, C. J., who delivered the opinion of the court after an advisement, said: "It was the duty of the judge to decide whether it was *proved to him*, and he decided that it was. There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus, an oath, or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; an apprehension of immediate death, to admitting evidence of dying declarations; a search, to secondary evidence of lost writings; a stamp, to certain written instruments: and so is consanguinity or affinity in the declarant, to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter evidence is offered, he must receive it before he decides; and he has no right to ask the opinion of a jury on the fact as a condition precedent." ⁷

§ 320. [Illustration.] **Admissibility of Copy of Instrument sued on, Existence of Original in Dispute.**—This exception to the rule is well illustrated by a case in the English Exchequer, where the action was upon a policy of insurance and the defendant had pleaded (*inter alia*) that the defendant did not become an insurer as alleged, which, it is perceived, was equivalent to a plea of *non est factum* in respect of the policy sued on. The plaintiffs, pursuant to notice to produce, called on the defendant to produce the original policy. He declined, and they, thereupon, with the view of proving that it had been duly executed, offered in evidence a document which purported to be a copy of the policy which they had received

⁶ Bartlett v. Smith, 11 Mees. & W. 433.

⁷ Jenkins v. Davies, 10 Ad. & El. (N. S.) 314, 323.

from the defendant's broker. To this the defendant objected, and requested the judge to hear evidence to show that no original policy was, or ever had been, in existence. The objection was overruled, and the alleged copy was admitted. Later in the trial, the defendant gave evidence tending to prove that in fact there had never been any duly stamped policy, or indeed any policy at all executed; and the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by the defendant. The jury having found in the affirmative, it was held that the question was rightly left to them, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties. Baron Bramwell, in the course of his opinion, said: "If the objection on the part of the defendant had been that there was a policy, but that it was not stamped, it would, perhaps, have been well founded. But here it was objected that there was no policy executed at all, an objection which goes to the entire ground of action, and one which, if it had prevailed, might have left the jury nothing to decide. For, suppose the judge had ruled that the copy was inadmissible on the ground that there was no original ever in existence, the plaintiffs would in fact have had no case left, and the judge would himself have decided the whole of it. * * * Put an illustration analogous to the present. Suppose an action to be brought for libel, and a copy of a letter which is destroyed, but which contained the libel complained of, is produced and tendered in evidence. Could the defendant say 'stop; I will show that no letter was in point of fact ever written, and I call upon you, the judge, to hear evidence upon this point, and if I satisfy you that no such letter ever existed, you ought not to admit the copy?' Surely not; for that would be getting the judge to decide what is peculiarly within the province of the jury. The distinction is really this: Where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury." * Barons Martin, Pigott and Cleasby concurred.

* *Stowe v. Quener*, L. R. 5 Exch. There is some variance in view about the order of proof, where it
155, 158, 39 L. J. (Exch.) 60.

§ 321. Error to submit these Preliminary Questions of Fact to the Jury.—Although Prof. Greenleaf states that the judge may, if he chooses, take the opinion of the jury upon these preliminary questions of fact,⁹ and although this doctrine has been admitted in a few cases,¹⁰ yet the general conclusion is that it is error to submit such questions to the jury.¹¹ If, upon such examinations of facts, the judge decides to admit the evidence, it is for the jury to weigh and apply it; but if the judge rejects it, the jury has no right even to know that it was offered.¹²

§ 322. Judge must be satisfied by Competent Proof.—In determining any preliminary fact essential to the admissibility of evi-

is proposed to introduce secondary evidence, the primary evidence being lost or destroyed. It has been held, that proof of existence or execution, or both, should be first shown. *Hayden v. Mitchell*, 103 Ga. 431, 30 S. E. 287; *McKenna v. Michael*, 184 Pa. 440, 42 Atl. 14. That the reverse course should be followed. See *Laster v. Blackwell*, 128 Ala. 143, 30 South. 663; *Hobbs v. Beard*, 43 S. C. 370, 21 S. E. 305. This, however, may not be material as, if the latter method were adopted, the evidence could be stricken out. The statutes often prescribe the formal proof to lay the proper predicate, and whether they are or not mandatory is to be best judged from their phraseology and as applied to varying circumstances.

⁹ 1 Greenl. Ev., § 49; *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266.

¹⁰ *Egan v. Larkin*, Arm. M. & O. (Irish Exch.) 403; *Bartlett v. Hoyt*, 33 N. H. 151, 165; *Scott v. Coxe*, 20 Ala. 294. In *Bartlett v. Hoyt*, the preliminary question whether a statement of a party offered in evidence was intended as an admission of a fact, or merely as an offer to compromise, was regarded as one which the court

might, in its discretion, submit to the jury,—the view being that there is a distinction between such a question and that of the interest of the witness and other questions which illustrate the rule we are considering; but the view which the court there took is plainly untenable.

¹¹ *Bartlett v. Smith*, 11 Mees. & W. 483; *Hart v. Heilner*, 3 Rawle (Pa.), 407, 411; *Stowe v. Querner*, L. R. 5 Exch. 155, 39 L. J. (Exch.) 60; *Robinson v. Ferry*, 11 Conn. 460; *Ratliff v. Huntly*, 5 Ired. L. (N. C.) 545; *Thomason v. Odum*, 31 Ala. 108; *Degraffenreid v. Thomas*, 14 Ala. 681; *Pace v. Paducah Ry. & Light Co.*, 28 Ky. Law Rep. 278, 89 S. W. 105; *St. Louis & S. W. Ry. Co. v. Smith*, 33 Tex. Civ. App. 520, 77 S. W. 28. Thus it was held error to submit to the jury whether certain statements were made for the purpose of effecting a compromise, and, if the jury so found, they should be disregarded. *Wright v. Gillespie*, 43 Mo. App. 244. See also *Colburn v. Town of Groton*, 66 N. H. 151, 28 Atl. 95, 22 L. R. A. 763.

¹² *Scovell v. Kingsley*, 7 Conn. 284.

dence, the rule is the same as to the weight of the testimony, as in the case of issues tried by juries: it is not sufficient that there may be evidence tending to establish the particular fact, but the judge must be satisfied of it by competent proof.¹³ But it was early held in Pennsylvania that if, when a witness is offered, it is *perfectly clear* from the testimony given in relation to him, that he is *interested*, the court may reject him as incompetent; but if his interest be *in the least degree doubtful*, the court should permit him to be sworn, instructing the jury, that if, in their opinion, he is interested, they are to pay no regard whatever to his testimony.¹⁴ But this view seems to have been grounded upon the disfavor with which the court, even at that early day, viewed the rule of law which excluded witnesses on the ground of interest, rather than upon a general principle applicable to all cases.

§ 323. [Illustration.] Competency of Witnesses.—Whether a witness is qualified to be sworn as such is always a question for the court; but it is for the jury to determine whether they will believe his evidence.¹⁵ Thus, whether a witness is incompetent (where the

¹³ Degraffenreid v. Thomas, 14 Ala. 681, 687; Jernigan v. St., 81 Ala. 58, 1 South. 72.

¹⁴ Hart v. Heilner, 3 Rawle (Pa.), 407, 411. So also, where there is evidence for and against the sanity of a witness. City of Gainesville v. Caldwell, 81 Ga. 76, 7 S. E. 99. It may be added, that the sufficiency of proof in the matter of laying the foundation, or proving the predicate, for competency depends not so much in satisfying the court by the weight of testimony, as in establishing by relevant testimony, of a formal nature, the condition of admissibility, as review of action by the trial court, by fair implication rather than direct assertion, shows, the tendency of decision is to withdraw from trial courts all responsibility in passing upon the credibility of witnesses, as far as it is possible thus to do.

A noted case in criminal annals draws the distinction between competency of the wife of a bigamous marriage, where an independent crime is sought to be proven against the alleged husband. Where he was on trial for murder it was held she could not testify as to the former marriage and his wife thereby being alive and undivorced, but these facts being shown, prima facie, by other evidence, she became a competent witness against him. Hoch v. People, 219 Ill. 265, 76 N. E. 356. In Georgia it was ruled, that a woman might testify in a criminal case, she was not the wife of the defendant. Hoxie v. St., 114 Ga. 19, 39 S. E. 944. Contra, see Campbell v. Tremlow, 1 Price, 81; Peat's Case, 2 Lewin Cr. Cas. 288; Reg. v. Madden, 14 N. C. B. 586.

¹⁵ Com. v. Lynes, 142 Mass. 577,

old rule prevails) by reason of *interest*,¹⁶ or by reason of a want of *religious belief*;¹⁷ or whether or not a witness is an *expert* so as to render him competent to express an *opinion* upon the question in issue,¹⁸—are questions for the judge.

§ 324. **Competency of Documentary Evidence.**—In like manner, the judge must determine all questions of fact which are necessary to the decision of the question whether writings which are offered in evidence are admissible. Thus, in an action of ejectment, the court must decide upon the competency of *title papers*, and the right to use them; and, as an incident to this, under what title the party entered.¹⁹ So, it is for the judge to decide, where a document is offered in evidence and objected to on the ground that it has not come from the *proper custody*, whether it has come from the proper custody or not; and an appellate court will not interfere with his decision, unless it appears to be clearly wrong.²⁰ Upon like

3 New Eng. Rep. 89, 91 N. E. 408, Reg. v. Hill, 5 Cox C. C. 259; Kendall v. May, 10 Allen (Mass.) 64; White v. St., 133 Ala. 122, 32 South. 139; Barber v. Manchester, 72 Conn. 675, 45 Atl. 1014; Jenny Elec. Co. v. Branham, 145 Ind. 314, 41 N. E. 448; Marston v. Dingley, 88 Me. 546, 34 Atl. 414; Toland v. Paine, 179 Mass. 501, 61 N. E. 52; Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 115; Bowdle v. Railroad Co., 103 Mich. 292, 61 N. W. 529; Ruckman v. Lumber Co., 42 Ore. 231, 70 Pac. 811; Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445; Garr v. Cranney, 25 Utah, 193, 70 Pac. 853; Czarecki v. R. & N. Co., 30 Wash. 288, 70 Pac. 750; Stillwell Mfg. Co. v. Phelps, 130 U. S. 527, 9 Sup. Ct. 901. It has been held that a child not over six years of age is not necessarily incompetent. Com. v. Ramage, 177 Mass. 349, 58 N. E. 178. See also Wheeler v. U. S., 159 U. S. 523, 40 L. Ed. 244.

¹⁶ Cook v. Mix, 11 Conn. 432.

¹⁷ Wakefield v. Ross, 5 Mason (U. S.), 16, 18; People v. Matteson,

2 Cow. (N. Y.) 433, 572; Jackson v. Gridley, 18 Johns. (N. Y.) 99.

¹⁸ St. v. Cole, 94 N. C. 959; Flynt v. Bodenhamer, 80 N. C. 205. Compare St. v. Sanders, 84 N. C. 728; St. v. Efler, 85 N. C. 585; St. v. Burgwyn, 87 N. C. 572; Fairbanks v. Hughson, 58 Cal. 314; Jones v. Tucker, 41 N. H. 546; Ives v. Leonard, 50 Mich. 183, 15 N. W. 73.

¹⁹ Carrico v. McGee, 1 Dana (Ky.), 6; Hamilton v. Taylor, Littell's Sel. Cas. (Ky.) 444; Bealmear v. Hutchins, 148 Fed. 545, 78 C. C. A. 231. Whenever proof of execution must be made to authorize admission of a writing, the sufficiency thereof is for the court. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S. E. 664. In its discretion the court may admit records of deeds instead of the deeds themselves. Rupert v. Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824.

²⁰ Shrewsbury v. Keeling, 11 Ad. & El. (N. S.) 884, 889; Reese v. Walters, 3 Mees. & W. 527, 531, per Parke, B.; Jacobs v. Phillips, 8 Ad. & El. (N. S.) 158. See the opinion

grounds, evidence of the loss or destruction of an instrument upon which suit is brought, is not to go to the jury, but is addressed to the court, for the purpose of establishing the right of the party to introduce secondary evidence of the contents of the *lost instrument*, and it is error to refer such a question to the jury.²¹ So, where a *bill of exchange*, purporting to be a foreign bill and stamped accordingly, was offered in evidence, and objected to, on the ground that, although it purported to have been drawn abroad, it was in fact an inland bill, drawn in London, and therefore required a higher *stamp*, it was held that the judge ought to have received the evidence in that stage of the case, and ought to have decided upon the admissibility of the instrument, instead of receiving the evidence afterwards, as a part of the defendant's case, and submitting it to the jury; and for this error a new trial was ordered.²² Applying the same principle, it has been ruled that, where the question is whether a *check* was *post-dated*, and this question arises upon an objection to its admissibility in evidence, it is for the judge to try and determine the question as a collateral issue, and not for the jury.²³

of the judges to the Lords, given by Tindal, C. J., in the case of the Bishop of Meath v. Marquis of Winchester, 3 Bing. N. C. 183, 196, 198. Compare Reg. v. Kenilworth, 7 Ad. & El. (N. S.) 642; Bell v. Kendrick, 25 Fla. 798, 6 South. 868. Where an instrument is offered as an ancient document, it has been held, that whether it is or not is a question for the jury. Woodward v. Keck (Tex. Civ. App.), 97 S. W. 852 (not reported in state reports).

²¹ Loewe v. Reismann, 8 Bradw. (Ill.) 525; Dormandy v. State Bank, 3 Id. 236; Tayloe v. Riggs, 1 Pet. (U. S.) 591; Ratliff v. Huntly, 5 Ired. L. (N. C.) 545; Graff v. Pittsburgh etc. R. Co., 31 Pa. St. 489; Witter v. Latham, 12 Conn. 392; Donelson v. Taylor, 8 Pick. (Mass.) 390. Contra, Coleman v. Wolcott, 4 Day (Conn.), 388. And this question is not afterwards to be considered by the jury. Witter v. Latham, supra; Grimes v. Hillary, 150 Ill. 141, 36 N. E. 977;

Hume v. Hopkins, 140 Mo. 65, 41 S. W. 784; Gorgas v. Hertz, 150 Pa. 240, 24 Atl. 756; Elrod v. Cochran, 59 S. C. 467, 38 S. E. 122; Bain v. Walsh, 85 Me. 108, 26 Atl. 101; Bonds v. Smith, 106 N. C. 553, 24 N. E. 31. The courts have endeavored to prescribe specific tests as regards the search, of which proof is to be made, as a condition of admissibility, but these are not regarded as absolutely controlling, but more as general rules. See Foster v. St., 88 Ala. 182, 7 South. 185; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 24 N. E. 238; Howe v. Fleming, 123 Ind. 263. The finding of the trial judge is only reviewable, when based on error of law. Smith v. Brown, 151 Mass. 338, 24 N. E. 331. See also L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

²² Bartlett v. Smith, 11 Mees. & W. 483.

²³ Dumsford v. Curlewis, 1 Fost. & Fin. 702.

§ 325. **Witness' Inability to Attend so as to Admit his Deposition.**—Where the deposition of a witness is made by a statute,²⁴ inadmissible in evidence, unless it shall appear to the satisfaction of the judge that the deponent is unable, from permanent sickness or other permanent infirmity, to attend the trial,—it is for the judge to satisfy himself of the deponent's inability to attend, by such evidence as he shall think fit; and although his decision is subject to review, yet it will not be disturbed by a reviewing court, unless it be shown that he has been misled by false evidence, or that injustice has resulted from the course pursued at the trial.²⁵

§ 326. **Privilege.**—Where the question is whether the evidence of a witness is to be excluded on the ground of privilege, as where the witness is an attorney and the evidence called for is a confidential communication of his client,—this, on like grounds, is a question for the court, and not for the jury.²⁶ So, whether an instrument of writing, offered in evidence, is protected on the ground of its being a privileged communication, is a preliminary question of

²⁴ In this case, the Stat. 1 Wm. IV., c. 22, § 10.

²⁵ *Duke of Beaufort v. Crawshay*, L. R. 1 C. P. 699, 35 L. J. C. P. 342; *Norris v. Norris*, 3 Ind. App. 500, 28 N. E. 1014. It has been held that even though a witness is present, has been sworn and put under the rule, this is not conclusive of the court's discretion in allowing his deposition to be read. See *Fire Ass'n of Philadelphia v. Masterson*, (Tex. Civ. App.), 83 S. W. 49 (not reported in state reports). And discretion has been exercised to allow such to be one, where the adversary party has procured the attendance of the witness. *L. & N. R. Co. v. Steenberger*, 24 Ky. Law Rep. 761, 69 S. W. 1094; *East Tenn. V. & G. R. Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315. For note on this subject see 50 C. C. A. p. 230.

²⁶ *Hull v. Lyon*, 27 Mo. 570, 576; *St. v. Calhoun*, 50 Kan. 523, 32 Pac.

38, 34 Am. St. Rep. 141, 18 L. R. A. 838; *Matthews v. Hoagland*, 48 N. J. Eq. (3 Dick) 455, 21 Atl. 1054; *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. 1038. Objection on the ground of privilege being made and overruled, this is sufficient without repeating the objection to each question propounded. *Gabriel v. McMullin*, 127 Iowa, 426, 103 N. W. 355. But any objection to be available must be before testimony is given pertaining to privileged matter. *Urdangen & Greenberg Bros. v. Doner*, 122 Iowa, 533, 98 N. W. 317. If, however, a witness in testifying incautiously or inadvertently discloses privileged matter, this may be stricken out on motion. *Kessler v. Best*, 121 Fed. 439. The court may on conflicting testimony between an attorney asserting that the relation of attorney did not exist and his alleged client receive or not the evidence. *Reese v. Bell*, 138 Cal. xix, 71 Pac. 87.

fact to be decided by the judge,²⁷ though his decision is subject to review in a court of error.²⁸

§ 327. **Dying Declarations.**—So, upon the question whether a declaration by a deceased person is competent as a dying declaration on the trial of an indictment for murder, it is the duty of the court to hear evidence tendered by both parties as to the circumstances under which the declaration was made, and thereupon to determine whether evidence of it is admissible or not.²⁹

²⁷ *Cleave v. Jones*, 7 Exch. 421; *Allen v. Hartford L. Ins. Co.*, 72 Conn. 693, 45 Atl. 955.

²⁸ *Wright v. Tatham*, 7 Ad. & El. 313. In Illinois it was ruled, that the constitutional guaranty against denial of any civil or political right, privilege or capacity on account of religious opinions, prevented disqualification for non-belief in accountability to the Deity. *Hroneck v. People*, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837.

²⁹ *St. v. Elliott*, 45 Iowa, 486, 2 Am. Crim. Rep. 322; *St. v. Molisse*, 36 La. Ann. 920. "This point," said Lord Ellenborough "was considered by the judges here, on a question proposed to them by the judges in Ireland, who entertained doubts upon the subject, and this was their unanimous opinion,"—that is, that it was a question for the judge, and not for the jury. *Rex v. Hucks*, 1 Stark. N. P. 523. In this view of the law the ruling of Lord Eyre, C. B., in *Rex v. Woodcock* (2 Leach Cr. C. 563), was plainly erroneous. *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; *Jones v. St.*, 79 Miss. 309, 30 South. 759; *Fogg v. St. (Ark.)*, 99 S. W. 537. And may determine what portions thereof may be withheld from the jury respecting matters not so provable *St. v. Spivey*, 191 Mo. 87, 90 S. W. 81; *Com. v. Spahr*, 211 Pa. 542, 60

Atl. 1084. "It cannot be left to the jury (in the first instance) to say whether the deceased thought he was dying or not, for that must be decided by the judge before he permits the declaration to be given in evidence." *People v. Smith*, 104 N. Y. 491, 10 N. E. 873. In Texas the ruling is, that it is for the jury to say whether a sufficient predicate for admission has been laid. *McCorquodale v. St.*, 54 Tex. Cr. R. 344, 99 S. W. 879. Other courts come nearly to the same rule. Thus after it has been admitted the jury are to weigh its value. *St. v. Sexton*, 147 Mo. 89, 48 S. W. 452. They may reconsider all the circumstances. *St. v. Phillips*, 118 Iowa, 660, 92 N. W. 876. And decide whether or not as a fact the declarant was in articulo mortis and conscious of his condition, and if they thought either that he was not or was not conscious that he was, they ought not to consider it as evidence. *Smith v. St.*, 118 Ga. 61, 44 S. E. 92. See also *Com. v. Bewer*, 164 Mass. 577, 42 N. E. 92; *Willoughby v. Ter.*, 16 Okl. 577, 86 Pac. 56. Contra, in New Jersey, where it was ruled that defendant was not entitled to have the jury instructed that they may review such determination and disregard the declaration, if they come to a different conclusion. *St. v. Monich*, 74 N. J. L.

§ 328. Threats or Promises which will Exclude Confessions.—

What amounts to such threats or promises as will exclude evidence of the confessions of the defendant in a criminal case, is a question of law, which may be reviewed on exceptions by an appellate court.³⁰ But, whether the evidence, if true, proves these facts, and whether the witnesses giving the testimony in regard to the facts are credible or not, and, in a case presenting a conflict of testimony, which witnesses shall be believed by the court, are all questions of fact to be decided by the trial court, the decision of which cannot be reviewed on appeal.³¹ Where objection is made to the competency of evidence offered to prove confessions made by the defendant in a criminal case, upon the ground that such confessions were made under the influence of fear produced by threats, and evidence is offered to prove such threats, it is the duty of the court to hear such evidence, to determine therefrom the competency of the evidence offered to prove the confession, and not to submit the question to the jury.³²

522, 64 Atl. 1016. It has been held that, the great weight of modern ruling is to the contrary, and the declaration is not usable by an accused. *People v. Southern*, 120 Cal. 645, 53 Pac. 214; *Mattox v. U. S.*, 146 U. S. 151. The practice of sending the jury out and first determine this question has been approved in *Missouri*, and, where prosecuting attorney refused to question the witness in the absence of the jury, it was error for the court to refuse to allow defendant's counsel to do so. *St. v. Minor*, 193 Mo. 597, 92 S. W. 466. The court should exclude the jury hear evidence as to all the attendant circumstances and, on the trial permit defendant to introduce any statements made afterwards that may lessen or destroy the force of the declaration. if the court has admitted same. *Coyle v. Com.*, 29 Ky. Law Rep. 340, 93 S. W. 584. But not to do so is not error. See *St. v. Murdy*, 81 Iowa, 603, 47 N. W. 867; *St. v. Shaffer*, 23 Or. 555, 32 Pac. 545.

³⁰ *St. v. Andrew*, Phil. L. (N. C.) 205; *St. v. Burgwyn*, 87 N. C. 572; *Brickenfeld v. St.*, 104 Md. 253, 65 Atl. 1; *Smith v. St.*, 125 Ga. 252, 54 S. E. 190; *Maxwell v. St.* (Miss.), 40 South. 615 (not reported in state reports.) And so whether an alleged statement is relevant as an admission of a material fact. *St. v. Thompson*, 135 Iowa, 717, 109 N. W. 900. It has been ruled that, among the matters that may be gone into in the preliminary examination, is the mental condition of accused. *St. v. Hogan*, 117 La. 863, 42 South. 352.

³¹ *St. v. Burgwyn*, supra. To the same effect are *St. v. Vann*, 82 N. C. 631; and *St. v. Effer*, 85 N. C. 585; *Hardy v. U. S.*, 3 App. D. C. 35; *Murray v. St.*, 25 Fla. 528, 6 South. 498; *St. v. Holden*, 42 Minn. 350, 44 N. W. 123.

³² *Brown v. St.*, 71 Ind. 470; *Com. v. Culver*, 126 Mass. 464; *Pearsall v. Com.*, 29 Ky. Law Rep. 222, 92 S. W. 589. In *Missouri* the Supreme Court will review errors in ruling

§ 329. **Similar Instances.**—While it is true, that acts or omissions independent one of the other are regarded, generally, as collateral to each other from a legal standpoint, yet, if an act or omission is repeated under similar circumstances, or accidents thus happen, the mind inclines naturally to the conclusion, that there was a similar intent or motive relating to all the acts or omissions, or culpable conduct with regard to one or more of the accidents. In recognition of this experience, exceptions cull, from among independent facts, some which are not deemed purely collateral, because they conduce not only to a proper understanding of another conceded or established fact, but also assist toward the proof or disproof of a disputed fact.³³ These exceptions find their more frequent application in the law of evidence in prosecution of crime, but the principle of their competency also finds place in civil suits. Thus, where there is a question of fraud, accomplished by fraudulent representations or practices, other like representations under similar circumstances tend to show the intent or bent of the mind of the actor in a particular case. And in a question of negligence,

as to the scope of the preliminary examination and whether or not evidence offered by defendant should have been heard. See *St. v. Ruck*, 194 Mo. 416, 92 S. W. 706. If evidence is conflicting as to its being voluntary, court may admit and instruct jury to disregard, if found not to be. *People v. Flynn*, 96 Mich. 276, 55 N. W. 834; *People v. Cassidy*, 60 Hun, 579, 14 N. Y. S. 349, 133 N. Y. 612. Other courts hold, that the jury must be instructed, that they must first determine whether or not the confession was voluntary, making the court's ruling on this question purely tentative. *People v. Maxfield*, 146 Mich. 103, 108 N. W. 1087; *Johnson v. St.*, 89 Miss. 773, 42 South. 606. Texas while appearing to be decidedly of the view that the court's ruling as to a dying declaration is merely tentative, seems the reverse as to a confession. See *Herndon v. St. (Tex. Cr. R.)*, 99 S. W. 558 (not reported in state re-

ports). For an example of an elaborate laying of the predicate to admissibility, see *St. v. Banusick* (N. J. L.), 64 Atl. 994 (not reported in state reports).

³³ *Standard Mfg. Co. v. Brons*, 118 Ill. App. 632; *Yakima Valley Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243; *Mudsill Min. Co. v. Watrous*, 61 Fed. 163, 9 C. C. A. 415. The other fraudulent acts, however, must reasonably tend to prove a plan or scheme to defraud, and not merely indicate independent acts under dissimilar circumstances. *Buckley v. Acme Food Co.*, 113 Ill. App. 210; *Price v. Winnebago Nat. Bank*, 14 Okl. 268, 79 Pac. 105; *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 833. Unless they tend to show intent or the absence of oversight. *American Surety Co. v. Pauly*, 72 Fed. 470, 18 C. C. A. 644; *Dwyer v. Bassett*, 1 Tex. Civ. App. 513, 21 S. W. 621.

causing an accident or injury, proof of the happening of a like accident or injury, or either being threatened or escaped, under similar circumstances, may tend to show whether a particular accident or injury should have been foreseen and prevented.³⁴ Also proof of a series of like acts or representations, constituting a chain, may tend to prove a combination or conspiracy fixing responsibility, civil or criminal, upon a number of actors for the overt acts of one or more of them.³⁵ Then, too, prior contracts of the same nature, understanding of which by the same parties has been acted on, or a course of dealing even by one of the parties with others making a usage, tend to explain a particular contract.³⁶ In many ways it readily may be conceived that evidence of acts, both prior and

³⁴ *City of Aurora v. Plummer*, 122 Ill. App. 143; *Mayer v. Detroit etc. Ry. Co.*, 142 Mich. 459, 105 N. W. 888; *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102; *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 615. If an accident occurs, by reason of a statutory requirement upon a master being disregarded, proof of a former accident similarly occurring is competent as tending to show willful violation. *Joseph Taylor Coal Co. v. Dawes*, 220 Ill. 145, 77 N. E. 131. See also *McGinnis v. R. M. Rigby Prtg. Co.*, 122 Mo. App. 227, 99 S. W. 4. And to illustrate or show the cause of an accident. *Southern Bell Telephone Co. v. Watts*, 66 Fed. 460, 13 C. C. A. 419.

³⁵ *West Florida Land Co. v. Studebaker*, 37 Fla. 28, 19 S. E. 176. One of the best illustrations of this principle is found in what was called in Missouri the "Foot Race Cases," where a confidence game was charged between individuals and a local bank, whereby the cupidity of plaintiff was played upon so as to induce him to engage in a fraudulent scheme to outwit others, when in fact his supposed confederates were conspirators to make him the victim of all of the defendants. It

was first held that the principle of *in pari delicto* did not compel the court to turn plaintiff away, and evidence of a series of like transactions served to fasten responsibility on the defendants, who appeared in the open, and upon the bank which claimed it was merely acting according to due course in business. Appeals in these cases were heard in Missouri Supreme Court and in 8th Circuit Court of Appeals. See *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934; *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499, and judgments against defendant's upheld.

³⁶ *N. H. Martin & Co. v. Logan*, 30 Ky. Law Rep. 799, 99 S. W. 648; *Summerville v. Penn Drilling Co.*, 119 Ill. App. 152; *Sullivan v. Mauston Milling Co.*, 123 Wis. 360, 101 N. W. 679. A habit of drawing kerosene oil and gasoline indiscriminately in the same buckets was held competent, as tending to account for explosion of a lighted lamp. *Standard Oil Co. v. Parish*, 145 Fed. 829 (C. C. A.). A course of dealing may be shown as explanatory. *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

subsequent, would help to a better understanding of a specific act, though, in a general sense, all are independent of each other, and the cases in which such evidence has been held competent are innumerable. The general rule may be said to be that there must be substantially similar conditions and circumstances existing with reference to the other acts. If they are designed to show motive or intent, they must tend to a similar end, and if they are designed to prove knowledge they must reasonably tend to the same, or substantially the same, result. There are cited here some illustrative cases,⁸⁷ in civil actions, and the following sections are confined largely to the other criminal acts.

§ 330. [Continued.] Admissibility of Evidence of other Criminal Acts.—The general rule is that it is not competent, on a criminal trial, to give evidence tending to show that the defendant has been guilty of other acts of a criminal nature.⁸⁸ Upon the same view it has been held that it is not competent to show that the defendant had a *tendency to commit* the offense with which he was charged.⁸⁹ A better statement of the rule is that evidence of other

⁸⁷ *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380, shows evidence of sales of wheat to others with warranty of variety to overcome defense of no warranty as to the wheat in controversy. See, however, *Elbert v. Mitchell*, 131 Iowa, 598, 109 N. W. 181. A recognized method adopted by other railroads to prevent accidents of a certain kind held competent proof of knowledge by defendant railroad. *Denver & R. G. R. Co. v. Burchard*, 35 Colo. 539, 86 Pac. 749; *Lee v. Missouri Pac. R. Co.*, 195 Mo. 400, 92 S. W. 614. The principle was held not to cover evidence of prior acts of contributory negligence in a suit for personal injuries. *M. K. & T. Ry. Co. v. Parrott*, 43 Tex. Civ. App. 325, 96 S. W. 950. Liability may be fixed on the husband, by showing, that about the same time he and his wife bought goods from other parties on his credit, though

purchased for a sanitarium company, of which he was manager. *Moore v. Schroeder*, 14 Ind. App. 69, 42 N. E. 490. Whether it was intended defendant should be credited with certain expenses of plaintiff on a trip, competent to show plaintiff had on other like trips traveled as defendant's guest, he bearing all expenses of the party. *Zane v. De Onativia*, 139 Cal. 328, 73 Pac. 856.

⁸⁸ *Com. v. Campbell*, 7 Allen (Mass.), 542; *Ryan v. U. S.*, 26 App. D. C. 74; *Brown v. People*, 216 Ill. 148, 74 N. E. 790; *McCalman v. St.*, 121 Ga. 580, 49 S. E. 689; *St. v. Elder*, 36 Wash. 482, 78 Pac. 1023; *Nesbit v. St.*, 125 Ga. 91, 54 S. E. 195; *Swalm v. St.*, 49 Tex. Cr. R. 241, 91 S. W. 575.

⁸⁹ *St. v. Renton*, 15 N. H. 174. It was held in Texas, that evidence of solicitation of C. O. D. orders in a local option district, thus evading

criminal acts of the prisoner cannot be given by the prosecution, unless such acts are so connected by circumstances with the particular crime in issue, that proof of one act, with its attending circumstances, has a tendency to make it probable that the accused committed the crime with which he stands charged.⁴⁰ It has been reasoned that such evidence should have a peculiar and intimate, if not also an inseparable connection with and tendency to explain and characterize the act in issue against the prisoner, and that it is only admissible on the question of intent.⁴¹ The objection to such evidence was thus forcibly stated by Allen, J.: "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime, if it was known that he had committed another of a similar character, or indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one."⁴² So, in a leading case in New Hampshire it was said by Smith, J.: "It is always competent for the government to introduce evidence of any facts tending directly to show an evil intent, or from which such evil intent may be justly and reasonably inferred; but all proof in relation to transactions

the statute, was competent in a prosecution based on actual violation of a local option statute prohibiting sales in the district. *Taggart v. St.* (Tex. Cr. R.), 97 S. W. 95 (not reported in state reports).

⁴⁰ *St. v. Lepage*, 57 N. H. 245. For an example of what seems to be an exceedingly slight connection between the other criminal act and the one upon which the prosecution relied, see *Cook v. St.*, 80 Ark. 495, 97 S. W. 683.

⁴¹ *Com. v. Tuckerman*, 10 Gray (Mass.), 198; *St. v. Lepage*, 57 N. H. 245, 302, 304. In Georgia the rule has been held, that, to make one criminal act evidence of another, a connection between them

must have existed in the mind of the actor, or it must be necessary to identify the actor by a showing that he who committed the one must have committed the other. *Alsobrook v. St.*, 126 Ga. 100, 54 S. E. 805. See also *Raymond v. Com.*, 29 Ky. Law Rep. 785, 96 S. W. 515. The understanding of a party defendant to a contract reserved in a right of way deed may be shown by its compliance according to plaintiff's understanding in other like contracts. *Owens v. Carthage & W. Ry. Co.*, 110 Mo. App. 320, 85 S. W. 987.

⁴² *Coleman v. People*, 55 N. Y. 81, 90.

not intimately and directly connected with the particular case against the defendant, or with the evidence, or in necessary explanation of the evidence introduced in support of the charge contained in the indictment, is irrelevant and inadmissible.”⁴³

§ 331. [Continued.] Instances under this View of the Law.—

Thus, where the action was against the owner of a dog for damages in consequence of the killing of plaintiff's sheep by the dog, it was said in the Supreme Court of New Hampshire, by Perley, C. J.: “We are not acquainted with any rule of evidence which will allow the character of the dog, or the fact that he had killed or worried sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief, it is not competent to prove that he had done similar mischief before, more than it would be to prove that the defendant, sued for an assault and battery, had beaten other men before, or the same man.”⁴⁴ So, where the indictment was for keeping a gaming house, and the allegation in the second count was confined to a single day, it was held that the government could not, for the purpose of charging the defendant on that count, prove that the crime was committed on more than one day, although evidence covering a longer time would be admissible for the purpose of showing what character the house had on the particular day when it was sought to prove that the offense was committed.⁴⁵ On the other hand, on the trial of an indictment for murder, proof of other crimes than that alleged in the indictment, but connected with it by unity of plot and design and influenced by a similar motive, has been held admissible.⁴⁶ So, evidence of the commission of a previous crime is admissible where it will furnish a motive for the commission of the crime charged. As where A. is indicted for the murder of B., and evidence is admitted to show an adulterous intercourse between A. and the wife of B.⁴⁷

⁴³ *St. v. Lepage*, 57 N. H. 245, 302.

⁴⁴ *East Kingston v. Towle*, 48 N. H. 57, 65. As contra it has been held, that other acts of viciousness in an animal, though subsequent to that complained of, might be proven as tending to show such one should have been provided against by the owner of the animal. *Harris v. Carstens Packing Co.*, 43 Wash. 647,

86 Pac. 1125, 6 L. R. A. (N. S.) 1164. See also as to prior acts *Hadtke v. Grzyll*, 130 Wis. 275, 110 N. W. 225.

⁴⁵ *St. v. Prescott*, 33 N. H. 212.

⁴⁶ *People v. Wood*, 3 Park Cr. (N. Y.) 681.

⁴⁷ *Com. v. Ferrigan*, 44 Pa. St. 386. In Missouri it has been held that a sufficient basis is, that the

§ 332. [Continued.] **Such Evidence Admissible to show Guilty Purpose, Plan, System, etc.**—Where evidence is admissible as bearing upon the question of *intent*, it is not rendered inadmissible by the fact that it tends to prove the commission of another distinct and separate offense.⁴⁸ “The principle is, that all the evidence admitted must be pertinent to the point in issue; but if it be pertinent to this point, and tends to prove the crime charged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts.”⁴⁹ This rule applies where *intent*, *system*, or *scienter* may be involved, as illustrated in successive cheats or forgeries, or passing counterfeit money to different persons, and the like.⁵⁰ “Another act of fraud is admissible to prove the fraud charged, whenever there is evidence that the two are parts of one scheme or plan of fraud, committed in pursuance of a common purpose.”⁵¹

§ 333. [Continued.] **Instances in the Case of Forgery and Uttering Forged Paper.**—Numerous instances of the application of this principle could be cited where the trial was for forgery or the

evidence of other criminal acts tends to show motive, intent or absence of mistake or accident or identity of accused, a breadth of predicate, which would seem to make exceptional cases more numerous than those under what is regarded to be the rule. See *St. v. Spaulgh*, 200 Mo. 571, 98 S. W. 55. As being competent to show motive, see *Thompson v. U. S.*, 144 Fed. 14 (C. C. A.). Or identity. *Untreinor St.*, 146 Ala. 133, 41 South. 170.

⁴⁸ *Reg. v. Weeks*, Leigh & Cave C. C. 18, 21; *Kirkwood's Case*, 1 Lewin C. C. 103; *Com. v. Stearns*, 10 Metc. 257; *Mason v. St.*, 42 Ala. 532; *Thompson v. U. S.*, 144 Fed. 14; *St. v. Roberts*, 28 Nev. 350, 82 Pac. 100; *St. v. Rudolph*, 187 Mo. 67, 85 S. W. 584; *St. v. Rea*, 46 Or. 620, 81 Pac. 822.

⁴⁹ *Com. v. Choate*, 105 Mass. 451, 458.

⁵⁰ See *St. v. Bridgman*, 49 Vt. 202; *Thayer v. Thayer*, 101 Mass. 111; *Com. v. Nichols*, 114 Mass. 285;

Whart. Crim. Ev. (8th ed.), §§ 31 et seq.; 1 *Greenl. Ev.* (13th ed.), §§ 53, 451, 454; *Whart. Crim. Law* (8th ed.), § 1733; *Bish. Stat. Crime*, § 682; 2 *Bish. Mar. & Div.* (6th ed.), § 625; *St. v. Lonanis*, 79 Vt. 463, 65 Atl. 532; *Brown v. U. S.*, 142 Fed. 1, 73 C. C. A. 187; *St. v. High*, 116 La. 79, 40 South. 538; *Rex v. Wyatt*, 73 Law J. K. B. 15, 20 Law Times R. 68; *St. v. Peterson*, 98 Minn. 210, 108 N. W. 6.

⁵¹ *Jordan v. Osgood*, 109 Mass. 457, 461; approved and applied in *Berkey v. Judd*, 22 Minn. 287, 298. In a case in Illinois evidence of this kind was allowed to run back for several years, witnesses testifying in a prosecution for attempt to commit abortion, that accused had solicited them to bring him cases of pregnancy, and that he held himself out as being ready and willing to produce abortion by instruments and medicine. *Clark v. People*, 224 Ill. 554, 79 N. E. 941.

uttering of forged paper. Proof of the commission of other forgeries, or the having in possession other forged paper, is generally admissible in such cases, as bearing upon the question of intent.⁵² Thus, where the indictment was for forging and uttering a note of the Kingdom of Poland, on September 1st, 1835, evidence was received to show that the defendant, on August 24th, 1835, agreed to forge a thousand Austrian notes, and that in September, 1834, he had in his possession plates for printing Polish notes different from that which was the subject of the indictment, and had caused 500 notes to be printed from those plates.⁵³ So, where the charge was that the defendant had in his possession a counterfeit bank bill with intent to pass it, it was held that evidence was admissible to show that he had passed a different kind of counterfeit money at various times and places, and that he had made statements to a witness which were tantamount to an admission that he was a dealer in counterfeit money.⁵⁴ So, on the trial of an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity and the delivery of one note had been given, it was held that parol evidence of the contents of a *letter* from the defendant to an *accomplice* on the subject of counterfeit notes, for which the accomplice could not account and had not searched, but which he believed to be lost, might be admitted.⁵⁵

§ 334. [Continued.] Instances in the Case of Sexual Crimes.—

Upon the same principle, on an indictment for *adultery*, evidence of previous improper familiarities is competent.⁵⁶ But it is said that the reception of such evidence is to be controlled largely by the judge who tries the cause, and that it is to be submitted to the

⁵² Reg. v. Foster, Dearsley C. C. 456; Reg. v. Nisbett, 6 Cox C. C. 320; Reg. v. Salt, 3 Fost. & F. 834; Com. v. Price, 10 Gray, 473; St. v. Newman, 34 Mont. 434, 87 Pac. 462; Dillard v. People, 141 Fed. 303, 72 C. C. A. 451; Rex v. Mean, 69 J. P. 27, 21 Times Law Rep. 172. A decision by New York Court of Appeals, reversing the Supreme Court of that state, discloses reference to motive, as an element helping out admissibility of other forgeries in their tending to show a fraudulent

scheme See People v. Dolan, 186 N. Y. 4, 78 N. E. 569.

⁵³ Rex v. Balls, 1 Moody C. C. 470, 7 Carr. & P. 429.

⁵⁴ Com. v. Edgerly, 10 Allen (Mass.), 184, 186, 187.

⁵⁵ U. S. v. Doebler, 1 Baldw. (U. S.) 519.

⁵⁶ State v. Wallace, 9 N. H. 515; St. v. Marvin, 35 N. H. 22; Com. v. Merriman, 14 Pick. (Mass.) 518; Thayer v. Thayer, 101 Mass. 111 (overruling Com. v. Horton, 2 Gray (Mass.), 354, and Com. v. Thrasher, 11 Gray (Mass.), 450).

jury with proper explanation of its purpose and effect.⁵⁷ So, on an indictment for *seduction*, it is competent for the defendant to give evidence of previous acts of carnal intercourse between the prosecutrix and himself, not for the purpose of impeaching her character for chastity, but for the purpose of showing that the criminal act charged was not committed under a promise of marriage.⁵⁸ So, on an indictment for *rape*, evidence that the defendant had made previous attempts to have sexual intercourse with the prosecutrix has been held admissible.⁵⁹ But where the defendant was charged in the indictment with the *murder* of a woman, perpetrated in attempting to commit *rape* upon her, and the evidence of *another woman* was admitted, detailing the fact that, four years before, the defendant had committed a rape upon the witness in Canada, giving in full the circumstances of the outrage,—it was held that, for the admission of this evidence, a new trial must be had.⁶⁰

§ 335. [Continued.] Other Instances where such Evidence has been admitted.—In the leading case on this subject in New Hampshire,⁶¹ the court had the advantage of an exhaustive printed argument by the attorney-general, Lewis W. Clark (with whom were W. W. Flanders, solicitor, and C. P. Sanborn). In this argument the following instances were given of cases where evidence of other criminal acts has been admitted. They have been re-examined and verified by the present writer:—On the trial of an indictment for

⁵⁷ St. v. Witham, 72 Me. 531, 535.

⁵⁸ Bowers v. St., 29 Ohio St. 542.

⁵⁹ Williams v. St., 8 Humph. (Tenn.) 585; St. v. Knapp, 45 N. H. 148, 156, 157; St. v. Palmberg, 199 Mo. 233, 97 S. W. 566; Cecil v. Ter., 16 Okl. 197, 82 Pac. 654. In Vermont evidence of both prior and subsequent acts of intercourse admissible. St. v. Willett, 78 Vt. 157, 62 Atl. 48. The theory in some jurisdictions is, that it tends to show probability as to the particular act. St. v. Conlin, 45 Wash. 576, 88 Pac. 932. And the same applies to a prosecution for incest. Adams v. St., 78 Ark. 16, 92 S. W. 1123; Lipham v. St., 125 Ga. 52, 53 S. E. 817.

⁶⁰ St. v. Lepage, 57 N. H. 245.

The Ohio statute with reference to *seduction* (Ohio Act of April 4th, 1859, S. & C. 452) extends its protection to all females under the age of 18 years who are "of good repute for chastity;" and therefore on the trial of an indictment under the statute, it is not competent for the defendant to prove specific acts of carnal intercourse by the prosecutrix with other persons, but he must attack her character, if at all, by proof of her reputation. Bowers v. St., 29 Ohio St. 542. See Gen. Code Ohio 1910. § 13026.

⁶¹ St. v. Lepage, 57 N. H. 245.

shooting with intent to kill, evidence that the defendant shot at the same person at another time was held by all the judges admissible, for the purpose of showing that the shooting charged was not accidental.⁶² Where the charge was against a wife for murdering her husband by poison, evidence that three of her sons had been subsequently poisoned was received, as tending to show that the husband had died of poison, and that his death was not accidental.⁶³ Where the charge was against a mother for murdering her child by poison, evidence was held admissible that two other children of the mother and a lodger in the house had previously died of the same poison.⁶⁴ Where the charge was that the defendant had murdered his mother by poison, and the defendant's wife had lived in his family as a servant when his former wife died, evidence was received to show that his first wife had died of poison, and also to show the circumstances of her death.⁶⁵ Where the charge was against a mother for murdering her infant by suffocating it in bed, evidence was received to show the previous deaths of her other children at early ages.⁶⁶ Where the indictment was for the murder of H., evidence was received to show that H. had been employed by the defendant to murder P.⁶⁷ Where the charge was that the defendant had murdered his wife, evidence was received to show that he had lived in adulterous intercourse with another woman for some months prior to his wife's death.⁶⁸ So, on a trial for murder, evidence was received to show an adulterous intercourse between the defendant and the wife of the deceased.⁶⁹ On the charge of administering sulphuric acid to eight horses with intent to kill them, evidence that the defendant had administered the same chemical at different times, was received to show his intent.⁷⁰ On a charge of setting fire to a rick by firing a gun close to it, on the 29th of March, evidence that the rick was also on fire on the 28th of March, and that the prisoner was then close to it, having a gun in his hand, was received to show that the fire of the 29th was not accidental.⁷¹ On the charge of setting fire to the defendant's house with intent to defraud an insurance company, evidence that the defendant had

⁶² *Rex v. Voke*, Russ. & Ry. 531.

⁶³ *Reg. v. Geering*, 18 L. J. (Mag. Cas.) 215.

⁶⁴ *Reg. v. Cotton*, 12 Cox C. C. 400.

⁶⁵ *Reg. v. Garner*, 3 F. & F. 681.

⁶⁶ *Reg. v. Roder*, 12 Cox C. C. 630.

⁶⁷ *Rex v. Clewes*, 4 Carr. & P. 221.

⁶⁸ *St. v. Watkins*, 9 Conn. 47; *Johnson v. St.*, 17 Ala. 618; *Hall v. St.*, 40 Ala. 698; *People v. Stout*, 4 Park. Cr. (N. Y.) 71.

⁶⁹ *Com. v. Ferrigan*, 44 Pa. St. 386.

⁷⁰ *Rex v. Mogg*, 4 Carr. & P. 364.

⁷¹ *Reg. v. Dosset*, 2 Carr. & K. 306.

insured in other offices two other houses in which he had lived, which other houses were burned and that he received the insurance money from the other companies, has been held relevant as tending to show that the fire in question was intentional and not accidental.⁷² On an indictment for arson, evidence of two previous unsuccessful attempts to set fire to the same premises was admitted to show that the last fire was not accidental, although there was no evidence that the two former attempts were made by the defendant.⁷³ Where the charge was embezzlement by the defendant as a clerk, who had made false entries in his book of the amounts by him received, it was held that the book was evidence, and that generally not only the false entries bearing directly upon the issue, but also other similar false entries might be shown thereby.⁷⁴ Where the charge was that of embezzlement against a clerk who made out weekly accounts of his payments, it was shown that on three occasions within six months he had entered the payments correctly, but that in adding them up he had made the totals £2 greater than they were, and had taken credit for the larger amounts. These were the cases on which the indictments were founded. Evidence was admitted that, on several occasions before and afterwards, precisely similar errors had been made and similar advantage taken of them by him, as tending to show that the errors which were the foundation of the indictment were intentional and fraudulent, and not accidental.⁷⁵ In another case, where the charge was embezzlement, evidence of another act of embezzlement by the defendant during the same week was held competent on the question of intent.⁷⁶ Where the defendants were indicted for obtaining goods of certain persons by false pretenses, evidence of the purchase of other goods from other persons by similar pretenses was held competent on the question of criminal intent.⁷⁷ So, where the indictment was for obtaining money by false pretense, and the pretense charged was

⁷² Reg. v. Gray, 4 Fost. & F. 1102.

⁷³ Reg. v. Bailey, 2 Cox C. C. 311.

⁷⁴ Reg. v. Proud, Leigh & Cave C. C. 97, 101.

⁷⁵ Reg. v. Richardson, 2 Fost. & F. 343.

⁷⁶ Com. v. Shepherd, 1 Allen (Mass.), 575, 581. So receiving embezzled property of the same kind at or near the same time. Gassenheimer v. U. S., 26 App. D. C. 432;

Buechert v. St., 165 Ind. 523, 76 N. E. 111.

⁷⁷ Com. v. Eastman, 1 Cush. (Mass.) 189, 216. Or obtaining other moneys by a confidence game through bogus checks. Juretic v. People, 223 Ill. 484, 79 N. E. 181. Or misapplication of funds by officer of a national bank by means of similar loans. Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187.

that a chain which the defendant pledged to a pawn broker was silver, evidence that the defendant, a few days afterwards, offered a similar chain to another pawn broker, was held admissible.⁷⁸ Where, on an indictment for robbery, evidence was adduced to the effect that the prosecutor was induced, by defendant's advice, to give money to a mob who had come to his house for the purpose of getting rid of them and preventing mischief, it was competent to show that the same mob had demanded money at other houses when some of the defendants were present,—for the purpose of showing that the advice was fraudulent and a mere mode of effecting the robbery.⁷⁹ Where the defendant was indicted for robbery and found guilty of larceny of the prosecutor's watch, upon evidence that he had obtained it under the pretense of a bet, evidence was held competent to show that the defendant had attempted to practice the same artifice on other persons and on other occasions.⁸⁰ Where the question at issue was whether the purchase of property from one person was fraudulent, evidence was held admissible to show that the purchasers had fraudulently bought other property of other persons.⁸¹ Where the charge was the stealing of coal, it was held competent to prove that the defendant was the lessee of a coal mine, and that he had from the shaft of the leased mine wrongfully cut into adjoining premises and taken coal, during a period of more than four years, from the coal fields of thirty or forty different owners,—the evidence bearing upon the question of felonious in-

⁷⁸ Reg. v. Roebuck, Dearsley & B. C. C. 24; St. v. Gibson, 132 Iowa, 53, 106 N. W. 270; St. v. Seligman, 127 Iowa, 415, 103 N. W. 357.

⁷⁹ Rex v. Winkworth, 4 Carr. & P. 444.

⁸⁰ Defrese v. St., 3 Heisk. (Tenn.) 53, 62. As tending to show conspiracy to defraud the government of a large quantity of public lands, the overt act being by procuring entries by individuals not bona fide in character, defendant could be shown to have induced entry of other tracts by other persons at about the same time and under similar circumstances. Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21. In rebuttal the admissibility of such

evidence is considerably extended. See St. v. Bailey, 190 Mo. 257, 88 S. W. 733.

⁸¹ Bradley v. Obear, 10 N. H. 477, 480; Hovey v. Grant, 52 N. H. 569. See also St. v. Johnson, 33 N. H. 441, 456, 457; Ames Merc. Co. v. Kimball S. S. Co., 125 Fed. 332. Where the testimony is merely a legal conclusion it should not be received. Calvert v. Schultz, 143 Mich. 441, 106 N. W. 1123. The judge must decide whether or not the evidence is sufficient to submit the question of usage or custom to the jury. Traders Ins. Co. v. Dobbins & Ewing, 114 Tenn. 227, 86 S. W. 383.

tent.⁸² So, on an indictment for burglary, it is competent to show that the defendant entered the building with a felonious intent, by proof of a felony committed by him in the adjoining building.⁸³ So, it was held competent on an indictment of two persons for burglary, to show that they had committed other burglaries, for the purpose of showing privity and community of design.⁸⁴ So, on an indictment for kidnaping a negro boy, evidence that the defendants made a similar attempt to kidnap another boy on the day previous, was held competent as bearing upon the question of intent.⁸⁵ So, on a charge of keeping liquor for sale contrary to law, evidence that the defendant had previously sold other liquor, or kept other liquor for sale, or was a liquor-dealer, has been held admissible on the question of intent.⁸⁶ So, where the prisoner was indicted for placing obstructions upon a railroad track, it was held competent to prove that he had placed other obstructions than those for which the indictment was found, upon the same railroad track, the court reasoning that the acts were so connected that they might be regarded as being the continuation of the same transaction.⁸⁷

§ 336. **Usage of Trade or Business.**—So, where the question at issue is the practice or usage with reference to a particular trade or business, it is for the judge to decide, as a preliminary question, whether the evidence tendered upon the question is evidence of the fact of a general usage or practice prevailing in the particular trade or business, or merely the judgment or opinion of the witness. If the latter, he must reject it, as that furnishes no safe guide for interpretation.⁸⁸

§ 337. **Leading Questions.**—On the same principle the judge must determine the facts which form the necessary premises for a conclusion whether or not *leading questions* ought to be allowed to be put to a witness.⁸⁹

⁸² Reg. v. Bleasdale, 2 Carr. & K. 765.

⁸³ Osborne v. People, 2 Park. Cr. (N. Y.) 583; Phillips v. People, 57 Barb. (N. Y.) 356.

⁸⁴ Mason v. St., 42 Ala. 532, 539.

⁸⁵ Com. v. Turner, 3 Metc. (Mass.) 19, 24, 25.

⁸⁶ St. v. Plunkett, 64 Me. 534; Com. v. Stoehr, 109 Mass. 365; Com. v. Dearborn, 109 Mass. 368.

⁸⁷ St. v. Wentworth, 37 N. H. 197.

⁸⁸ Lewis v. Marshall, 7 Man. & G. 729, 743.

⁸⁹ Bundy v. Hyde, 50 N. H. 116, 120; post, §§ 357, et seq.; McBride v. Ga. Ry. & Elec. Co., 125 Ga. 515, 54 S. E. 674; St. v. Woodward, 191 Mo. 617, 90 S. W. 90; St. v. Drake, 128 Iowa, 539, 105 N. W. 54; Gordon v. St., 140 Ala. 29, 37 South. 158.

§ 338. **Further Illustrations.**—On the same principle it is for the judge, and not for the jury, to decide whether one person sustains such a relation to another, that the *declarations* of the former are admissible in evidence against the latter;⁹⁰ whether evidence shall be heard to show that a debt, absolute on its face, was merely intended by the parties as a mortgage;⁹¹ and whether a combination has been established such as renders competent unsworn declarations of a person, *dum fervet opus*, in furtherance of the common design.⁹²

⁹⁰ Cliquot's Champagne, 3 Wall. (U. S.) 114, 140; Claytor v. Anthony, 6 Rand. (Va.) 285; Cable Co. v. Walker, 127 Ga. 65, 56 S. E. 108; Leavell v. Leavell, 122 Mo. App. 654, 99 S. W. 460; Hartman v. Thompson, 104 Md. 389, 65 Atl. 117.

⁹¹ De France v. De France, 34 Pa. St. 385; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac.

349; Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813.

⁹² Claytor v. Anthony, 6 Rand. (Va.) 285; Moore v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418; St. v. White, 48 Or. 416, 87 Pac. 137; Lawrence v. St. 103 Md. 17, 63 Atl. 96; Wallace v. St., 48 Tex. Cr. R. 313, 87 S. W. 1041. .

CHAPTER XIV.

CONTROL OF THE COURT OVER THE EXAMINATION OF WITNESSES.

SECTION

- 343. Extent of the Discretion of the Court.
- 344. Order of Proof. Refusal to Reopen Case—Abuse of Discretion When.
- 345. Anticipating the Defense.
- 346. Allowing the Plaintiff to Introduce Evidence not in Rebuttal after the Defendant has Rested.
- 347. Defendant's Right of Reply or Sur-rebuttal.
- 348. Reopening the Case to admit Additional Evidence.
- 349. Recalling Witnesses for further Examination.
- 350. Allowing Witnesses to Correct their Testimony.
- 351. Admitting Irrelevant Testimony upon a Promise of subsequently Showing Relevancy.
- 352. Limiting Time — Stopping Repetitions and Irrelevant Examinations.
- 353. Limiting the Number of Witnesses.
- 354. Control as to the Mode of Examination.
- 355. Right of Judge to put Questions.
- 356. Indecent Questions.
- 357. Leading Questions.
- 358. [Continued.] What Questions are Leading and what not.
- 359. [Continued.] Where the Witness is manifestly Hostile.
- 360. [Continued.] Other Circumstances where Allowed.
- 361. Effect of Admissions upon offers of Evidence.

§ 343. **Extent of the Discretion of the Court.**—It is best to consider at the outset the extent of the discretionary power which is possessed by the trial judge in the matter of the examination of the witnesses and the deraignment of the evidence. As it may be necessary to appeal to this discretion to help the party out of the consequences of omissions or mistakes, it is necessary for counsel to have as clear a view as possible of the extent to which the law requires them to proceed according to strict rules, and the extent to which they may secure a possible relaxation of such rules through an exercise of the discretion of the court.

§ 344. **Order of Proof.**—Where the plaintiff sustains the burden of proof, “the rule of practice in the introduction of testimony is, that the plaintiff shall first bring forward all the testimony that

goes to establish his claim; the defendant shall then introduce his proof upon matters of defense and his testimony rebutting the proof adduced by the plaintiff; then the plaintiff by his proof rebutting that of the defendant. And after the plaintiff has introduced his proof establishing his case, and the testimony of the defendant has been heard, the plaintiff is not entitled, as a matter of right, to introduce additional proof in chief."¹ In strict practice the party holding the affirmative of the issue, is bound to give all his evidence in support of the issue, in the first instance; he can only give such evidence in reply, as tends to answer the new matter introduced by the adversary.² But the order in which testimony, competent and relevant to the issues, is admitted, is largely within the *discretion* of the trial court, and the exercise of this discretion is not assignable for error except in cases of manifest abuse.³ The reason

¹ Walker v. Walker, 14 Ga. 242, 250. See also Macullar v. Wall, 6 Gray (Mass.), 507; Hathaway v. Hemingway, 20 Conn. 195; Gilpins v. Consequa, 3 Wash. C. C. (U. S.) 184, Pet. C. C. 85; Pettibone v. Derringer, 4 Wash. C. C. (U. S.) 215; Braydon v. Goulman, 1 Monr. (Ky.) 115; Abb. Tr. Brief, 42; Gerrish v. Whitfield, 72 N. H. 222, 55 Atl. 551; Louisville Ry. Co. v. Gaar (Ky.), 112 S. W. 1130. Abuse of discretion to refuse to reopen and admit material evidence, inadvertently omitted. Tierney v. Spiva, 76 Mo. 279.

² Graham v. Davis, 4 Ohio St. 362; Miller v. Springfield Wagon Co., 6 Ind. T. 115, 89 S. W. 1011; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

³ Graham v. Davis, *supra*; Blake v. Powell, 26 Kan. 320, 327; Rheinhart v. St., 14 Kan. 322; Bourresau v. Detroit Evening Journal Co. (Mich.), 6 West. Rep. 151; Butterfield v. Gilchrist (Mich.), 5 West. Rep. 744; Hastings v. Palmer, 20 Wend. (N. Y.) 225; Ford v. Niles, 1 Hill (N. Y.), 300; Marshall v. Davies, 78 N. Y. 414, 420; Agate v. Morrison, 84 N. Y. 672; Braydon v. Goulman, 1 Monr. (Ky.) 115; St. v. Alford, 31 Conn. 40; St. v. Fox, 25 N. J. L. 566; Dane v. Treat, 35

Me. 198; Pierce v. Wood, 23 N. H. 519. Especially where the case is tried before the court, without a jury. Goodman v. Kennedy, 10 Neb. 271, 274; Walker v. Walker, *supra*. It is said that: "Only in an extreme case will it be held that the manner or order of presenting competent testimony violates a substantial right of either party." Blake v. Powell, *supra*, opinion by Brewer, J. The remedy for an abuse of such a discretion is a *motion for a new trial*; and if reviewable at all on error, it is only when, taken in connection with all the evidence in the case, it is shown to have prevented the party from having a fair trial. Webb v. St., 29 Ohio St. 351; McBride v. Steinwender, 72 Kan. 508, 83 Pac. 822; Campell v. Ry. Transfer, 95 Minn. 375, 104 N. W. 547; St. v. Smith, 115 La. 801, 40 South. 171; St. v. Dilts, 191 Mo. 665, 90 S. W. 782; Com. v. Tucker, 189 Mass. 457, 76 N. E. 127; Lorenz v. U. S., 24 App. D. C. 337; Turner v. U. S., 66 Fed. 280, 13 C. C. A. 436; Dunn v. Harrison, 83 Ala. 384, 3 South. 715. All questions relating to the apparent competency of a particular item of evidence, where there is promise to connect or supply 115, 119.

and policy of this rule were thus well stated by Poland, J.: "Although there are certain established rules, which have obtained in the process of trying causes before a jury, and in the order of introducing the evidence of witnesses, yet these rules, for the most part, are but rules of practice, and are considered as under the control of the court, and subject to be varied, in the exercise of a sound judicial discretion; so that a departure from the ordinary rules, in the course of a trial, or a refusal to grant such indulgence to a party on request, cannot properly be made a ground of error. Of this class are the rules as to the order of introducing the evidence, and also as to the mode of examining witnesses. Indeed, the constantly varying circumstances under which cases arise, and the haste and confusion which must frequently be expected in jury trials (without permitting the exercise of the discretion of the court), would often lead to most unjust results and disastrous consequences."⁴

§ 345. Anticipating the Defense.—Thus, while the plaintiff is not bound to anticipate the defense of his opponent, and to introduce evidence in rebuttal of it,⁵ yet, where the materiality of evidence in rebuttal is foreshadowed by the line of defense, it is within the discretion of the trial court to admit it in advance of the evi-

predicate making the admission conditional, and matters of that nature, are in the trial court's discretion. See *Bashore v. Mooney* (Cal. App.), 87 Pac. 553; *People v. Tollefron*, 145 Mich. 444, 108 N. W. 751; *Jones v. Peterson*, 44 Ore. 161, 74 Pac. 661; *Virginia F. & M. Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973; *Morse v. Woodworth*, 155 Mass. 293, 29 N. E. 525. It has been held error for the court to attempt to control defendant as to mere sequence in the introducing of his testimony. *Brown v. St.*, 88 Miss. 166, 40 South. 737:

⁴ *Goss v. Turner*, 21 Vt. 437, 439. The learned judge cited *Clayes v. Ferris*, 10 Vt. 112; *Hopkinson v. Steel*, 12 Vt. 582. See also *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Déc. 676. See under Tex. Stat.

ute, Bostick v. St., 11 Tex. App. 126; *Cohea v. St.*, Id. 153; *Dosch v. Diem*, 176 Pa. 603, 35 Atl. 207; *Branstetter v. Morgan*, 3 N. D. 290, 55 N. W. 758. Thus in connection with a cross examination evidence of a documentary character may, in the court's discretion, be permitted in the other party's time. *Ranney v. St. Johnsbury etc. R. Co.*, 67 Vt. 594, 32 Atl. 810; *Tietz v. Tietz*, 90 Wis. 66, 62 N. W. 939; *Patton v. Fox*, 179 Mo. 625, 78 S. W. 804.

⁵ *Dodge v. Dunham*, 41 Ind. 187, 192; *Bancroft v. Sheehan*, 21 Hun (N. Y.), 550. Strictly it has been held that such evidence is inadmissible. *Maurice v. Hunt*, 80 Ark. 476, 97 S. W. 664. And also it has been held that the prosecution has the right to anticipate evidence tending to sustain the defense of

dence which it is intended to rebut.⁶ It has been laid down that it is not an objectionable practice to allow the plaintiff, after submitting sufficient evidence to make a *prima facie* case within his complaint, to rest and see what the defendant will make out by way of affirmative proof, reserving the balance of his evidence for purposes of rebuttal,—thereby not exhausting all his ammunition at the first fire.⁷

§ 346. Allowing Plaintiff to introduce Evidence not in Rebuttal after Defendant has rested.—The admission or exclusion of evidence not strictly in rebuttal is a matter resting in the discretion of the trial court, the exercise of which discretion is not subject to review except in cases of gross abuse.⁸ The proper rule for the exercise of this discretion is, that material testimony should not be excluded because offered by the plaintiff after the defendant has rested, although not in rebuttal, unless it has been kept back by a

self-defense in a murder case. *Stevens v. St.*, 138 Ala. 71, 35 South. 122.

⁶ *Dimick v. Downs*, 82 Ill. 570; *York v. Pease*, 2 Gray (Mass.), 282; *Williams v. DeWitt*, 12 Ind. 309; *Dunn v. People*, 29 N. Y. 523; *Bancroft v. Sheehan*, 21 Hun (N. Y.), 550; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *Kansas City F. S. & M. R. Co. v. McDonald*, 51 Fed. 178, 2 C. C. A. 153; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Lilly v. Person*, 168 Pa. 219, 32 Atl. 23. This is said to be at most a mere irregularity not constituting reversible error, where defendant afterwards introduces evidence, which would have made the evidence competent in rebuttal. *Easley v. M. P. R. Co.*, 113 Mo. 236, 20 S. W. 1073; *E. T. V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828.

⁷ *Dean v. Corbett*, 51 N. Y. Super. (19 J. & S.) 103. And see *Bedell v. Carll*, 33 N. Y. 581. But if the plaintiff takes this course, he is not, in strict right, entitled to give in rebuttal further evidence on the

same point. *Holbrook v. McBride*, 4 Gray (Mass.), 215; *York v. Pease*, 2 Id. 282; *Gilpins v. Consequa*, 3 Wash. C. C. (U. S.) 184.

⁸ *Farmers' Mutual Fire Insurance Co. v. Bair*, 87 Pa. St. 124; *Vandike v. Townsend*, 6 Week. Notes Cas. (Pa.) 55; *Marshall v. Davies*, 78 N. Y. 414, 58 How. Pr. (N. Y.) 231; reversing 16 Hun (N. Y.), 606; *Huntsman v. Nichols*, 116 Mass. 521; *Dozier v. Jerman*, 30 Mo. 216, 220; *Walker v. Walker*, 14 Ga. 242; *Gaines v. Com.*, 50 Pa. St. 319; *Morse v. Potter*, 4 Gray (Mass.), 292; *Day v. Moore*, 13 Id. 522; *Clinton v. McKenzie*, 5 Strobb. (S. C.) 36; *Finlay v. Stewart*, 56 Pa. St. 183; *Dailey v. Grimes*, 27 Md. 440; *McCoy v. Phillips*, 4 Rich. (S. C.) 463; *Birmingham Ry. etc. Co. v. Martin*, 148 Ala. 8, 42 South. 618; *Olwell v. Skobis*, 126 Wis. 308, 105 N. W. 777; *Louisville & N. R. Co. v. Board*, 28 Ky. Law Rep. 921, 90 S. W. 944; *St. v. Seligman*, 127 Iowa, 415, 103 N. W. 357; *Norfolk & A. Terminal Co. v. Morris*, 101 Va. 423, 44 S. E. 719; *Mayer v.*

trick, and for the purpose of deceiving the defendant and affecting his case injuriously.⁹ On this subject, the following observation has been made: "It is a settled rule of practice that, whilst the plaintiff is entitled to rest, on making out a *prima facie* case, and afterwards to adduce additional as well as rebutting testimony, the defendant is in general required to go through his proofs before resting. In ordinary cases, a departure from this course is matter of indulgence and discretion with the court, and a refusal to permit it is, therefore, no ground of error. The rule supposes, however, that the case as first made by the plaintiff shall be calculated to apprise the defendant of the ground on which the right of recovery is finally to be supported. If a new case is made in the close, without any previous notice to the defendant, he should be allowed to go into evidence in answer to it."¹⁰ But the plaintiff is not entitled to this grace. The strict rule is that he must try his case out when he commences.¹¹ He cannot in strictness (though he can in discretion) be allowed to prove again the facts which he proved, in making out his *prima facie* case.¹² The better view, however, is that where the plaintiff's *prima facie* case is vigorously assailed, he should be allowed to introduce in rebuttal additional *corroborating evidence*.¹³ This discretion cannot be exercised so as to abridge the plaintiff's *right of rebuttal*,—which is, his right to in-

Walker, 82 Tex. 222, 17 S. W. 505; Willard v. Pettit, 153 Ill. 663, 39 N. E. 991; Hale v. Life etc. Co., 65 Minn. 548, 68 N. W. 182; Jacksonville etc. R. Co. v. Peninsula etc. Co., 27 Fla. 1, 9 South. 661, 17 L. R. A. 33; Halthouse v. Rynd, 155 Pa. 43, 25 Atl. 760; K. C. So. R. Co. v. Henrie (Ark.), 112 S. W. 767.

⁹ Richardson v. Lessee etc., 4 Binn. (Pa.) 198; Rucker v. Eddings, 7 Mo. 115, 118; Dozier v. Jerman, 30 Mo. 216, 220; Foley v. Brunswick Traction Co., 69 N. J. L. 481, 55 Atl. 803; Birmingham v. Pettit, 21 D. C. 209; Indiana Farmer etc. Ins. Co. v. Byrket, 9 Ind. App. 443, 36 N. E. 779; DeKenner v. Parker, 19 Colo. 242, 34 Pac. 980.

¹⁰ Claves v. Ferris, 10 Vt. 112; McGowan v. Chicago & N. W. R. Co., 91 Wis. 607, 40 N. W. 212.

¹¹ Rowe v. Brenton, 3 Man. & Ry. 133, 139; Young v. Brady, 94 Cal. 128, 29 Pac. 489; Fox v. Peninsular etc. Works, 84 Mich. 676, 48 N. W. 203. But if discretion is abused it will be corrected on appeal. Wilson v. Johnson, 51 Fla. 370, 41 South. 395.

¹² Union Water Co. v. Crary, 25 Cal. 504; Kohler v. Wells, 60 Cal. 606; Jacksonville T. & K. W. R. Co. v. Wellman, 26 Fla. 344, 7 South. 845; Cogswell v. West St. etc. R. Co., 5 Wash. 46, 31 Pac. 411; Barnes v. Stacy, 79 Wis. 55, 48 N. W. 53.

¹³ Bryan v. Walton, 20 Ga. 480; Davidson v. Overhulser, 3 Iowa, 196; Union Pac. etc. R. Co. v. Perkins, 7 Colo. App. 184, 42 Pac. 1047; Wine- man v. Grummond, 90 Mich. 280, 51 N. W. 509; Taylor v. Cayce, 97 Mo. 242, 10 S. W. 382.

roduce evidence which tends to meet and overthrow the *affirmative case* set up by the defendant in his testimony.¹⁴ It is no ground of exception to such evidence that, in addition to rebutting the defendant's new matter, it also tends to *corroborate* the case made by the plaintiff in chief;¹⁵ nor that it may necessitate allowing the defendant to give evidence in sur-rebuttal.¹⁶

§ 347. **Defendant's Right of Reply or Sur-rebuttal.**—Moreover, this discretion cannot properly be exercised so as to cut off the defendant's right of reply to any new matter which the plaintiff may thus be allowed to introduce in rebuttal, provided the defendant has not had the opportunity of introducing the same evidence in his case in chief,¹⁷—and this, in the view of one court, though his evidence in reply is merely cumulative.¹⁸

§ 348. **Reopening the Case to Admit Additional Evidence.**—So, it is within the *discretion* of the trial court, both in civil and criminal trials, to reopen the case at the request of a party, for the purpose of allowing him to introduce additional evidence.¹⁹ The court

¹⁴ *Bancroft v. Sheehan*, 21 Hun (N. Y.), 550; *Andrews v. Hayden's Admrs.*, 88 Ky. 455, 11 S. W. 428; *Anderson v. Arpin* *Hardwood Lbr. Co.*, 131 Wis. 34, 110 N. W. 788.

¹⁵ *Chadbourn v. Franklin*, 5 Gray (Mass.), 312; *Maier v. Mass. Ben. Assn.*, 107 Mich. 687, 65 N. W. 1052; *Miendorff v. Manhattan R. Co.*, 4 App. Div. 46, 38 N. Y. S. 690.

¹⁶ *Abb. Tr. Brief*, 43; citing *Scott v. Woodward*, 2 McCord (S. C.), 161; *Hills v. Ludwig*, 46 Ohio St. 373, 24 N. E. 596.

¹⁷ *Asay v. Hay*, 89 Pa. St. 77; *Kent v. Lincoln*, 32 Vt. 591 (compare as to Vermont rule *Thayer v. Davis*, 38 Vt. 163). The surrebuttal should be confined to new matter brought out on the rebuttal. *St. v. Forsha*, 190 Mo. 296, 88 S. W. 746; *Chateaugay O. & I. Co. v. Blake*, 144 U. S. 476, 36 L. Ed. 510; *Arnold v. Pfontz*, 117 Pa. 103, 11 Atl. 871. It has been held, that, where there

was merely a simple denial in chief and details are gone into on rebuttal, on surrebuttal plaintiff's reputation for truth and veracity might be shown. *Devonshire v. Peters*, 104 Mich. 501, 63 N. W. 973. And also it has been ruled, that the surrebuttal is extended by permitting evidence in rebuttal, which should have been introduced in chief. *Gandy v. Earle*, 30 Neb. 183, 46 N. W. 418.

¹⁸ *Walker v. Fields*, 28 Ga. 237.

¹⁹ *Com. v. Ricketson*, 5 Metc. (Mass.) 412, 428; *Taylor v. Shemwell*, 4 B. Mon. (Ky.) 575; *Fleet v. Hoelenkemp*, 13 B. Mon. (Ky.) 219; *Larman v. Huey*, 13 B. Mon. (Ky.) 436; *McDowell v. Crawford*, 11 Gratt. (Va.) 377, 408; *Eggspieller v. Knockles*, 58 Iowa, 649; *McKinney v. Jones*, 55 Wis. 39; *St. v. Coleman*, 27 La. Ann. 691; *Johnston v. Mason*, 27 Mo. 511; *St. v. Porter*, 26 Mo. 201, 209; *Couch v. Charlotte*

may allow a party to introduce further evidence after the testimony has closed on both sides,²⁰ after a demurrer to the evidence has been made,²¹ after the argument has commenced,²² and even after the argument has closed.²³ The court may allow the prosecution in a criminal trial, to reopen its case and introduce further evidence in chief, even after the examination of witnesses for the defense has

etc. R. Co., 22 S. C. 557; *St. v. Rose*, 33 La. Ann. 932; *Darlend v. Rosencrans*, 56 Iowa, 122, 8 N. W. 776; *Williams v. Hayes*, 20 N. Y. 58; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, 295; *People v. Rector*, 19 Wend. (N. Y.) 569; *St. v. Constantine*, 43 Wash. 102, 86 Pac. 384; *Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13; *Lally v. Woodward*, 5 N. M. 583, 25 Pac. 785; *Consol Nat. Bank v. Pac. Coast S. S. Co.*, 95 Cal. 1, 30 Pac. 96; *Hartley St. Bank v. McCorkell*, 91 Iowa, 660, 60 N. W. 197; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 99, 24 S. W. 192; *Calkins v. Seabury-Calkins etc. Co.*, 5 S. D. 299, 58 N. W. 797; *Riba v. Pelnar*, 86 Wis. 408, 57 N. W. 51; *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372. To recall a witness to settle a dispute between counsel as to what he had testified to does not take away discretion in refusing to hear further evidence on same subject. *Gregg v. Mollett*, 111 N. C. 74, 15 S. E. 936.

²⁰ *Taylor v. Shemwell*, 4 B. Mon. (Ky.) 577; *Hess v. Wilcox*, 58 Iowa, 380, 10 N. W. 847; *Morena v. Winston*, 194 Mass. 378, 80 N. E. 473; *People v. Wiemers*, 227 Ill. 59, 81 N. E. 7; *Standard Cotton Mills v. Cheatham*, 125 Ga. 649, 54 S. E. 650; *Hill v. Miller*, 50 Kan. 659, 32 Pac. 304; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *St. v. Duvall*, 83 Md. 123, 34 Atl. 831; *Joplin W. W. Co. v. Joplin*, 177 Mo. 496, 76 S. W. 960; *Leake v. King D. G. Co.*, 5 Ga. App. 102, 62 S. E. 729.

²¹ *Tierney v. Spiva*, 76 Mo. 279;

Kane v. Kane, 35 Wash. 517, 77 Pac. 842; *Bridges v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97; *Pocahontas Collieries Co. v. Williams*, 105 Va. 708, 54 S. E. 868; *Dorr Cattle Co. v. Chicago, etc. R. Co.*, 128 Iowa, 359, 103 N. W. 1003; *Anderton v. Blais*, 28 R. I. 78, 65 Atl. 602; *Farmers etc. Bank v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680; *Carradine v. Hotchkiss*, 120 N. Y. 608, 24 N. E. 1020; *McCoy v. Niblick*, 221 Pa. 123, 70 Atl. 577. The court may impose terms by providing, that even more evidence shall be introduced than upon the one point, as to which leave is invoked. *Cole v. Gray*, 70 Kan. 705, 79 Pac. 654. In Alabama it was held, that, where defendant demurs and judgment is entered, court should not reopen the merits generally, on a trial before a jury. *Gluck v. Cox*, 90 Ala. 331, 8 South. 161.

²² *Ruggles v. Coffin*, 70 Me. 468; *George v. Pilcher*, 28 Gratt. (Va.) 299, 310; *Watson v. Barnes*, 125 Ga. 733, 54 S. E. 723; *Gulf C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; *Lowenstein v. Finney*, 54 Ark. 124, 15 S. W. 153. Court may require a statement of facts expected to be proven or show why this cannot be done. *Wagar v. Bowley*, 104 Mich. 38, 62 N. W. 293.

²³ *Breedlove v. Bundy*, 96 Ind. 319; *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642; *Fremont etc. R. Co. v. Crum*, 30 Neb. 70, 46 N. W. 217. A case should not be reopened merely to submit expert evidence. *Bertha*

commenced,²⁴ and after the State has closed and the defendant has announced that he will introduce no evidence;²⁵ though it has been elsewhere said that this discretion should be exercised with the utmost caution.²⁶ This discretion will not be exercised where it would work a fraud on the opposite party, or where the withholding of the evidence was a manifest trick;²⁷ and if the introduction of such additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side.²⁸ It is scarcely necessary to add that it is not an abuse of discretion for the trial court to refuse to open a case to admit further defenses after the trial, where the defendant, *knowing* of the existence of the defenses, neglected to assert them in his pleading in the first instance, and gives no satisfactory reason for the neglect.²⁹ But where the plaintiff has inadvertently omit-

Zinc Co. v. Martin's Admr., 93 Va. 791, 22 S. E. 869; Nelson v. Finseth, 55 Minn. 417, 57 N. W. 141. And even after jury has retired, if so shortly that their deliberations could scarcely have begun. Royston v. Illinois Cent. R. Co., 67 Miss. 376, 7 South. 320.

²⁴ St. v. Clyburn, 16 S. C. 375; Humphreys v. St., 78 Wis. 569, 47 N. W. 836.

²⁵ St. v. Rose, 33 La. Ann. 932.

²⁶ Clough v. St., 7 Neb. 323, 341, 342. See also Kalle v. People, 4 Park. Cr. R. (N. Y.) 591. This must be allowed under Tex. Code Crim., art. 661 (which is mandatory), at any time before the conclusion of the arguments. Donahoe v. St., 12 Tex. App. 297.

²⁷ Breedlove v. Bundy, 96 Ind. 319. Where prosecution failed to produce one, who it knew claimed to be an eyewitness to the homicide, and defendant's evidence tended to show she was connected therewith, she should not have been allowed to testify on a reopened case under the incentive thus afforded to color her testimony against defendant. People v. Harper, 145 Mich. 402, 108 N. W. 689.

²⁸ George v. Pilcher, 28 Gratt. (Va.) 299, 310. Or if the other side would be placed at a disadvantage by reason of having excused a witness. Osgood v. Bander, 82 Iowa, 171, 47 N. W. 1001. If it was newly discovered, and counsel state he was unable to discover it sooner and it does not appear it would have taken the other side by surprise, it should be admitted. St. L. etc. R. Co. v. Fire Assn., 55 Ark. 163, 18 S. W. 43.

²⁹ Kirschbon v. Bonsel, 67 Wis. 178, 29 N. W. 907. And see Foster v. Newbrough, 66 Barb. (N. Y.) 645, where it was held that it was proper to refuse to allow the defendant, after the plaintiff had closed in rebuttal, to offer witnesses to sustain his testimony on the defense and to contradict the plaintiff's evidence in rebuttal. In a case in Georgia it was said by Lumpkin, J.: "I must say that so much averse am I to withholding testimony, that I can hardly conceive of a case so gross and palpable that I should feel constrained to control the discretion of the circuit judge from receiving at any time additional affirmatory, cumulative and corroborative evidence of

ted to introduce a formal though necessary document, until after the close of his evidence, it will be an abuse of discretion, for which the judgment will be reversed, to refuse his application to be allowed to introduce it then.³⁰ So, where a material witness failed to arrive in time through no fault of his own, it was held error to refuse to allow him to testify, after the argument had commenced, but before the case had been finally submitted to the jury.³¹ If, after the defense is closed, the plaintiff introduces new evidence, the defendant will have the right to explain.³² Thus, where, after the plaintiff had rested, the defendants moved for a non-suit, on the ground that there was already on the records of the court a judgment against them, the plaintiff, it was held, must be allowed to introduce a docket entry showing that it has been set aside.³³ If the court exercises this *discretion unsoundly*,³⁴—as by refusing to let in evidence which has been omitted in its regular order by an oversight, the judgment will be reversed.³⁵

§ 349. Recalling Witnesses for Further Examination.—So, it is within the *discretion* of the trial court to grant³⁶ or to refuse³⁷ an

fact^s previously proved, or which tends to strengthen and add force or probability to such evidence. *Walker v. Walker*, 14 Ga. 242, 250. It has even been held no error, in a suit on a promissory note, to admit evidence of a reasonable attorney's fee (allowed by statute), after motions for new trial and in arrest have been overruled. *Maynard v. Shorb*, 85 Ind. 501; *Cincinnati etc. R. Co. v. Cox*, 143 Fed. 110 (C. C. A.); *Alexis v. U. S.*, 129 Fed. 60, 63 C. C. A. 502; *LeMoyne v. Braden*, 87 Iowa, 739, 55 N. W. 14; *Loftus v. Fisher*, 113 Cal. 286, 45 Pac. 328; *Derry v. Holman*, 27 S. C. 621, 2 S. E. 841. Where defendant has introduced no evidence at all, it is no abuse of discretion to refuse to open the case to permit him to do so. *Blewett v. Gaynor*, 77 Wis. 378, 46 N. W. 547.

³⁰ *Meacham v. Moore*, 59 Miss. 561; *Case v. Dodge*, 18 R. I. 661, 29 Atl. 785. *Tierney v. Spiva*, 79 Mo. 279. And so of a formal but nec-

essary fact, e. g. the death of a life tenant in suit by a remainderman. *Wingo v. Caldwell*, 35 S. C. 609, 14 S. E. 827. Even after verdict or judgment court may, in its discretion, allow documentary evidence in perfecting technically the record, where it does not appear the verdict could not have been affected thereby. *Meserve v. Folsom*, 62 Vt. 504, 20 Atl. 926.

³¹ *Smith v. State Ins. Co.*, 58 Iowa, 478. Or was taken ill while testifying and had to leave court and returned later while argument was progressing. *Ft. Worth & D. C. R. Co. v. Johnson*, 5 Tex. Civ. App. 24, 23 S. W. 827.

³² *Asay v. Hay*, 89 Pa. St. 77.

³³ *Gillette v. Morrison*, 7 Neb. 395.

³⁴ *Meyer v. Cullen*, 54 N. Y. 392; *Meacham v. Moore*, 59 Miss. 561.

³⁵ *Owen v. O'Reilly*, 20 Mo. 603.

³⁶ *St. v. Coleman*, 27 La. Ann. 691; *Johnston v. Mason*, 27 Mo. 511; *St. v. Porter*, 26 Mo. 201, 209; *Samuels v. Griffith*, 13 Iowa, 103; *Morning-*

application to recall a witness, who has been examined and dismissed from the stand, for further examination. A witness may be thus recalled after cross-examination, for further examination in chief,³⁸ or for further cross-examination.³⁹ But when permitted to be recalled, the court is entitled to exercise a large discretion as to the manner in which, and the extent to which the favor granted shall be made use of.⁴⁰

§ 350. **Allowing Witness to correct his Testimony.**—The trial court will always allow a witness to explain an error, mistake or

star v. St., 59 Ala. 30; Rucker v. Eddings, 7 Mo. 115; Brown v. Burrus, 8 Mo. 26; Gavan v. Elsworth, 45 Ga. 283; Cothran v. Forsyth, 68 Ga. 560; De Lorne v. Pease, 19 Ga. 220; Jesse v. St., 20 Ga. 156, 164; Jones v. Smith, 64 N. Y. 180. See also Curran v. Connery, 5 Binn. (Pa.) 488. By statute in *Texas*, "the court shall allow testimony to be introduced at any time before argument of a cause is concluded, if it appear that it is necessary to a due administration of justice." Pasch. Dig. Tex. Stat., art. 3046. See Sherwood v. St., 42 Tex. 498. The construction of this statute is that the discretion thus confided to the court is not subject to revision, except in cases where it has been so abused as to defeat the ends of justice (Kemp v. St., 38 Tex. 111; Roach v. St., 41 Tex. 262; Treadway v. St., 1 Tex. App. 668); and that it would be difficult to conceive of such a case, where the discretion has been exercised by permitting the re-examination. Treadway v. St., 1 Tex. App. 668. See also Harris v. St., 44 Tex. 146; Meredith v. St., 40 Tex. 483. A witness thus recalled does not necessarily become the witness of the party recalling him. Treadway v. St., 1 Tex. App. 668, 670. Recalling to lay foundation for impeachment. Ibid. Recalling to restate testi-

mony, under Texas statute (Pasch. Dig. Tex. Stat., art. 3080; Tex. Code Cr. Proc., art. 615) where jury disagree as to the statements of the witnesses. Edmondson v. St., 7 Tex. App. 116; Campbell v. St., 42 Tex. 591; Tarver v. St., 43 Tex. 564; Hammond v. St., 147 Ala. 79, 41 South. 761; St. v. Johnson, 116 La. 30, 40 South. 521; McQueen v. Com., 28 Ky. Law Rep. 20, 88 S. W. 1047; People v. McNamarra, 94 Cal. 509, 29 Pac. 953; Brown v. St., 72 Md. 468, 20 Atl. 186.

³⁷ People v. Mather, 4 Wend. (N. Y.) 229, 249; Beaulieu v. Parsons, 2 Minn. 37; Treadwell v. Goodwin, 6 Bosw. (N. Y.) 180. It has been held that the fact that, in a criminal trial after the prosecuting witness has left the stand, another witness for the prosecution gives a different account of the occurrence from that given by the prosecutor, does not give the defendant a right further to cross-examine the prosecutor. People v. Parton, 49 Cal. 632. It is scarcely necessary to say that a witness cannot thus be recalled without *special leave* of the court, whether in a case at law or in equity. Girault v. Adams, 61 Md. 1, 9; Heise's Case, 44 Md. 453.

³⁸ Brown v. Burrus, 8 Mo. 26, 30.

³⁹ Cummings v. Taylor, 24 Minn. 429.

⁴⁰ Ibid. Rule of court restricting

oversight in his testimony, when he requests the privilege of doing so before leaving the stand.⁴¹ But whether it will allow a witness to be *recalled* for the purpose of correcting his testimony after he has left the stand, is a matter which rests in the *discretion* of the court.⁴² This will always be allowed unless there is reason to believe that the witness desires to substitute an untruthful statement for a truthful one,—especially in view of the fact that the witness has delivered his testimony under the risk of an indictment for *perjury*, and if he has testified erroneously he is under a moral, if not a legal obligation, of tendering the proper correction.⁴³ But *amended swearing* is a thing which justice suspects and abhors; and where a witness has demeaned himself unfavorably on the stand, has been manifestly prejudiced or uncandid, it will be no abuse of discretion to deny him the privilege of returning to the stand for the alleged purpose of correcting a statement, if there is reason to believe that the correction will not be in furtherance of truth and justice.⁴⁴ It is not error for the court to allow the testimony of witnesses, taken down in writing, to be *read over* to them in the presence of the jury, for the purpose of correcting errors

this discretion not valid. *De Lorne v. Pease*, 19 Ga. 220, 227.

⁴¹ *Oberfelder v. Kavanaugh*, 21 Neb. 483, 32 N. W. 296; *Pac. Exp. Lumber Co. v. North Pac. Lumber Co.*, 46 Ore. 194, 80 Pac. 105. Or to give his version as to statements attributed to him where cross-examined as to contradictory statements. *St. v. Reed*, 89 Mo. 168, 1 S. W. 225.

⁴² *Miller v. Hartford Ins. Co.*, 70 Iowa, 704, 29 N. W. 411; *Erickson v. Milwaukee etc. R. Co.*, 93 Mich. 414, 53 N. W. 393; *Cherokee etc. Co. v. Hilson*, 95 Tenn. 1, 31 S. W. 737; *Denehy v. O'Connell*, 66 Conn. 175, 33 Atl. 920; *Chicago City R. Co. v. Walsh*, 136 Ill. App. 73. May be recalled to explain an ambiguous expression. *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30, 42 N. E. 334.

⁴³ Upon this point it was said by Lumpkin, J.: "A witness, through forgetfulness or inadvertence, misstates a fact: upon reflection he dis-

covers the mistake and seeks to rectify it. Would it not be monstrous to deny him the privilege? Is it not due to him, apart from any other consideration? Should he fail to make the explanation so soon as he detects the error, he would be guilty undoubtedly of moral, if not of legal perjury. And for the court to refuse him the permission to make a correction would be to transfer the guilt from his conscience to theirs." *Walker v. Walker*, 14 Ga. 242, 251; *Faust v. U. S.*, 163 U. S. 453, 41 L. Ed. 224; *Blumb v. Curtis*, 66 Conn. 154, 33 Atl. 998.

⁴⁴ A witness who had just sworn that certain property was worth \$2,000, was not allowed to be recalled for the purpose of proving that, at the same time referred to in his testimony, the property was worth but \$300. *St. v. Nauert*, 6 Mo. App. 596.

which may have been committed in writing it down. It is impossible that a party can be injured by having the testimony twice impressed on the minds of the jury, if it is taken down correctly; and it can do him no injustice to have errors, if any, corrected.⁴⁵

§ 351. **Admitting Irrelevant Testimony upon a promise of subsequently showing Relevancy.**—It is laid down by Professor Greenleaf that it is not necessary that the relevancy of testimony “should appear at the time when it is offered, it being the usual course to receive, at any proper and convenient stage of the trial, in the *discretion* of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is laid out of the case.”⁴⁶ This is regarded by many courts as merely a branch of the general rule already treated of,⁴⁷ that the order of proof is a matter within the discretion of the trial court. Thus, it has been held that a judgment will not be reversed because the court admitted *declarations of a conspirator* against his co-conspirator, before proof of the connection of the latter with the conspiracy had been made, provided the proof was afterwards made. If the proof is not afterwards made, the rule is to withdraw the testimony from the jury.⁴⁸ It is conceded, however, that the better rule is not to admit evidence of the declarations of a co-conspirator or accomplice, until a *prima facie* case has been made, establishing the fact of the conspiracy.⁴⁹ And, in general, it is an objectionable practice, to admit evidence which may be prejudicial, with the understanding that it may be *excluded* from the jury by *an instruction*, unless the party tendering it produces other evi-

⁴⁵ Cobb v. St., 27 Ga. 648. See also Crawford v. St., 12 Ga. 145.

⁴⁶ 1 Greenl. Ev., § 51a. Compare Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; People v. Bragle, 10 Abb. New Cas. (N. Y.) 300, 26 Hun (N. Y.), 378; Gould v. Dwelling House Ins. Co., 134 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; McIntyre v. Smith, 108 Va. 736, 62 S. E. 930. This is not however an arbitrary discretion and is subject to review when abused. See Guess Lumber

Co. v. Coody, 94 Ga. 519, 21 S. E. 217. This rule applies as well to documentary as to oral evidence. Loudon v. Vinton, 108 Mich. 313, 66 N. W. 222; Consane v. Sheldon, 35 Neb. 247, 52 N. W. 1104.

⁴⁷ Ante, § 344.

⁴⁸ Miller v. Barber (N. Y. Ct. of App.), 4 Cent. Law. Journ. 177. See Page v. Parker, 40 N. H. 62; Sweat v. Rogers, 6 Heisk. (Tenn.) 118; Page v. Parker, 43 N. H. 363.

⁴⁹ Sweat v. Rogers, *supra*; Pearson v. South, 61 Iowa, 232, 16 N. W. 99.

dence which makes it competent,⁵⁰ for which in some cases judgments have been reversed.⁵¹ In a criminal case where this was done it was said: "It must be apparent that such testimony, having once gone to the jury, its impression would necessarily, to some extent, remain in their minds, though they were ordered to discard it; and in a case of circumstantial evidence, it is next to impossible to say how far that impression exercised its influence in supplying any defect which might have arisen, or in solving any doubt in their minds on the general state of the evidence. A prosecuting officer in behalf of the State, in his zeal for a conviction, should never overlook the fact that the interests of society and the vindication of the law require at his hands as much the protection of the innocent as the conviction of the guilty. Evidence of this character, in cases involving life, should never be proposed by him, unless he is morally certain that he can make good his promise of connecting the defendant with the matter; there should be no room for doubt, where, as in this case, he could have ascertained in advance the existence or non-existence of defendant's connection with the proposed evidence."⁵² On the other hand, there is considerable authority to the effect that the admission of improper evidence, which is subsequently withdrawn from the jury, presents no available error.⁵³ In any view, counsel cannot claim the privilege of thus putting evidence before laying the foundation, without stating in advance *what he expects to prove*, and in such a case it will be no error to refuse it.⁵⁴

⁵⁰ Insurance Co. v. Rubin, 79 Ill. 402; Howe Machine Co. v. Rosine, 87 Ill. 105; post, §§ 723, 2415; Lungerbransen v. Crittenden, 103 Mich. 173, 61 N. W. 270; Harvey v. Edens, 69 Tex. 420, 6 S. W. 306; Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935.

⁵¹ St. v. Mix, 15 Mo. 153; St. v. Wolff, 15 Mo. 168; St. v. Schneider, 35 Mo. 536; St. v. Marshall, 36 Mo. 400; St. v. Danhart, 42 Mo. 242; Gulf etc. R. Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 269; Cobb v. Griffith etc. Co., 12 Mo. App. 130; Railroad Co. v. Winslow, 66 Ill. 219. Compare Tucker v. Hamlin, 60 Tex. 171.

⁵² Marshal v. St., 5 Tex. App. 273, 291.

⁵³ Blizzard v. Applegate, 77 Ind. 516; Hopt v. People, 7 U. S. Sup. Ct. Rep. 614; Specht v. Howard, 16 Wall. 564; Davis v. Peveler, 65 Mo. 189; St. v. May, 4 Dev. L. (N. C.) 330; Goodnow v. Hill, 125 Mass. 589; Smith v. Whitman, 6 Allen (Mass.), 562; Hawes v. Gustin, 2 Allen (Mass.), 125; Dillin v. People, 8 Mich. 369.

⁵⁴ Abb. Tr. Brief, 52; citing Mechelke v. Bremar, 59 Wis. 57, 17 N. W. 682; Piper v. White, 56 Pa. St. 90; Hall v. Patterson, 51 Id. 289; Bilberry v. Mobley, 21 Ala. 277; Van Buren v. Wells, 19 Wend. (N.

§ 352. **Limiting Time, Stopping Repetitions and Irrelevant Examinations.**—In like manner, the *discretion* of the trial court extends to the stopping of repetitions, to the placing of a reasonable limit upon the time which shall be allowed for the examination or cross-examination of a witness, and to preventing the consuming of the public time by an examination into irrelevant matters. It is discretionary with the trial court to allow a subject to be gone into again, in examining a witness, after he has been fully examined upon it.⁵⁵ So, it has been laid down, generally, that where, in the progress of a trial, it appears obvious that a party, either in the examination of his witnesses or in his argument, is consuming time unnecessarily, the court may, in its discretion, arrest the examination; and the exercise of this discretion will not be reviewed unless its abuse manifestly appears.⁵⁶ So, it is the obvious duty of the judge to interpose of his own motion, when a useless and irrelevant examination of the witness is going on, and prevent a waste of time and the distraction of the attention of the jury from the real issues.⁵⁷

Y.) 202; *Abbey v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Carnes v. Pratt*, 15 Abb. Pr. (N. S.) 337, 36 N. Y. Super. 361, affirmed, 59 N. Y. 405.

⁵⁵ *Joslin v. Grand Rapids Ice & Coal Co.*, 53 Mich. 323; *Crow v. Marshall*, 15 Mo. 499. Where a witness has already testified that he cannot swear to a certain fact, e. g., that certain persons were at a certain time intoxicated,—no error is committed in allowing the same question to be repeated in substance to the witness. *Aurora v. Hillman*, 90 Ill. 62; *Geminder v. Machinery etc. Ins. Co.*, 120 Iowa, 614, 94 N. W. 1108; *Ala. Const. Co. v. Car & E. Co.*, 131 Ga. 365, 62 S. E. 160.

⁵⁶ It was so held where, in a civil action to recover a quantity of goods, the plaintiff, after having examined sixteen witnesses in rebuttal, was ordered by the court to stop; and the defendant declining to argue, the court restricted the

plaintiff's counsel to ninety minutes. *Rosser v. McColly*, 9 Ind. 587. See also *Priddy v. Dodd*, 4 Ind. 84; *Lynch v. St.*, 9 Ind. 541; *Spinks v. Clark*, 147 Cal. 439, 82 Pac. 45; *Nunn v. Jordan*, 31 Wash. 406, 72 Pac. 124; *St. v. Rodriguez*, 115 La. 1004, 40 South. 538; *Brown v. St.*, 72 Md. 417, 20 Atl. 140. Merely cumulative evidence may, for this reason, be rejected. *Siegelman v. Jones*, 103 Mo. App. 172, 77 S. W. 307; *Steedman v. S. C. etc. R. Co.*, 66 S. C. 542, 45 S. E. 84. So mere repetition. *Hughes v. Ward*, 38 Kan. 452, 16 Pac. 810; *Vance v. Richardson*, 110 Cal. 114, 42 Pac. 709; *People v. Smith*, 9 Cal. App. 224, 644, 98 Pac. 546.

⁵⁷ *St. v. McGee*, 36 La. Ann. 206, 209; *St. v. Caron*, 118 La. 349, 42 South. 960; *McPhail v. Johnson*, 115 N. C. 298, 20 S. E. 373; *McGuire v. Lawrence Mfg. Co.*, 156 Mass. 324, 21 N. E. 3; *Eastman v. El. Ry. Co.*, 200 Mass. 412, 86 N. E. 795.

§ 353. **Limiting Number of Witnesses.**—So, a reasonable limitation of the *number of witnesses* who shall testify to a particular fact is within the discretion of the trial court; and it has been held that the limitation of the number to *seven* is not an abuse of discretion in a criminal prosecution for a *nuisance*, where the court gives notice in advance of the limitation.⁵⁸ So, the court may limit the number of *expert* witnesses to be called at the trial.⁵⁹ So, the court may make and enforce a rule limiting the number of witnesses who shall be allowed to testify upon the question of the *credibility* of the plaintiff.⁶⁰ So, the court may, in its discretion, notify the parties that not more than *eleven* witnesses on each side will be heard upon the question of the *value* of the property in controversy, and may enforce the order.⁶¹ So, in an action against a railway company to recover damages for taking the plaintiff's land for the defendant's use, it has been held no abuse of discretion for the court to limit the number of witnesses who should be allowed to testify as to the value of the land, to *five*.⁶²

⁵⁸ *Mergentheim v. St.*, 107 Ind. 567, 8 N. E. 568; *Detroit City v. Mills*, 85 Mich. 634, 48 N. W. 1007. It has been held that it is error to limit as to a controverted controlling fact. See *Green v. Phoenix etc. Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; *Barhyte v. Summers*, 68 Mich. 541, 36 N. W. 93. Unless objection is made and exception taken, objection to an order limiting the number is deemed waived. *Jones v. Lindsay*, 98 Ind. 218; *McConnell v. City of Osage*, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778.

⁵⁹ *Hilliard v. Beattie*, 59 N. H. 462; *J. H. Clark & Co. v. Rice*, 127 Wis. 451, 106 N. W. 231; *Sixth Ave. R. Co. v. Met. El. Ry. Co.*, 138 N. Y. 548, 34 N. E. 400; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559. Where a party has exhausted his quota, he cannot on cross-examination of his adversary's witness called for another purpose, have him answer on this subject. *White*

v. City of Boston, 186 Mass. 65, 71 N. E. 75.

⁶⁰ *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785; *St. v. Burkholder*, 42 Kan. 641, 22 Pac. 722. Or, where there is no rule, exercise its discretion. *Hollywood v. Reed*, 57 Mich. 234, 23 N. W. 792. It has been held, that limiting the number to three is error. *Hoag v. Cooley*, 33 Kan. 387, 6 Pac. 585. A rule, however, which would compel an interested party to submit a cause on his unsupported testimony as to a particular fact is unreasonable. *Page v. Kickey*, 137 N. Y. 307, 33 N. E. 311, 33 Am. St. Rep. 731, 21 L. R. A. 409.

⁶¹ *Union etc. R. Co. v. Moore*, 80 Ind. 458.

⁶² *Everett v. Union Pacific R. Co.*, 59 Iowa, 243 (Beck and Adams, J.J., dissenting). For example of other limits than five, see *Preston v. City of Cedar Rapids*, 95 Iowa, 71, 63 N. W. 577; *Huett v. Clark*, 4 Colo. App. 231, 35 Pac. 631.

§ 354. **Control as to the Mode of Examination.**—The manner of examining a witness is largely within the discretion of the court before whom the witness is produced, and that discretion must be governed, in a great measure, by a knowledge of the character of the witness, and from his demeanor during his examination.⁶³ While the regular practice is to allow the examination to proceed by *questions and answers*, so that the opposing counsel shall have fair opportunity for interposing seasonable objections—yet it is within the discretion of the trial court to allow a witness to give his testimony without being questioned at all; and it is said that cases undoubtedly occur which justify such an indulgence.⁶⁴ So, it is discretionary and proper for the court to act as a moderator over the course of the examination, and to interpose, when necessary, to prevent the unreasonable interruption of a witness, or to allow the witness to complete a statement or to give his version of a fact or circumstance.⁶⁵ It is the obvious duty of the trial judge to see that all witnesses are treated with respect, and that *aged and feeble witnesses* are treated with indulgence, specially when testifying under circumstances which necessarily call forth great emotion.⁶⁶ It has been held that a witness cannot be required to put a question to *a person in court*, for the purpose of eliciting informa-

⁶³ *Brown v. Burrus*, 8 Mo. 26, 30, per Scott, J.; *City of Lawton v. McAdams*, 15 Okl. 412, 83 Pac. 429. The court may allow questions on re-examination, which should have been asked in chief. *Chesapeake & O. Ry. Co. v. Lynch*, 28 Ky. Law Rep. 467, 89 S. W. 517. Also the court may require that only one counsel on a side may examine each witness. *St. v. Nugent*, 116 La 99, 40 South. 581.

⁶⁴ *Clark v. Field*, 42 Mich. 342, 344, 4 N. W. 19; *Horton v. St.*, 123 Ga. 145, 51 S. E. 287; *White v. City of Boston*, 186 Mass. 65, 71 N. E. 75; *N. P. R. Co. v. Charless*, 51 Fed. 562, 2 C. C. A. 380. It has been ruled, that counsel may demand as his right, that the witness respond only to questions, so he may protect his client by objection instead of motion to strike out. *Altkrug v.*

Harrowitz, 111 App. Div. 420, 97 N. Y. S. 716.

⁶⁵ *St. v. Scott*, 80 N. C. 365.

⁶⁶ Thus, on the trial of an indictment for rape, the mother of the prosecutrix, while testifying before the jury, held down her head seemingly much affected, and spoke in a low voice. The prisoner's counsel thereupon requested the court to instruct her to hold up her head and speak louder. The court declined to compel the witness to hold up her head, but said that she would be required to speak loud enough to be heard, at the same time remarking to counsel that, "some allowance must be made for the woman, as she is overcome with emotion." It was held that the prisoner could not claim a new trial on the ground that this remark might have had an unfair influence

tion concerning which the witness is interrogated,—as for instance, the full name of a person of which the witness professes to be ignorant.⁶⁷ Where a witness states that he is *not able to answer* a question, the discretion of the court is not abused in excluding it.⁶⁸

§ 355. **Right of a Judge to put Questions to a Witness.**—A judge presiding upon the trial of a cause is more than a mere moderator between contending parties; he is charged with the grave duty of maintaining truth and preventing wrong, and, to this end, has a large *discretion*, which, if exercised without abuse, will not be error. He may in the exercise of this discretion propound questions to witnesses with a view to elicit the facts;⁶⁹ and if they be *leading questions*, it is not available error.⁷⁰ It is said to be the *duty* of the judge, both in civil and criminal cases, to give strict attention to the evidence, and to propound to the witness such questions as he may deem necessary to elicit any relevant or material evidence, without regard to its effect upon the interests of either party.⁷¹ But it is also said that the questions which a judge or a juror may properly put to a witness should be such as are suggested by the evidence given on the trial.⁷² To this end the

with the jury, nor was it objectionable in view of a then existing statute (N. C. C. C. P., § 237; same code 1883, § 413), which forbade the judge in giving a charge to the jury "to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury." *St. v. Laxton*, 78 N. C. 564. Court may allow child, laboring under embarrassment, or an aged witness whose recollection has been exhausted by general questions, to be asked leading questions. *St. v. Drake*, 128 Iowa, 539, 105 N. W. 54; *Gray v. Kelly*, 190 Mass. 184, 76 N. E. 724.

⁶⁷ *Wehrkamp v. Willet*, 4 Abb. App. Dec. (N. Y.) 548.

⁶⁸ *Teese v. Hüttingdon*, 23 How. (U. S.) 2.

⁶⁹ *Ferguson v. Hirsch*, 54 Ind. 337; *Blizzard v. Applegate*, 77 Ind. 516; *Lefever v. Johnson*, 79 Ind. 554; *Baur v. Beall*, 14 Colo. 383, 23 Pac.

345; *DeFord v. Painter*, 3 Okl. 80, 41 Pac. 96, 30 L. R. A. 722.

⁷⁰ *Huffman v. Cauble*, 86 Ind. 591, 596. Thus power should be carefully exercised to avoid giving to the jury any expression of opinion on the merits, or showing any bias or prejudice. *Komp v. St.*, 129 Wis. 20, 108 N. W. 46.

⁷¹ *Sparks v. St.*, 59 Ala. 82; *St. v. Caron*, 118 La. 349, 42 South. 960.

⁷² *Ibid.* 87. Where a judge ex mero motu called an eye witness of the homicide to the stand, his name being on the indictment, and both sides questioned him, he was not considered the witness of either party, and it was ruled, that upon defendant's demurrer to the evidence, his testimony was not, so far as it conflicted with the commonwealth's evidence to be taken into consideration. *Clark v. Com.*, 90 Va. 360, 18 S. E. 440.

judge may propound to *unwilling witnesses* all such proper questions as may throw light upon their statements, and especially upon the motives which actuate them.⁷³

§ 356. **Indecent Questions.**—The fact that evidence is indecent is no objection to its being received, where it is necessary to justice.⁷⁴ But it is proper for the trial court to refuse to permit indecent questions to be put to *children* on the witness stand;⁷⁵ nor will the court commit error in refusing to compel a *female witness*, testifying upon an indelicate subject, to couch her answers in indecent language, although, if so expressed, her answers would be more direct, though not necessarily more intelligible.⁷⁶

⁷³ Lockhart v. St., 92 Ind. 452. In this case the judge was upheld in propounding to the prosecutrix in an indictment for rape, who had been brought in by attachment, questions which elicited answers showing that the mother of the defendant had given her a sum of money to induce her not to appear against the defendant. But see the Queen's Case, 2 Brod. & B. 284.

⁷⁴ Da Costa v. Jones, Cowp. 729. Compare Anon. v. Anon., 23 Beav. 273, 22 Beav. 481.

⁷⁵ People v. White, 53 Mich. 537, 540.

⁷⁶ Thus, on the trial of an indictment for rape, the prosecutrix, while testifying as to the circumstances of the crime, hesitated and wept, whereupon the court directed her to proceed, saying: "I will not require you to use language that will shock your modesty." The witness then said: "He had his will with me." It was held that there was no error in this; but the report showed that no objection was made by the prisoner's counsel at the time. St. v. Laxton, 78 N. C. 564. A recent case in Indiana strikingly illustrates the extent to which the discretionary power of the court in this regard extends in

the absence of an appearance of prejudice in the record. On the trial of an indictment for an *assault upon a deaf-mute*, with intent to commit rape, a question was propounded through an interpreter to the prosecuting witness which shocked her modesty to such an extent that she fled precipitately into an adjoining room. She was there followed by another deaf and dumb woman, whom the court had appointed as an interpreter, without any objection from the court or on the part of the prisoner. In the seclusion of that room, the interpreting witness succeeded in pacifying her and in getting her to answer the question. In about a minute they returned together into the court, and there, in the presence of the court, the jury, the witness and defendant, the interpreting witness, without having repeated the question to the witness, communicated the witness' answer thereto to another interpreter, who was not deaf and dumb, who gave such answer orally to the court and jury. This proceeding was vigorously assailed on appeal by the prisoner's counsel, as being intolerable in a court of justice and a palpable violation of his constitutional right to

§ 357. **Leading Questions.**—As a general rule, a party will not be allowed to put leading questions to his own witnesses,⁷⁷ though he will be allowed to put such questions to the witnesses of his adversary on *cross-examination*.⁷⁸ But this rule is one which yields

be brought face to face with a witness testifying against him. The Supreme Court nevertheless held that the proceeding was not fairly open to any of the criticisms or oburgations of the prisoner's counsel. Howk, C. J., said: "In some particulars the case is an anomalous one; for, to the credit of human nature, it is not often that a man is charged with an attempt even to gratify his passions upon the person of an unfortunate woman, forcibly and against her will, who is deprived of the sense of hearing and the power of speech. When the case occurs, however, as it must be sustained, in the nature of things, by the woman's evidence in relation to the offense charged, the proceedings to obtain her evidence will also be anomalous to some extent. If it be conceded that the proceedings of which appellant complains were irregular or even erroneous, there is nothing in the record to show that the appellant was in any manner injured thereby. The record fails to show what the question was which shocked the modesty of the prosecuting witness, or what was her answer thereto, which she communicated to Miss Coons, the interpreting deaf-mute, out of the presence of the court and jury. In this state of the record, we cannot say that the error under consideration was materially, or in any wise, injurious to the appellant." *Skaggs v. St.*, 108 Ind. 53, 8 N. E. 695.

⁷⁷ *Klock v. St.*, 60 Wis. 574, 576. It is said in *Pennsylvania* by Mr. Justice Paxton: "While there are in-

stances in the books where judgments have been reversed for the refusal to allow leading questions where the party was entitled to them, I know of no reversal in Pennsylvania for allowing a leading question." *Farmers' Mutual Fire Ins. Co. v. Bair*, 87 Pa. St. 124, 128. In *Texas*, the rule seems to be that the action of the trial court in a criminal case, in permitting a leading question to be put by the State's attorney, may be *assigned for error*, and is ground of reversing a conviction. *Rangel v. St.*, 22 Tex. App. 642, 3 S. W. 788; *Mathis v. Buford*, 17 Tex. 152; *Tinsley v. Carey*, 26 Tex. 350; *Kennedy v. St.*, 19 Tex. App. 620. Thus, on the trial of an indictment for *theft*, under the Texas statute, while a witness was testifying, the district attorney handed him a paper purporting to be a certificate of the brand of the company whose steer the defendant was charged with stealing, a representation of the brand being therein contained. After the witness had examined it, the district attorney, for the purpose of identifying this brand with the one on the stolen animal, asked the witness, "Is this the brand that was on the animal killed?" It was held that the court erred in overruling an objection to this question on the ground that it was leading. *Rangel v. St.*, 22 Tex. App. 642, 3 S. W. 788; *Groeschel v. Fisher*, 108 Mich. 212, 65 N. W. 965; *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854.

⁷⁸ *Phares v. Barber*, 61 Ill. 272. Post, §§ 443, et seq.

to the sound *discretion* of the trial court,⁷⁹ which discretion will not be reviewed on error or appeal except in cases of manifest abuse.⁸⁰ In some jurisdictions it is held that this discretion is unlimited, and that the exercise of it is not subject to revision, even upon a case reserved.⁸¹ In others, *e. g.*, in New Hampshire, the propriety of admitting or excluding a leading question is deemed a matter most conveniently and satisfactorily determined at the trial, upon personal examination of the witness, and in view of all the circumstances of the case. At the same time it is held to be quite proper at any time, and certainly expedient in cases of doubt and difficulty, for the presiding judge to reserve the question of discretion for the revision of the whole court; but when it is not reserved, it will always be presumed that the discretion has been properly exercised.⁸²

§ 358. [Continued.] What Questions are Leading and what not.—A leading question is one which may be answered by Yes or No, or which suggests the desired answer.⁸³ It is a question which puts the answer into the mouth of the witness.⁸⁴ All questions put

⁷⁹ 1 Greenl. Ev., § 435; Calvin v. McCormick Oil Co., 66 S. C. 61, 44 S. E. 380; Anderson v. St., 104 Ala. 83, 16 South. 108; St. v. George, 214 Mo. 262, 113 S. W. 1116.

⁸⁰ Cade v. Hatcher, 72 Ga. 359; Farmers' Mutual Fire Ins. Co. v. Bair, 87 Pa. St. 124; Hopkinson v. Steel, 12 Vt. 582; Donnell v. Jones, 13 Ala. 490; Walker v. Dunspaugh, 20 N. Y. 170; Addison v. St., 48 Ala. 478; Lawson v. Glass, 6 Colo. 134; 1 Greenl. Ev., § 435; Stark v. Burke, 131 Iowa, 684, 109 N. W. 206; Caldwell v. Atlantic Coast Line R. Co., 75 S. C. 74, 55 S. E. 131; St. v. Carrawan, 142 N. C. 575, 54 S. E. 1002; McBride v. Georgia R. etc. Co., 125 Ga. 515, 54 S. E. 674; St. v. Wertz, 191 Mo. 569, 90 S. W. 838.

⁸¹ St. v. Lull, 37 Me. 246; Parsons v. Huff, 38 Me. 137; Moody v. Rowell, 17 Pick. (Mass.) 498.

⁸² Bundy v. Hyde, 50 N. H. 116, 120; Severance v. Carr, 43 N. H.

65; Steer v. Little, 44 N. H. 613; Kendall v. Brownson, 47 N. H. 186.

⁸³ 1 Whart. Ev. (2d ed.), § 499; Rangel v. St., 22 Tex. App. 642, 3 S. W. 788. Accordingly, it is not proper, on the direct examination of a witness who does not need the aid of a *memorandum to refresh his memory*, to read to him paragraphs from an *affidavit* made by him on a previous occasion, and to ask him if those statements are true. This is in effect putting in evidence the affidavit of the witness and his declarations made previous to the trial, in place of his direct oral statements to the jury on his present recollection of the facts. Hubbell v. Bowe, 17 Jones & Sp. (40 N. Y. Super.) 131; St. Louis & S. F. R. Co. v. Conrad (Tex. Civ. App.), 99 S. W. 209 (not reported in state reports).

⁸⁴ Harvey v. Osborn, 55 Ind. 535, 547. That a question is put in the

to a witness, which assume the existence of facts material to the issue which have not been proved, are said to fall within the definition of leading questions.⁸⁵ But a question which merely directs the attention of the witness to the fact in controversy, about which his testimony is desired, is not leading.⁸⁶

§ 359. [Continued.] Where the Witness is manifestly Hostile to the Party calling him.—The discretion of the trial court is well exercised in allowing leading questions to be put, where it appears, from the previous answers or conduct of the witness, that he is an *unwilling witness*,⁸⁷ or *manifestly hostile* to the party calling him.⁸⁸

§ 360. [Continued.] Other Circumstances where allowed.—An exception to the rule which disallows leading questions to one's

alternative way may not relieve it of objection. *Hicks v. Sharp*, 89 Ga. 311, 15 S. E. 314.

⁸⁵ *Klock v. St.*, 60 Wis. 574, 576, 19 N. W. 543; 1 Greenl. Ev., § 434; 1 Stark. Ev. (9th ed.) 197; *Turney v. St.*, 8 Smed. & M. (Miss.) 104; *Nelson v. Hunter*, 140 N. C. 598, 53 S. E. 439. Or where it mentions a collateral fact in a way to suggest the answer regarding the main fact. *Thompson v. Ray*, 92 Ga. 285, 18 S. E. 59.

⁸⁶ Thus, the following question has been held not leading: "Do you know anything of the money transactions between the same parties? If so, state their nature and the time, as near as you may remember." *Harvey v. Osborn*, 55 Ind. 535, 547. So, the following question has been held not leading: "State what you may know, if anything, of the purchase of land, by your brother William, from Harvey or Harvey's wife, share or shares of the estate, when it was, and what land it was, and what, if anything, did Harvey ever say to you on the subject." *Ibid.* So, the following question has been held not lead-

ing: "State what you may know, if anything, about any indebtedness by Squire Harvey, one of the defendants in the case, to William Osborn, the other defendant." *Ibid.* 548. So, of the following question: "In speaking of a balance of his wife in the homestead, was reference had to a share purchased by William Osborn of the wife of Harvey, as child and heir at law of James D. Osborn, or was it some other and different claim?" This question naturally arose from the witness' answer to a preceding question, and was therefore held not leading. *Ibid.*; *Krup v. Corley*, 95 Mo. App. 640, 69 S. W. 609. Or which asks explanation of a fact not controverted. *St. v. Fonterrat*, 42 La. Ann. 220, 19 South. 112.

⁸⁷ *Hopkinson v. Steel*, 12 Vt. 582; *Bradshaw v. Combs*, 102 Ill. 429; *Baker v. St.*, 69 Wis. 32, 33 N. W. 52; *St. v. Waters*, 132 Iowa, 481, 109 N. W. 1013; *St. v. Barrett*, 117 La. 1086, 42 South. 513; *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396.

⁸⁸ *Williams v. Jarrot*, 6 Ill. 120; *McBride v. Wallace*, 62 Mich. 451, 29 N. W. 75; *Klock v. St.*, 60 Wis.

own witness, is that such questions may be put for the purpose of *introducing* matter or leading or directing the attention of the witness to the subject upon which his testimony is desired.⁸⁹ So, a party may put leading questions to his own witness where an omission in the testimony of the witness is evidently caused by a failure of recollection, which a suggestion may assist.⁹⁰ So, it has been held that, where a witness is called to contradict a former witness, who has stated that certain expressions were used, the proper practice is to ask whether such expressions were used, without putting the question in the general form of inquiring what was said.⁹¹ In general, it is not within the inhibition of the rule against leading questions, to ask a witness questions calling for an affirmative or negative answer, which, from the nature of the case, could not well be put in any other way. "Some discretion," says Campbell, C. J., "must be used on the subject, and every nicety is not conducive to either convenience or justice."⁹² According to a learned and accurate writer, "the judge may, in his discretion, allow leading questions to be put, on direct or re-direct examination, where the witness is hostile or reluctant, or is in the interest of the other party, or so youthful, ignorant, or infirm as to require the attention to be led; or where his memory has been exhausted without stating some particular, such as a name, which cannot be significantly pointed out by a general inquiry."⁹³

574, 576, 19 N. W. 543; *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822; *St. v. Waldrop*, 73 S. C. 60, 52 S. E. 793.

⁸⁹ *Williams v. Jarrot*, 6 Ill. 120; *Graves v. Merchants Ins. Co.*, 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507. Thus a recapitulation of facts already testified merely to draw attention to further questions. *St. v. Walsh*, 44 La. Ann. 1122, 11 South. 811.

⁹⁰ *Shultz v. St.*, 5 Tex. App. 390; 1 Greenl. Ev., §§ 434, 435; *Born v. Rosenow*, 84 Wis. 620, 54 N. W. 1089.

⁹¹ *Farmers' Mutual Fire Ins. Co. v. Bair*, 87 Pa. St. 124; explaining *Susquehanna Coal Co. v. Quick*, 61 Pa. St. 328.

⁹² *McKeown v. Harvey*, 40 Mich. 226; *St. Louis So. W. R. Co. v. Lowe* (Tex. Civ. App.), 97 S. W. 1087 (not reported in state reports).

⁹³ Abb. Tr. Brief, 96; citing 14 Abb. N. C. (N. Y.) 470, note; *Moody v. Rowell*, 17 Pick. 490, 498; *Metro-politan Bank v. Hale*, 28 Hun (N. Y.), 341; *Cheney v. Arnold*, 18 Barb. (N. Y.) 434 (witness old and blind); *Stratford v. Sandford*, 9 Conn. 274, 284; *Snyder v. Snyder*, 50 Ind. 492 (child); *Paschal v. St.*, 89 Ga. 303, 15 S. E. 322; *Polson v. St.*, 137 Ind. 519, 35 N. E. 907 (ignorance of language); *Navarro v. St.*, 29 Tex. App. 378, 6 S. W. 542; *People v. Jensen*, 66 Mich. 711, 38 N. W. 710.

§ 361. **Effect of Admissions upon Offers of Evidence.**—On principles already stated,⁹⁴ stipulations made between counsel in court,⁹⁵ dispensing with witnesses or with evidence, will be enforced by the court, at least when in writing,⁹⁶ or when acted on by one of the parties,⁹⁷ or even where, though not in writing,⁹⁸ it would work a fraud to allow them to be disregarded.⁹⁹ Nor will such stipulations be set aside on the ground of *mistake*, where the evidence touching the mistake is conflicting and doubtful;¹ or where entered into by one party under a mistaken belief touching a fact which did not change the legal rights of the parties;² or because of *newly discovered evidence*.³ Agreements touching instruments of evidence, when not otherwise confined in their meaning, are applicable to *any future trial* of the cause.⁴ A frequent stipulation, entered into to avoid a continuance, relates to what an *absent witness* would testify to, if present. On plain grounds, this does not preclude objections to the reading of any portion of the admission, founded on reasons which would have been good against the like testimony

⁹⁴ Ante, § 193.

⁹⁵ Not enforced when made out of and not entered of record, though made pending the trial. *Commercial Bank v. Clark*, 28 Vt. 325.

⁹⁶ See, as to the necessity of stipulations being in writing, ante, § 200; also *Huff v. St.*, 29 Ga. 424.

⁹⁷ *Johnson v. Wright*, 19 Ga. 509.

⁹⁸ *Henderson v. Merritt*, 38 Ga. 232.

⁹⁹ *Heilner v. Battin*, 27 Pa. St. 517. See as to various stipulations touching evidence,—their validity and interpretation,—*Sidener v. Essex*, 22 Ind. 201; *Shields v. Guffey*, 9 Iowa, 322; *Curl v. Watson*, 25 Iowa, 35; *Bryan v. Coursey*, 3 Md. 61; *Booth v. Hall*, 6 Md. 1 (interpretation of an agreement waiving errors in pleading); *Farmers' Bank v. Sprigg*, 11 Md. 389 (effect of agreement that judgment shall be entered for the plaintiff, as evidence on a *future trial*); *St. v. Norwood*, 12 Md. 177 (waiving formality of pleading); *Boardman v.*

Kibbe, 10 Cush. (Mass.) 545 (waiving of proof of execution of papers); *White v. Harlow*, 5 Gray (Mass.), 563; *Leonard v. White*, 5 Allen (Mass.), 177 (agreement to defend on a particular ground only); *Bingham v. Supervisors*, 8 Minn. 441 (restricting the evidence to a particular question); *Seawell v. Cohn*, 2 Nev. 308 (to enter judgment and stay of execution); *Neil v. Tarin*, 9 Tex. 256 (final determination of controversy); *Unis v. Charlton*, 12 Gratt. (Va.) 484 (evidence taken in one of several cases to be read in all); *Douglass v. Rogers*, 4 Wis. 304 (that certain depositions be admitted, reserving objections to matters of substance only).

¹ *Charles v. Miller*, 36 Ala. 141 (affidavit against affidavit).

² *Chapman v. Coates*, 26 Iowa, 288.

³ *Franklin v. National Ins. Co.*, 43 Mo. 491.

⁴ *Central etc. Corp. v. Lowell*, 15 Gray (Mass.), 106; *Carroll v. Paul*, 19 Mo. 102.

of the witness, if personally present;⁵ nor prevent the State from showing that the absent witness has made contradictory statements.⁶ There are statutes which enable the State's attorney to avoid a continuance by admitting that an absent witness of the accused would, if present, swear to the facts which the accused, in his affidavit for a continuance, states that he expects to prove by him; in which case the affidavit and the admission are read to the jury in the place of the testimony of the absent witness. It is obvious that the statements thus read to them will not have the same realistic effect on their minds as would the testimony of the witness delivered in their presence; and on this ground doubts have been felt as to whether such a statute does not violate the constitutional rights of the accused.⁷ On a similar view, it has been reasoned in civil cases, that the admission of a fact by the opposing counsel will not necessarily preclude the party from proving it;⁸ since "it would be absurd to hold that any party by his bald admissions on a trial, could shut out legal evidence."⁹ But this reasoning seems to go too far. Carried to its logical extent, it would destroy the conclusive effect of the admissions in the pleadings. The better view is that a formal admission of a fact precludes, in the *discretion* of the court, the offer of any further evidence of such fact,¹⁰ unless the admission is not co-extensive with the offer;¹¹ though it will not be *error* to admit it.¹²

⁵ *Scaggs v. Baltimore etc. R. Co.*, 10 Md. 268.

⁶ *St. v. Miller*, 67 Mo. 604; *St. v. Hatfield*, 72 Mo. 518; *St. v. Jennings*, 81 Mo. 585; *St. v. Henson*, 81 Mo. 384.

⁷ *St. v. Underwood*, 75 Mo. 230, 234.

⁸ *Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41.

⁹ *Kimball etc. Man. Co. v. Vroman*, 35 Mich. 310.

¹⁰ *Dorr v. Tremont Bank*, 128 Mass. 349; *Ainsworth v. Hutchins*, 52 Vt. 554; *Butterworth v. Pecare*, 8 Bosw. (N. Y.) 671.

¹¹ *Abb. Tr. Brief*, 45; citing *Priest v. Groton*, 103 Mass. 540; *Brown v. Perkins*, 1 Allen (Mass.), 89, 96.

¹² *Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41; *Bannister v. Alderman*, 111 Mass. 261.

CHAPTER XV.

INCIDENTS OF THE DIRECT EXAMINATION.

SECTION

364. Examination on the *voir dire*.
365. Of the Oath or Affirmation.
366. Of Sworn Interpreters.
367. Examination of Deaf and Dumb Witnesses.
368. Introductory Statements.
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371. [Illustration.] Marking the Boundaries of Parishes in London.
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392. Putting the Testimony of two Witnesses together.
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§ 364. **Examination on the Voir Dire.**—Where the witness is objected to on the ground of incompetency, what is called his examination on the *voir dire* precedes, in strict practice, his examination as a witness.¹ But this strictness does not obtain in modern

¹ *Dewdney v. Palmer*, 4 Mees. & upon discovery of disqualification, W. 664. If objection is not made it is waived. *Ladd v. Williams*,

practice; and, where the objection is grounded on interest, it is now entirely a matter of *discretion* with the court whether the preliminary oath as to interest, or the oath in chief shall be administered; and it has been said that the better practice is to swear the witness in chief, and to bring out the facts showing his interest, either by direct or by cross-examination.² Under the former practice, the examination on the *voir dire* related only to the question of the interest of the witness in the subject-matter of the suit;³ but the term is now generally employed to designate the preliminary examination of the witness touching any other ground of qualification as to which he may be interrogated.⁴ He is first sworn to make true answers to such questions as shall be put to him touching his competency as a witness. He is then examined in chief by the objecting party, after which the party calling him has the right of cross-examination.⁵ The question of his competency is decided by the court, and not by the jury.⁶ Where, under the old system, the witness was objected to on the ground of interest, two methods of proving him incompetent were open to the objecting party: 1. By examining him on his *voir dire*. 2. By the introduction of independent evidence. The resort to one method was in general a waiver of the other.⁷ The rule that the contents of a *written instrument* cannot be proved by *parol* where the instrument itself can be produced, does not apply to the examination of a witness on

104 Mo. App. 390, 79 S. W. 511; St. v. Crabb, 121 Mo. 554, 26 S. W. 548. Cross-examination about matters not testified to in chief is held in Virginia to waive competency. Miller v. Miller Admr. 92 Va. 219, 23 S. E. 891.

² Seeley v. Engel, 17 Barb. (N. Y.) 530.

³ 1 Greenl. Ev., § 424.

⁴ Rapalje on Witnesses, § 232.

⁵ Beach v. Covillaud, 2 Cal. 237; Succession of Weigel, 18 La. Ann. 49. Leading questions may be propounded in such an examination. Hodge v. St., 26 Fla. 11, 7 South. 593.

⁶ Ante, §§ 323, et seq.; Reynolds v. Lounsbury, 6 Hill (N. Y.), 534; Chouteau v. Searcy, 8 Mo. 733; Cook v. Mix, 11 Conn. 432; Amory

v. Fellows, 5 Mass. 219, 229; Tucker v. Welsh, 17 Id. 160; Dole v. Thurlow, 12 Metc. (Mass.) 157; Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94; Stall v. Catskill Bank, 18 Id. 466; Rohrer v. Morningstar, 18 Ohio St. 579; City Council v. Haywood, 2 Nott & McC. (S. C.) 308.

⁷ Butler v. Butler, 3 Day (Conn.), 214; The Watchman, 1 Ware (U. S.), 232; Waughop v. Weeks, 22 Ill. 350; Diversy v. Will, 28 Ill. 216; Walker v. Collier, 37 Ill. 362; Welton v. Buck, Anthon. (N. Y.) 15; Miffin v. Bingham, 1 Dall. (U. S.) 294; Mallet v. Mallet, 1 Root (Conn.), 501; McAllister v. Williams, 1 Tenn. (Overt.) 107, 119; Bridge v. Wellington, 1 Mass. 219; Chance v. Hine, 6 Conn. 231.

a *voir dire*; since the examining party cannot be supposed to know beforehand what the witness will state, or what papers affecting his competency are in existence.⁸

§ 365. **Of the Oath or Affirmation.**—It is the duty of the party calling the witness to see that he is sworn; ⁹ though if the oath is inadvertently omitted, the objection will not be good after verdict.¹⁰ The objection must be made as soon as it is discovered, or it will be deemed waived.¹¹ The oath, as we have inherited it from England, is generally administered by handing to the witness a copy of the *New Testament*, on the external cover of which is imprinted a *cross*. The clerk of the court, at the same time retaining hold of the book, recites an oath like the following: "You do solemnly swear, on the holy Evangelists of Almighty God, that the evidence you shall give in the cause now in hearing, wherein A. B. is plaintiff and C. D. is defendant (or otherwise describing the parties, or omitting the description altogether), shall be the truth, the whole truth, and nothing but the truth: so help you God." The witness nods assent and kisses the book. In many American jurisdictions this form of administering the oath is changed, and in its place is substituted an oath administered by the *uplifted hand*.¹² The clerk of the court rises and holds up his right hand, and so does the witness. The clerk then recites an oath like the following: "You solemnly swear that the evidence you shall give in the cause now in hearing shall be the truth, the whole truth, and nothing but the truth; so help you God." The witness bows, or adds the words

*1 Greenl. Ev., § 95; Herndon v. Givens, 16 Ala. 261. When incompetency is revealed objection must be made. Moore v. St., 96 Tenn. 209, 33 S. W. 1046; White v. St., 33 Tex. Cr. R. 177, 26 S. W. 72.

⁹ Rap. Wit., § 235; Davis v. Melvin, 1 Ind. 136; White Water Valley Canal Co. v. Dow, Id. 141; Hawks v. Baker, 6 Me. 72. Where witness testified without being sworn and is recalled, and sworn and then testified, that what he had testified to before being sworn was true, there was no reversible error. Southern Ry. Co. v. Ellis, 123 Ga. 614, 51 S. E. 594.

¹⁰ Nesbit v. Dallam, 7 Gill & J. (Md.) 494; Cady v. Norton, 14 Pick. (Mass.) 236; Sells v. Hoare, 7 J. B. Moore, 36, 3 Brod. & Bing. 232.

¹¹ Slaughter v. Whitelock, 12 Ind. 338; St. v. Smith, 124 Iowa, 334, 100 N. W. 40; St. v. Peterson, 149 N. C. 533, 63 S. E. 87.

¹² That such an oath is good see Gill v. Caldwell, 1 Ill. (Breese) 28; Doss v. Birks, 11 Humph. (Tenn.) 431; McKinney v. People, 7 Ill. 540. The uplifted hand is not strictly necessary. Dunlap v. Clay, 65 Miss. 454, 4 South. 118.

"I do." In the case of non-christians, the judge will substitute an oath which conforms to the custom of the witness' country or to his religious belief or scruples;¹³ or where he is conscientiously opposed to taking an oath, he will allow the clerk to administer to him an affirmation,¹⁴ which may run thus: "You do solemnly, sincerely, and truly declare and affirm," etc.¹⁵ Thus, Jews may be sworn on the Pentateuch with covered head,¹⁶ Gentoos, by touching the feet of a Brahmin;¹⁷ Chinese, by the ceremony of killing a cock, or breaking a saucer;¹⁸ a member of the Scottish Kirk, by holding up the hand without kissing the book;¹⁹ a Methodist on the Old Testament, if he prefers;²⁰ Quakers and others of like scruples, by taking a solemn asseveration that their testimony shall be true;²¹ and in whatever way the oath is administered, if the witness knowingly testifies falsely, he will be guilty of perjury.²² The fact that the oath is more comprehensive than the statute requires does not, of course, affect its validity.²³ The meaning of the clause in the oath, "to tell the whole truth," is that the witness obligates him-

¹³ By the principles of the common law, no particular form of oath is necessary, so that it binds his conscience. *Atcheson v. Everitt*, Cowp. 389; *Rex v. Gilham*, 1 Esp. 285, 6 T. R. 265; *The Queen's Case*, 2 Brod. & B. 284. If sworn according to statutory mode, it cannot be presumed in absence of showing, that this was less obligatory than according to particular religious belief of the witness. *Curtis v. Lehmann & Co.*, 115 La. 40, 38 South. 887; *People v. Green*, 99 Cal. 564, 34 Pac. 231.

¹⁴ See *U. S. v. Coolidge*, 2 Gall. (U. S.) 364; ante, § 188. If the witness does not object to be sworn he cannot be allowed to affirm. *Williamson v. Carroll*, 16 N. Y. 217.

¹⁵ N. Y. Code Civ. Proc., § 847. Or, "I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth." Stat. 32 & 33 Vict., ch. 68, § 4. For an earlier form, see Stat. 17 & 18 Vict., ch. 125, § 20.

¹⁶ *Ormychund v. Barker*, 1 Atk. 21, 40, 42, Willes, 543.

¹⁷ *Ibid.*

¹⁸ *Ibid.* That they are sworn thus and under statutory mode also is no ground for objection. *Bow v. People*, 160 Ill. 438, 43 N. E. 593. Though it may be error to omit the Chinese, and compel the statutory, oath. *St. v. Chyo Chiagk*, 92 Mo. 395, 4 S. W. 704.

¹⁹ *Mildronę's Case*, 1 Leach C. C. 459.

²⁰ *Edmonds v. Rowe*, Ryl. & M. 77.

²¹ *U. S. v. Coolidge*, 2 Gall. (U. S.) 364; Stat. 9 Geo. 4, ch. 32; 3 & 4 Will. 4, ch. 49; *Id.*, ch. 82; Reg. v. *Doran*, Lewin C. C. 27; Stat. 1 & 2 Vict, ch. 77; and many American statutes.

²² *Sells v. Hoare*, 3 Brod. & B. 232. See further 1 Greenl. Ev., § 371; Rap. Wit., § 235, and cases cited.

²³ *Ballance v. Underhill*, 4 Ill. 453.

self to tell so much of the truth as may be *competent* evidence and as may not *criminate* himself.²⁴ An oath administered to the witness suffices for the whole trial.²⁵ Although the witness is sworn before arraignment in a criminal case, but after the prisoner has announced his readiness to proceed with the trial, it is unnecessary to reswear him.²⁶ Where the witness is competent in chief he must be sworn generally, although his examination is confined to a particular fact.²⁷

§ 366. Of Sworn Interpreters.—Where the witness does not understand the English language, the court may swear an interpreter to translate his answers.²⁸ This is generally provided for by statute; but where there is no statute, it will be presumed on appeal, in the absence of a contrary showing in the record, that the parties agreed upon the appointment of an interpreter.²⁹ “The interpreter,” said Mr. Rapalje, “is *sworn* truly to interpret between the court, the jury and the witness; the oath is then administered to the witness in English, and interpreted to him by the sworn interpreter, as it is pronounced by the clerk.”³⁰ He should be *instructed* to interpret and report every statement made by the witness.³¹ He may, it has been ruled, take advantage of the suggestions of others who are not sworn, with regard to the proper interpretation of the testimony, stating the result to the court as

²⁴ Rap. Wit., § 235, citing Com. v. Reid, 1 Leg. Gaz. Rep. (Pa.) 182.

²⁵ Bullock v. Coon, 9 Cow. (N. Y.) 30.

²⁶ St. v. Weber, 22 Mo. 321.

²⁷ Jackson v. Parkhurst, 4 Wend. (N. Y.) 369. A civil action for damages will not lie against a witness who swears falsely. Amey v. Long, 9 East, 473, 6 Esp. 116, 1 Camp. 16; Collins v. Cave, 9 Jur. (N. s.) 297, 4 Hurl. & N. 225; 28 L. J. (Exch.) 204.

²⁸ See Norberg's Case, 4 Mass. 81; Amory v. Fellows, 5 Mass. 219, 226; Rap. Wit., § 236. Where the witness is at the moment physically incapable of speaking aloud, his testimony may be reported by some suitable person appointed by the court. Conner v. St., 25 Ga. 515;

St. v. Severson, 78 Iowa, 653, 43 N. W. 533; Jacobs v. St., 42 Tex. Cr. R. 353, 59 S. W. 1111. Court may reject one offered as possibly not disinterested. St. v. Thompson, 14 Wash. 285, 44 Pac. 533.

²⁹ Leetch v. Atlantic Mutual Ins. Co., 4 Daly (N. Y.), 518; St. v. Young, 108 Cal. 8, 41 Pac. 281.

³⁰ Rap. Wit., § 236; Norberg's Case, 4 Mass. 81.

³¹ People v. Wong Ah Bang (Cal.), 3 West. Coast Rep. 58. Held error for court to instruct interpreter not to repeat what witness said, where the interpreter told the court the witness merely stated something that had been told him by another. People v. Wong Ah Bang, 65 Cal. 305, 4 Pac. 19.

his own interpretation.³² Of course, a party is not *bound* by the interpretation, but may show that the interpreter has given an *erroneous translation* of a word or phrase.³³

§ 367. **Examination of Deaf and Dumb Witnesses.**—A deaf and dumb witness is examined by a *sworn interpreter*, upon principles similar to those which govern the examination of witnesses who cannot understand and speak the language in which the trial is conducted. It has been held that such an interpreter need not be an adept in the sign language used by deaf and dumb persons, but that it is sufficient if he understands the language so as to be able to interpret, as well the questions that might be propounded to the deaf and dumb witness as the answers thereto.³⁴ It should be added that in this, as in other cases, where an interpreter is employed, the accuracy of the interpretation may be impeached and is ultimately to be determined by the jury.³⁵ If he can *write* sufficiently well, he may be required to give his testimony in that way;³⁶ but he may be allowed to communicate by *signs*, although he can write imperfectly.³⁷

³² U. S. v. Gibert, 2 Sumn. (U. S.) 19. Mr. Rapalje regards this as a dangerous doctrine. Rap. Wit., § 236.

³³ Schnier v. People, 23 Ill. 17. A witness may translate to the jury documents written by himself, in a foreign language, without being sworn as an interpreter. Kuhlman v. Medlinka, 29 Tex. 385.

³⁴ Skaggs v. St., 108 Ind. 53, 8 N. E. 695.

³⁵ Ibid. As to this general principle see Whart. Crim. Ev., § 449; U. S. v. Gibert, 2 Sumn. (U. S.) 19; Schnier v. People, 23 Ill. 17. As to the *competency* of such witnesses, see Rap. Wit., § 6; Ruston's Case, 1 Leach C. C. 458; Snyder v. Nations, 5 Blackf. (Ind.) 295.

³⁶ Morrison v. Lennard, 3 Car. & P. 127. Where the witness can write, it is still not error to allow him to testify in sign language, through an interpreter, unless it is shown that this was not the better

method. Dobbins v. Little Rock etc. Ry. Co., 79 Ark. 85, 95 S. W. 794.

³⁷ St. v. De Wolf, 8 Conn. 93; Com. v. Hill, 14 Mass. 207; Snyder v. Nations, supra. In a trial in Indiana for assaulting a deaf and dumb woman with intent to ravish her, an interpreter was appointed to put the questions to and interpret the answers of the prosecuting witness. The court appointed another deaf and dumb woman to assist in the interpretation. It was held that there was no error in so doing. Howk, C. J., said: "The object of the examination of the prosecuting witness was to get the facts of the case within her personal knowledge, before the court and jury; and the court had the power undoubtedly to appoint as many interpreters as to it seemed necessary to the accomplishment of that object. The manner in which such an examination could be conducted was a matter to be regulated and

§ 368. **Introductory Statements.**—It is usual at the outset to ask a witness such questions concerning himself as are sufficient to inform the jury who he is; and the examination usually begins by asking him his *name*. But this question may be put to him by the *clerk* of the court at the time when he is called and sworn, in which case it will not be a good assignment of error that the name of the witness was not proved.³⁸ So, a witness may be permitted to state that he is a *public officer* without producing his *commission*.³⁹ A witness may be permitted to *tell in his own language* what may be necessary to tell by way of *introduction*, to make his narrative intelligible, provided his statements are properly restricted, or he reaches the material facts of his testimony,—that is, those portions that bear upon the issues involved in the case about which he is called to testify.⁴⁰

§ 369. **Assuming Material Facts in Issue.**—It is said by an able judge: “The rules of law which govern in the examination of witnesses as effectually prohibit counsel from assuming, in their questions, any facts which are material to the point of the inquiry, but which are to be ultimately found by the jury, as other rules of law forbid the presiding judge from assuming such facts in his instructions to the jury. In the former case, the reason of such rules does not rest merely upon the consideration that such assumption of facts might mislead the witnesses, but upon the liability of such assumption or assertion of facts by counsel becoming a substitute in the minds of the jurors for evidence, and thus calculated to mislead them. In the latter case the reason is the same, with the further reason that the assumption by the court, in its instructions to the jury, of material facts to be found by them, is regarded as an invasion by the court of the peculiar province of the jury. The rules in the former case are so rigidly maintained

controlled by the trial court, in its *discretion*, and will not be reviewed by this court, in the absence of a showing that appellant was in some way injured thereby.” *Skaggs v. St.*, 108 Ind. 53, 8 N. E. 695. As to the admissibility of *declarations*, communicated by *signs*, of a deaf and dumb female, alleged to have been ravished, see *People v. McGee*, 1 Denio (N. Y.), 19, 24; *Reg. v.*

Guttridge, 9 Car. & P. 471; *Reg. v. Megson*, Id. 420; *St. v. Howard*, 118 Mo. 127, 24 S. W. 41.

³⁸ *People v. Winters*, 49 Cal. 383; *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755.

³⁹ *Moody v. Keener*, 7 Port. (Ala.) 218.

⁴⁰ *Shultz v. St.*, 5 Tex. App. 390, 392.

that they will not permit counsel, even upon cross-examination and when leading questions may be put, to assume any material facts in issue and which are to be found by the jury, or to assume that particular answers have been given contrary to the fact.”⁴¹ Such a practice has also been regarded as subject to the objection that it tends to *lead* the witness; and where it was resorted to by the State’s counsel in a criminal case, against the objection of the defendant, it was held that the ruling might be assigned for error.⁴² Accordingly, counsel have no right to put a question to a witness which assumes that the witness has said something which he denies having said.⁴³ But it is no objection to a question that it assumes facts which are *not disputed*;⁴⁴ nor as hereafter seen, that the question is *hypothetically* framed, when designed to elicit the opinion of an *expert* witness.⁴⁵ Nor is it always available error that *introductory questions*, designed to draw the mind of the witness to the *scene* or *fact* of the controversy, are put in such a manner as to assume the existence of a fact. Thus, in a criminal trial it was held that a witness might be asked whether “he had examined the place designated by H. as the place where he was shot,”—the object being merely to introduce further questions.⁴⁶

§ 370. **Detailing Collateral Facts to Assist Recollection.**—The rule under this head is that it is not necessary that the witness should have a positive or full recollection of the facts to which he testifies, or that he should speak with such certainty as to ex-

⁴¹ *Haish v. Munday*, 12 Bradw. (Ill.) 539, 545, opinion by McAllister, J.; citing *People v. Mather*, 4 Wend. (N. Y.) 229, 249; *People v. Graham*, 21 Cal. 261; *Carpenter v. Ambrosan*, 20 Ill. 170; *Baltimore etc. R. Co. v. Thompson*, 10 Md. 76; 1 Greenl. Ev., § 434; *Nelson v. Hunter*, 140 N. C. 598, 53 S. E. 439; *People v. Lange*, 90 Mich. 454, 51 N. W. 534; *Green v. St.*, 96 Ala. 29, 11 South. 478; *White v. City of Boston*, 186 Mass. 65, 71 N. E. 75; *Price v. Rosenberg*, 200 Mass. 36, 85 N. E. 887.

⁴² *Klock v. St.*, 69 Wis. 574, 19 N. W. 543. The court cite *Turney v. St.*, 8 Smed. & M. (Miss.) 104,

120; *Gunter v. Watson*, 4 Jones L. (N. C.) 455.

⁴³ *Sanderlin v. Sanderlin*, 24 Ga. 583. Where there is conflicting testimony witness may be asked, as referring to his own version, when he first “learned the truth” etc. *Brandt v. Frederick*, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

⁴⁴ *Willey v. Portsmouth*, 35 N. H. 303; *Hays v. St. (Tex. Cr. R.)*, 20 S. W. 361 (not reported in state reports).

⁴⁵ *Ibid.*, post, ch. 22.

⁴⁶ *Magee v. St.*, 32 Ala. 5. See also *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272; *Huntoon v. O’Brien*, 79 Mich. 227, 44 N. W. 601.

clude all doubt in his mind.⁴⁷ "He may," said Willie. C. J., "detail circumstances which satisfy his mind of the existence of the fact, and they should go to the jury, so that they may draw from them such conclusion as they may deem just and reasonable. If the deduction drawn by the witness from these circumstances is unwarrantable, then the evidence may be excluded; but if they may or may not, under the facts, warrant the conclusion derived from them by the witness, we think that they should be allowed to go to the jury. When resort is had to circumstantial proof, 'any fact may be submitted to the jury, provided it can be established by competent means, which affords any fair presumption or inference as to the question in dispute.'⁴⁸ The particular fact connected with an old transaction as to which a witness' testimony is sought, may have faded from his memory, but other and surrounding or collateral facts, which are remembered, may be so intimately associated with the fact inquired about, as to satisfy the witness that it did exist. In such cases it is entirely proper that all these facts should be laid before the jury, together with the deduction drawn from them by the witness, and let them determine as to the sufficiency of the circumstances to establish the main fact. It is more a matter of the sufficiency than of the competency of the evidence."⁴⁹

§ 371. [Illustration.] **Marking the Boundaries of the Parishes in London.**—A good illustration of the value of the principle above stated, that the witness may be allowed to appeal to collateral facts in order to assist his memory, is found in a custom which still prevails in London, of perpetuating the memory of the corners of the different parishes of the city. As stated to the writer by an Eng-

⁴⁷ 1 Greenl. Ev., § 440.

⁴⁸ Citing *Wells v. Fairbanks*, 5 Tex. 585; *Packard v. Bryant*, 92 Mich. 430, 52 N. W. 788. Thus he may be asked, if at a certain time and place he made certain statements inconsistent with his present testimony. *White v. St.*, 87 Ala. 24, 5 South. 829; *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. 249; *Thompson v. St.*, 80 Ark. 364, 97 S. W. 297; *Hurley v. St.*, 46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161. Especially,

if he is to some extent hostile. *Spaulding v. Chicago etc. Ry. Co.*, 98 Iowa, 205, 67 N. W. 227; *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540. Contra it has been held in Kentucky not allowable to refresh memory of witness by reading to him his testimony on a former trial, and asking him, if it is true. *Com. v. Bavarian Brewing Co.*, 26 Ky. Law Rep. 121, 80 S. W. 772.

⁴⁹ *Davie v. Terrill*, 63 Tex. 105.

lish barrister, the beadle of each parish goes around at stated periods with a number of boys with hazel switches and marks the corners of the parish by calling the attention of the lads to it; and it was stated to the writer by a gentleman who had long lived in London, that in one known instance the point where several parishes "cornered" was immediately under the seat of one of the judges of one of the judicial courts, and that when the beadle and the boys came around to perform this ceremony, the judge would vacate his seat for the purpose. The custom originated in the practice of taking one or more boys to the parish corner and there *flogging them soundly* with hazel switches, which circumstance would ever afterwards fix the particular spot in their recollections, and in that way a perpetual memorial of the place was preserved in the memories of living witnesses.

§ 372. Evidence of Undisputed Date to fix a Disputed Date.—

It has been held within the discretion of the trial court to admit evidence of a transaction having an undisputed date, for the purpose of fixing in the mind of the witness a date which was in dispute. Loomis, J., said: "If the dates to be shown were material and in dispute, they could be shown by the date of some other date not in dispute, upon the same principle that 'the qualities of an object in dispute may be shown by comparison with the known qualities of some object not in dispute.'"⁵⁰

§ 373. Reason for Remembering.—"A witness," said Mr. Abbott, "may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant."⁵¹ Evidence which will assist in showing which party speaks the truth

⁵⁰ Harris v. Rosenberg, 43 Conn. 227, 231; citing Isbell v. New York etc. R. Co., 25 Conn. 556; St. v. Dunn, 109 Iowa, 750, 80 N. W. 1068; Stewart v. Anderson, 111 Iowa, 329, 82 N. W. 770; Wilkins v. Metcalf, 71 Vt. 103, 41 Atl. 1035. The true date of a paper, whether it is undated or not, may be fixed in this way. Lambe v. Manning, 171 Ill. 612, 49 N. E. 509; Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319; Vaughan

v. Parker, 112 N. C. 96, 26 S. E. 908. The date of an event may be fixed by refreshing the mind of witness by reference to a contemporaneous newspaper article. Bragg Mfg. Co. v. City of New York, 141 Fed. 118 (C. C. A.).

⁵¹ Abb. Pr. Brief, 99; citing Blackwell v. Hamilton, 47 Ala. 472; Angell v. Rosenberg, 12 Mich. 241, 256; People v. Kuches, 120 Cal. 566, 52 Pac. 1002.

is relevant;⁵² therefore a party may aid the memory of his own witness by directing his mind to any circumstance which will help him to recollect more clearly the fact sought to be proved.⁵³ The rule that a witness may state collateral facts which fixed the subject about which he is being interrogated in his recollection has been applied so as to allow a witness, testifying to a material fact in the case, to state as a reason for his accurate recollection that he had a *conversation about it* with a third person at a stated time; but the details of the conversation are not relevant or admissible. Somerville, J., speaking for the court, said: "It is always competent for a witness to state that he had a conversation with a third person on a certain subject germane to the issue in dispute, and at a time specified, as a reason for his accurate recollection of the fact to which he has testified. The rules of evidence are those of common sense and human experience; and both of these teach us that the retentiveness of a witness' memory as to a particular fact or incident, is greatly improved where, after seeing or hearing of it, he subsequently converses about it."⁵⁴

§ 374. **Questions as to Contemporaneous Circumstances.**—It has been held that a party ought to be allowed to put a question to his own witness relating to a contemporaneous circumstance, for the purpose of bringing to his recollection the fact desired to be brought out. It is said by the New York Court of Appeals: "While a party cannot cross-examine his own witnesses, and is in general bound by the answers made, it is not objectionable, after the witness has given an ambiguous answer, to inquire as to any circumstance or fact tending to enable him to recollect the fact sought to be proved more clearly or certainly."⁵⁵

§ 375. **Right to Contradict a Fact from which a Witness infers Another Fact.**—In a recent case in Massachusetts it is ruled that, where a witness swears to a fact only as an inference from the exist-

⁵² *Platner v. Platner*, 78 N. Y. 90; *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770; *Leonard v. Mixon*, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134.

⁵³ *O'Hagan v. Dillon*, 76 N. Y. 170. Compare *Sawyer v. Orr*, 140 Mass. 234, 5 N. E. 822; *Grenell v. R. Co.*, 124 Mich. 141, 82 N. W. 843; *Birm-*

ingham Elec. Ry. Co. v. Clay, 108 Ala. 233, 19 South. 309.

⁵⁴ *Adams v. Robinson*, 65 Ala. 587, 591; *Sanborn v. Detroit etc. R. Co.*, 99 Mich. 1, 57 N. W. 1047.

⁵⁵ *O'Hagan v. Dillon*, 76 N. Y. 170, 173; *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061.

ence of another fact, the question whether the fact from which the main fact is inferred is true, becomes material, and may be contradicted by the witnesses of the opposite party. Thus, in an action against a railway company for a negligent injury received by the plaintiff, a passenger, in alighting at the defendant's station in the night time, it became a material inquiry whether the premises were lighted at that time. The defendant's witnesses swore to the fact that they were lighted, but based their statement solely upon the ground that it was the uniform practice to light it. It was held competent for the plaintiff to show in rebuttal that there was no such uniform practice.⁵⁶

§ 376. **Strength of Recollection—"Impressions" of the Witness.**—In general, it may be said that the impressions of a witness are not evidence, unless it may be made to appear that what are called impressions are derived from *recollection*, and not from the information of others;⁵⁷ and not then when the so-called impressions are in substance the *conclusions* of the witness, under the rule

⁵⁶ *Wentworth v. Eastern R. Co.*, 143 Mass. 248, 3 New Eng. Rep. 355. So where any circumstance is given as the basis or source of knowledge, the non-existence of such circumstance may be shown. *St. Louis S. W. R. Co. v. Bryson*, 41 Tex. Civ. App. 245, 91 S. W. 829. The general rule is, that all details of testimony may be contradicted, whereon the probability of the truth of such testimony depends. *St. v. Rogers*, 115 La. 164, 38 South. 952.

⁵⁷ *Clark v. Bigelow*, 16 Me. 246; *Boyd v. Bank*, 25 Iowa, 255. Following this principle, it has been held in one of the appellate courts of Illinois, that it is not competent to allow a witness to answer, "My impression is that they did; I could not swear positively." *Rounds v. McCormick*, 11 Bradw. (Ill.) 220. But in another jurisdiction, on the trial of a felony, which consisted of shooting and wounding, after the witness had testified that she was at her mother's gate near the scene

of the injury, and saw a person run west just after the shooting, but that she could not say who it was, the court put to her this question: "At the time you saw that person running, and not from what you heard, did you think it was Dave Long (the defendant)?" To which the witness answered: "I took it to be Dave Long at the time. I could not say for certain who it was now; the man was running fast," etc. It was held after a conviction and on appeal, that it was not an available error for the court to put the question in a leading form, and that, for the purpose of testing the witness and getting at the truth, the court had the right to ask her what her impressions were at the time. *Long v. St.*, 95 Ind. 481, 487. See 3 Abb. N. C. 235. The following expressions have been held insufficient as testimony: "Think," *Ohio & M. R. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246; "Suppose," *Orr v. R. Co.*, 94 Iowa, 423, 62 N. W. 851; "Signature

hereafter stated.⁵⁸ Thus, on the trial of an issue of *devisavit vel non*, several witnesses were asked: "From the acts and declarations of S. (the deceased) by you related and testified, and as you observed, what impressions did it make on your mind as to his mental condition?" It was held that the question called for an *opinion* which the witnesses were not competent to give.⁵⁹ So, a witness called to authenticate a paper cannot be asked whether, to the best of his *impression*, it is in the handwriting of the party.⁶⁰

§ 377. **Witness must state Facts, not Conclusions.**—It is for the jury, and not for the witnesses, to draw *inferences* from facts; and therefore it is a general rule that witnesses who are not testifying as experts are not permitted to state their *opinions*, *conclusions* or *deductions* from facts, but they must be confined to the communication of facts, simply.⁶¹ Again, it is for the court, and not for the witnesses, to draw *conclusions of law*, and it is therefore a general rule that witnesses must not be permitted to state such conclusions.⁶² The dividing line between matter which involves the opinion, deduction, or conclusion of the witness, and the recital of a state of the facts, will often be difficult to be drawn; but several illustrations may be given of the rule. Where a witness ended his answer to a question by saying that he considered that certain property belonged to the plaintiff, it was held that this part of his answer should

looks like" etc., *Fullam v. Rose*, 181 Pa. 138, 37 Atl. 197. But abundant cases may be cited showing, that the test is whether or not the language intends merely to state what is witness's memory of an occurrence as it appeared to him. If so impression is only another word for the best of his recollection. *Shrimpton v. Brice*, 102 Ala. 655, 15 South. 452; *St. v. Seymore*, 94 Iowa, 699, 63 N. W. 663; *St. v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *St. v. Bradley*, 67 Vt. 465, 32 Atl. 240; *Combs v. Com.*, 90 Va. 88, 17 S. E. 881.

⁵⁸ *Real v. People*, 42 N. Y. 270.

⁵⁹ *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564.

⁶⁰ *Carter v. Connell*, 1 Whart. (Pa.) 392.

⁶¹ *Morehouse v. Mathews*, 2 N. Y. 514; *Teall v. Barton*, 40 Barb. (N. Y.) 137; *National Bank v. Isham*, 48 Vt. 590; *Chicago etc. R. Co. v. Stibbs*, 17 Okl. 97, 87 Pac. 293; *Atlanta Ice & Coal Co. v. Mixon*, 126 Ga. 457, 55 S. E. 237; *American Car & F. Co. v. Hill*, 226 Ill. 227, 80 N. E. 784; *Rice v. Janos*, 193 Mass. 458, 79 N. E. 807; *Charlton v. R. Co.*, 200 Mo. 413, 98 S. W. 529; *Swing v. Rose*, 75 Ohio St. 355, 79 N. E. 757; *Chow Chok v. U. S.*, 163 Fed. 1021. It has been held, that witness might be asked whether or not he said or did anything with a view of influencing, etc. *Sherman v. Sherman*, 193 Mass. 400, 79 N. E. 774.

⁶² *Tomlin v. Hilyard*, 43 Ill. 300; *Calvert v. Schultz*, 143 Mich. 441,

be excluded, it being the statement of a conclusion of law.⁶³ A question which embraces the *whole merits* of the controversy is ordinarily subject to the objection that it calls for a conclusion on the part of the witness, although it may not be so in particular cases.⁶⁴ Where, on a criminal trial, a witness persisted in stating, against the objection of the defendant's counsel, his *suspicions* and conclusions as to the defendant's *guilt*, and the court failed to confine his examination to statements of fact, a conviction was reversed.⁶⁵ So, a witness, in an action against a guarantor of a promissory note, in proving the defendant's indorsements, of which there are two,—one above and one below a written guaranty,—should not be allowed to testify that “the second signature was put on to guarantee the payment of the paper.”⁶⁶ So, in a summary proceeding by motion against a tax collector and his sureties for failing to pay over public moneys, it has been held error to allow the chairman of the county court, as a witness, to state orally the result of his *statement* of the collector's *account*, without producing the papers on which it is based.⁶⁷

§ 378. [Continued.] Further Illustrations.—Applying this rule, it has been held inadmissible, in an action by a bank on a promissory note, the entire consideration of which had failed, to ask the president of the bank whether the bank discounted and received the note in the *ordinary course of business* and in *good faith*.⁶⁸ So, the following question had been held improper, as calling for a conclusion of law: “Was the judgment obtained for the purchase-money of the land in controversy?”⁶⁹ So, it is improper to ask a witness what it would cost to do certain work “according to the contract testified to by the plaintiff,” because it is for the *court*, and not for the witness to construe the contract.⁷⁰ So, it is improper to ask the witness

106 N. W. 1123; Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

⁶³ Rosenthal v. Middlebrook, 63 Tex. 334.

⁶⁴ Caspar v. O'Brien, 15 Abb. Pr. (N. S.) (N. Y.) 402; Conner v. Stanley, 67 Cal. 315. Compare Orr v. St., 15 Ark. 540; Hamann v. Bridge Co., 127 Wis. 550, 106 N. W. 1081; Wiggins v. R. Co., 119 Mo. App. 492, 95 S. W. 311; Bentley

Shriber & Co. v. Edwards, 100 Md. 652, 60 Atl. 283.

⁶⁵ Harrison v. St., 16 Tex. App. 325, 329.

⁶⁶ Johnson v. Glover, 121 Ill. 283, 10 N. E. 214.

⁶⁷ Shepherd v. Hamilton County, 8 Heisk. (Tenn.) 380.

⁶⁸ National Bank v. Isham, 48 Vt. 590. See also Clough v. Patrick, 37

⁷⁰ McClay v. Hedge, 18 Iowa, 66. Vt. 421.

⁶⁹ Tomlin v. Hilyard, 43 Ill. 300.

what the defendant *meant* by an expression which, according to the testimony of the witnesses, the defendant had used,⁷¹—the interpretation of verbal speech being for the jury.⁷² So the question “was a certain deed delivered to take effect?”—is inadmissible, as calling for a legal conclusion.⁷³ So, in an action for damages for flowing land, a witness cannot be asked whether the flowage injured the plaintiff.⁷⁴ In like manner, it is not competent for a witness to testify as to the *knowledge* of a person other than himself. He may state declarations, acts or circumstances tending to show such knowledge, but beyond that his statement is merely that of a conclusion, which is inadmissible. The following question was, under this rule, properly rejected: “Did the plaintiff know you had nothing to do with the labor on the building after October last?”⁷⁵ For a somewhat different reason, it is not competent to ask a witness whether or not a certain instrument is a *warranty deed*. The reason is that the contents of a writing cannot be proved by parol, unless the absence of the writing has been sufficiently accounted for. Where the contents are shown, it is a question of law, for the court to decide, upon which the opinion of a witness is incompetent.⁷⁶ So, in an action on a *building contract*, it has been held proper not to allow the architect, testifying as a witness, to state whether certain extra work, which had been ordered, was of such character as to render it impossible for the plaintiff to complete the building by the date named.⁷⁷ What the witness *understands* or *thinks* falls within the rule which prohibits witnesses from stating their conclusions. Accordingly, the following testimony was properly excluded from the jury: “My understanding was, at the time, and still is, that the mortgage was given to release the securities and secure the payment of the note. I think Barber (the payee) understood it in that way also.”⁷⁸ But a witness may be asked whether a person, *e. g.*, the cashier of a bank, had *authority* to do a particular act.⁷⁹ And in an action for damages and for an injunction against miners, who had cut away the dam above the plaintiff’s mill, it has been held proper

⁷¹ Whitman v. Freese, 23 Me. 185.

⁷² Post, § 1115.

⁷³ Braman v. Bingham, 26 N. Y. 483.

⁷⁴ Reagan v. Grim, 13 Pa. St. 508.

⁷⁵ Major v. Spies, 66 Barb. (N. Y.) 577; Bush & Hattoway v. McCarty Co., 127 Ga. 308, 56 S. E. 430.

⁷⁶ Jackson v. Benson, 54 Iowa, 654, 7 N. W. 97.

⁷⁷ Campbell v. Russell, 139 Mass. 278, 1 N. E. 345.

⁷⁸ Phares v. Barber, 61 Ill. 272.

⁷⁹ Robinson v. Bealle, 20 Ga. 275.

to ask a witness what *effect* did the running of the slum, etc., by defendants and other miners above, have upon the plaintiff's race.⁸⁰

§ 379. **Appearances.**—An exception to the foregoing rule is that a witness may frequently state a conclusion of fact from appearances. Thus, it has been held not error, in a trial for murder, to allow witnesses for the State to testify that the prisoner “appeared to be *drinking*,”⁸¹ or was *intoxicated* at the time of the alleged offense.⁸² So, witnesses other than experts may give their opinions as to *sanity* or *insanity*, provided such opinions be accompanied with statements of facts upon which they are founded.⁸³ So, it has been held proper to ask, “What did persons in the crowd say, tending to show a *common design* and feeling among several persons, to resist an officer in the execution of his duty?”⁸⁴ So, on a trial for murder occurring in an affray, a witness, who was present, may be asked whether, when deceased rushed upon defendant, there was *time enough* for the latter to escape and get out of the way.⁸⁵ But where the issue is whether the deceased person was possessed of testamentary capacity, it will not be competent to ask a witness, “From what

⁸⁰ Bell v. Shutz, 18 Cal. 449.

⁸¹ Choice v. St., 31 Ga. 424. Or that a horse “was frightened.” Ward v. Merdith, 220 Ill. 66, 77 N. E. 118. Or that one did not have this or that symptom at a certain time, though only a physician may testify whether or not he had a certain disease. Ill. L. Ins. Co. v. De Lang, 30 Ky. Law Rep. 753, 99 S. W. 616. May testify one was ill. St. L. etc. R. Co., 44 Tex. Civ. App. 311, 97 S. W. 1070. As to speed of trains. Stotter v. R. Co., 200 Mo. 107, 98 S. W. 509. A non-expert may testify as to certain people having died of consumption. Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107. One knowing the place may state at what distance an engineer could have seen a cow killed by a train. Arkansas etc. R. Co. v. Sanders (Ark.), 99 S. W. 1109.

⁸² People v. Eastwood, 14 N. Y. 562.

⁸³ Choice v. St., 31 Ga. 424; Wrightman v. Grand Lodge A. O. U.

W., 121 Mo. App. 252, 98 S. W. 829. A non-expert may testify as to acquaintance with another and that he saw nothing in his appearance to indicate insanity. Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111. And as to his mental incapacity to understand a certain transaction. Beard v. Southern R. Co., 143 N. C. 137, 55 S. E. 505. A familiar illustration of testimony from appearance is that as to the handwriting of another—experts being the only ones entitled to testify from comparison with admittedly genuine writing. Ware v. Burch, 148 Ala. 529, 42 South. 562. So one may testify as to a sound, i. e. whether it was from the bell or gong on a street car, his familiarity therewith being shown. Kohr v. St. Ry. Co., 117 Mo. App. 302, 92 S. W. 1145.

⁸⁴ Main v. McCarty, 15 Ill. 441.

⁸⁵ Stewart v. St., 19 Ohio, 312. See also Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 South. 280.

you saw, what was his mental capacity?"—since this would devolve upon him the office of court and jury, and require him to decide the whole case.⁸⁶

§ 380. **Opinions as to Value.**—An exception to the rule which excludes the conclusions of witnesses is found in another rule which admits their opinions as to value, provided a *foundation* is first laid by showing that the witness is acquainted with the value of the thing, the value of which is in dispute, and is therefore competent to give an opinion upon that subject.⁸⁷ This rule is subject to the qualification that the opinions of witnesses as to value are not binding upon the jury, but persuasive merely. If they are of a different opinion, they may find according to their own opinion; though a wide discrepancy between their verdict and the opinions of the witnesses might be ground of setting the verdict aside.⁸⁸ Thus, where *land* is taken for the building of a railroad, a witness acquainted with the land and its value may state his opinion as to its value, immediately before the taking and immediately after, and the amount of damage done to the land by such taking.⁸⁹ So, a witness acquainted with the land and its value may state his opinion as to the amount of damage done by hauling logs over it, in an action of trespass *quare clausum fregit*.⁹⁰ These decisions proceed upon the ground that opinions of witnesses derived from observation are generally admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained.⁹¹ So, in an action on a policy for *fire insurance*, where it was necessary to show the value of articles destroyed by the fire, it was held that a daughter of the plaintiff who had bought many of the articles insured, and who was present when others were bought, was a competent witness to testify concerning their value.⁹² It is competent for a witness to testify as to the *actual cost* of property at a particu-

⁸⁶ White v. Bailey, 10 Mich. 155.

⁸⁷ Clark v. Field, 42 Mich. 342, 4 N. W. 19; Slaton v. Fowler, 124 Ga. 955, 53 S. E. 567; Palmer v. Goldberg, 128 Wis. 103, 107 N. W. 478; Union Pac. R. Co. v. Lucas, 136 Fed. 374, 69 C. C. A. 218.

⁸⁸ Winkler v. Railroad Co., 21 Mo. App. 109; Johnson v. City of Tacoma, 41 Wash. 51, 82 Pac. 1092.

⁸⁹ Curtis v. R. R. Co., 20 Minn. 28; Sherwood v. R. R. Co., 21 Minn. 127; Met. St. Ry. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

⁹⁰ Carter v. Thurston, 58 N. H. 105, 108.

⁹¹ Hardy v. Merrill, 56 N. H. 227, 241.

⁹² Continental Insurance Co. v. Horton, 28 Mich. 173.

lar place, such evidence being relevant on the question of value.⁹³ So, a witness may testify to a knowledge of the *market price* of cattle at a particular time and place derived from the *newspapers*.⁹⁴ Obviously, a witness cannot be asked a question which calls upon him, not to give his own opinion as to value, but which requires him, from what he knows and from the testimony of the witnesses which he has heard, to give his opinion as to the amount of damages which ought to be awarded,—since this devolves upon him the functions of the jury.⁹⁵

§ 381. **Opinion of the Plaintiff as to his own Damages.**—The rule of the preceding section does not extend so far as to allow a plaintiff in an action, where the quantum of damages is not determined by the value of real or personal property, to give an opinion on the witness stand, as to the extent to which he has been damaged.⁹⁶ Such evidence falls within the rule of a preceding section,⁹⁷ which excludes statements of witnesses which involve conclusions merely, and especially conclusions which go to the entire merits of the controversy.⁹⁸ Thus, in an action for maliciously suing out an *attachment*, where injury to the plaintiff's *credit* is assigned as an element of damages, he will not be permitted to testify what his credit was worth to him prior to the doing of the wrong.⁹⁹

§ 382. **Questions depending on the Experience of Witnesses.**—Witnesses may properly testify in regard to matters derived partly

⁹³ Whipple v. Walpole, 10 N. H. 130.

⁹⁴ Cleveland etc. R. Co. v. Perkins, 17 Mich. 296; Harris v. R. Co., 115 Mo. App. 527, 91 S. W. 1010.

⁹⁵ Shepherd v. Willis, 19 Ohio, 142. Compare White v. Bailey, 10 Mich. 155.

⁹⁶ Kennedy v. Holladay, 25 Mo. App. 503, 514; Smith v. Young, 26 Mo. App. 575, 578; Harriman v. New Nonpareil Co., 132 Iowa, 616, 110 N. W. 33. Applied to a case where plaintiff sued for wrongful death of minor child. Cincinnati etc. v. Stephens, 75 Ohio St. 171, 79 N. E. 235. But see Jackson v.

Ry., 73 S. C. 557, 54 S. E. 231. Contra, Roundtree v. R. Co., 72 S. C. 474, 52 S. E. 231.

⁹⁷ Ante, § 377.

⁹⁸ White v. Stoner, 18 Mo. App. 540, 547; Belch v. Railroad Co., Id. 80; Dunn & Lallande Bros. v. Gunn, 149 Ala. 583, 42 South. 686.

⁹⁹ Kauffman v. Babcock, 66 Tex. 241, 2 S. W. 878. The court cite Clardi v. Calicoat, 24 Tex. 170, 173; Gabel v. Weisensee, 49 Tex. 131, 142; Turner v. Strange, 56 Tex. 142; 1 Greenl. Ev., § 440. The same ruling was made at the same time in Hershheim v. Babcock (Tex.), 2 S. W. 880 (not reported in state reports).

from their own experience in a particular business, although their information comes through others in the course of such business,—as, for instance, where the question concerns the course of such business in a particular trade.¹ So, it has been held competent to ask a witness who professes to know the number of slaves, mules, etc., employed on a plantation, how much corn per month it would require to supply the wants of the plantation.² This opens up the question of *expert testimony*, which is too extensive a subject for full treatment here.³

§ 383. **Testimony as to Intent, Belief or Motive.**—It is a general rule that the intent or purpose with which an act is done is not material in civil cases, when the doing of the act is called in question; since parties are held to the natural and legal consequences of their acts, and the law cannot investigate their psychological conditions with accuracy.⁴ But where the intention of a party becomes material, it may, of course be shown in evidence. Before parties were made competent by statute to testify as witnesses, the intent of a party to a litigation, when material, necessarily had to be proved by his acts or declarations, or by surrounding circumstances. But since the passage of statutes rendering parties competent to testify as witnesses, it is settled by a preponderance of authority, that it is competent for a party, testifying in his own behalf, to state his intent with regard to the transaction in question, where such intent is material.⁵ Thus, in a civil action for wantonly and

¹ King v. Woodbridge, 34 Vt. 565. For other examples and the extent to which the witnesses may go, see Garran v. Michigan Cent. R. Co., 144 Mich. 26, 107 N. W. 284; Pittsburg etc. R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522; Brown v. R. Co., 94 Iowa, 369, 62 N. W. 737.

² Rembert v. Brown, 14 Ala. 36.

³ As to the manner of examining expert witnesses, see post, ch. 22.

⁴ Hale v. Taylor, 45 N. H. 405; Gale v. Belknap Ins. Co., 41 N. H. 170; Wadleigh v. Janvrin, 41 N. H. 512; Snedeker v. Warring, 12 N. Y. 170; Farmers etc. Bank v. Champlain Co., 23 Vt. 186; Hayward v. Bath, 38 N. H. 182. See also as

bearing on this subject, Gates v. Lounsbury, 20 Johns. (N. Y.) 427; Lawrence v. Ocean Co., 11 Johns. (N. Y.) 241; N. Y. Firemen's Co. v. Lawrence, 14 Johns. (N. Y.) 46; Palmer v. Pinkham, 33 Me. 35; Zimmerman v. Brannon, 103 Iowa, 144, 72 N. W. 439; Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829.

⁵ Shockey v. Mills, 71 Ind. 288; Thurston v. Cornell, 38 N. Y. 281; Miner v. Phillips, 42 Ill. 123; Bloch v. Price, 24 Mo. App. 14; Fish v. Chester, 8 Gray (Mass.), 506; Hulett v. Hulett, 37 Vt. 581, 586; Graves v. Graves, 45 N. H. 323; Homans v. Corning, 60 N. H. 418; Sweet v.

maliciously destroying property, the defendant may testify as to his *motive*, for the purpose of disproving *malice*.⁶ So, it has been held, on the trial of an indictment for an assault and battery with intent to commit a *rape*, that the accused might testify as to what his intention was in the commission of the assault and battery.⁷ So, on the trial of an indictment for *larceny*, it is competent for the defendant to testify as to what his intention was at the time the goods came into his possession.⁸ So, where the question concerns the intent with which an *assignment* of property has been made, it is competent for the assignor to testify what his intentions were.⁹ So, where the validity of a *deed*,¹⁰ or of an *official act*,¹¹ is in question, it is competent for the grantor to testify that he executed it *in good faith*. And in general, it may be stated that, where the intent is an essential element in the charge of *crime*, the prisoner has the right to testify as to intent in doing the act.¹² Nor is it necessary to the

Tuttle, 14 N. Y. 465; Hale v. Taylor, 45 N. H. 405; Gale v. Belknap Ins. Co., 41 N. H. 170, 175; Norris v. Morrill, 40 N. H. 395; Edwards v. Currier, 43 Me. 474; Wheelden v. Wilson, 44 Me. 11; Corinna v. Exeter, 13 Me. 328; French v. Marstin, 24 N. H. 440, 450; Conway v. Clinton, 1 Utah T. 215, 221; McKown v. Hunter, 30 N. Y. 625; White v. Tucker, 16 Ohio St. 468; Berkey v. Judd, 22 Minn. 287, 297 (overruling dictum in Hathaway v. Brown, 18 Minn. 414; distinguishing People v. Saxton, 22 N. Y. 309); Watkin v. Wallace, 19 Mich. 57; Seymour v. Wilson, 14 N. Y. 567; Forbes v. Waller, 25 N. Y. 430; Cortland County v. Herkimer County, 44 N. Y. 22. See also as bearing on the question, Jones v. Howland, 8 Metc. (Mass.) 377; Blodgett v. Farmer, 41 N. H. 403; Fiedler v. Darin, 50 N. Y. 437; Lawyer v. Loomis, 1 Thomp. & C. (N. Y.) 393; Acme Brewing Co. v. Central R. & Bkg. Co., 115 Ga. 494, 42 S. E. 8; Albion v. Maples Lake, 71 Minn. 503, 74 N. W. 282; Bright v. W. U. Tel. Co., 132 N. C. 317, 43 S. E. 841.

⁶ Conway v. Clinton, 1 Utah T. 215, 221. So in action for malicious prosecution. Spalding v. Love, 56 Mich. 366, 23 N. W. 46.

⁷ Greer v. St., 53 Ind. 420.

⁸ White v. St., 53 Ind. 595; St. v. Dillon, 48 La. Ann. 1365, 20 South. 913.

⁹ Watkins v. Wallace, 19 Mich. 57, 76. But not so as to change its legal effect, where there is no question of fraud or incapacity. Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829.

¹⁰ Thacher v. Phinney, 7 Allen (Mass.), 146; Stevens v. Stevens, 150 Mass. 557, 23 N. E. 378. Grantor may testify as to intent in executing a deed mortis causa. Kyle v. Craig, 125 Cal. 107, 57 Pac. 791.

¹¹ Cortlandt Co. v. Herkimer Co., 44 N. Y. 22.

¹² Kerrains v. People, 60 N. Y. 221; People v. Baker, 96 N. Y. 340; Bass v. U. S., 20 D. C. App. 232; St. v. Kirby, 62 Kan. 436, 63 Pac. 752; Wallace v. U. S., 166 U. S. 466; People v. Hughes, 11 Utah, 100, 39 Pac. 492; Fischer v. St., 101 Wis. 23, 76 N. W. 594.

operation of the rule that the witness should be a *party* to the action. More broadly, the rule is, that where the *motive of the witness*, in performing a particular act or making a particular declaration, becomes a material issue in the case, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested party.¹³ Some courts, however, hold that, where a party takes the stand as a witness in his own behalf in civil and criminal cases, it is incompetent for him to testify as to an uncommunicated opinion, belief or motive on which he acted.¹⁴ It is clear that "a party cannot be allowed to testify to his *undisclosed intent*, in order to alter the effect of that which was matter of *contract, representation, or estoppel*, on which the other party had a right to rely."¹⁵

§ 384. Rule where the Concurrence of Intent of two Parties is Material.—It is said that, where it is material to show the concurrence of two parties in the same intent, evidence of the intent of one party alone cannot prevail.¹⁶ But this will not necessarily render it improper to prove the intent of each party.¹⁷ Thus, upon the

¹³ Seymour v. Wilson, 14 N. Y. 567; Kerrains v. People, supra; Homans v. Corning, 60 N. H. 418; McKown v. Hunter, 30 N. Y. 625; Starin v. Kelly, 88 N. Y. 318; Griffin v. Marquardt, 21 N. Y. 121; Forbes v. Waller, 25 N. Y. 430; also, City of Columbus v. Dahn, 36 Ind. 330, where some authorities on this point were quoted, but the point left undecided. Counselman v. Reichart, 103 Iowa, 430, 72 N. W. 490; Crandell v. White, 164 Mass. 54, 41 N. E. 204; Thompson v. Glover, 120 Ga. 440, 47 S. E. 935.

¹⁴ Whizenant v. St., 71 Ala. 383; Ford v. St., Id. 385; McCormick v. Joseph, 77 Ala. 236; Stewart v. St., 78 Ala. 436; Ball v. Farley, 81 Ala. 288, 1 South. 253, 259; Ballard v. Lockwood, 1 Daly (N. Y.), 158; Oxford Iron Co. v. Spradley, 51 Ala. 172; Baker v. Trotter, 73 Ala. 277, 281; Slodge v. Scott, 56 Ala. 202.

In Georgia the doctrine obtains that, although the intention with which an act was done or a contract made may be a material subject of inquiry, it is not competent for a witness to testify as to what the intention was. Green v. Akers, 55 Ga. 159; Lawrence v. Doe, 144 Ala. 524, 41 South. 612.

¹⁵ Abb. Tr. Brief, 93; citing Dillon v. Anderson, 43 N. Y. 231; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Ballard v. Lockwood, 1 Daly (N. Y.), 158; Waugh v. Fielding, 48 N. Y. 681; Harris v. Lumber Co., 97 Ga. 465, 25 S. E. 519.

¹⁶ Hale v. Taylor, 45 N. H. 405; Murray v. Bethune, 1 Wend. (N. Y.) 191; compare Rich v. Jackway, 18 Barb. (N. Y.) 357.

¹⁷ Hale v. Taylor, supra; Blake v. White, 13 N. H. 272.

question of the delivery and acceptance of chattels under a contract of sale, the intent characterizes the act, and the intention with which the act is done becomes material;¹⁸ and therefore, under the above rule, each party may testify to his intention in doing what was done.¹⁹ This rule is not inconsistent with another rule, which conclusively ascribes a certain intent to a given act, which the law does in many cases, in which case the party will be precluded from asserting, at least in civil cases, an intent contrary to the act which he did.²⁰ Where the concurring intent of two parties must be shown,—as in an illegal agreement,—the intent of each may be shown by independent evidence, and evidence which shows the intent of one is not *incompetent* because it does not also show the intent of the other.²¹

§ 385. **Fullness of Witness' Statement.**—Either party is entitled, if he insists upon it, to have the witnesses state fully all the details in respect of which he is interrogated. The court cannot properly limit the direct examination to a general statement,—such as whether the witness has heard the testimony of a preceding witness and concurs therein.²² But the party calling the witness is not obliged to enter into the details. He may ask his witness a general question and elicit a general answer thereto, and then leave his opponent to supply the details, if he shall desire, by a cross-examination.²³ So, in a criminal trial, if there is no objection, it is not an abuse of discretion for the judge to allow a witness to answer the general question, whether the witness had seen the defendant play at a game charged in the indictment at any time within twelve months, etc.²⁴ It has been held that a witness cannot be asked whether the facts stated in a particular paper are true: he should be interrogated as to those facts particularly.²⁵

¹⁸ *Kelsea v. Haines*, 41 N. H. 246, 253.

¹⁹ *Hale v. Taylor*, 45 N. H. 405.

²⁰ 1 *Smith L. C.* 531. Compare *Hibbard v. Russell*, 16 N. H. 410, 417.

²¹ *Abb. Tr. Ev.* 739 n. 5; *Yerkes v. Saloman*, 11 Hun (N. Y.), 471.

²² *Eames v. Eames*, 41 N. H. 177.

²³ *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644, 12

Am. St. Rep. 299. Though such a question might be open to the objection of being too general and therefore indefinite. *Winchell v. Express Co.*, 64 Vt. 15, 23 Atl. 728. A question ought to be specific enough to put the opposite party on notice as to the testimony sought. *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69.

²⁴ *Orr v. St.*, 15 Ark. 540.

²⁵ *Richardson v. Golden*, 3 Wash. (U. S.) 109.

§ 386. **Sufficient that the Evidence tends to Prove.**—It is sufficient, in order to make a question relevant, that the answer which it seeks to elicit will tend in some sensible degree to prove or disprove the fact in issue. It is not necessary that the answer, if believed, should in itself afford complete proof. It may be *corroborative* testimony merely, or a single *link* in a *chain* of circumstances, or a single *fact* in a *collection* of facts, neither of which is sufficient in itself, but all of which, when taken collectively, may be of sufficient probative force to carry conviction to the minds of the jurors. If, therefore, the answer to a question may *tend* to prove, or may form *part* of the proof of the matters alleged, though not wholly sufficient to prove them, the question may be asked.²⁶ In technical strictness the word "*issue*," when used with reference to pleadings, signifies the disputed point or question.²⁷ It is said that by the term "*relevancy*," we do not mean that the evidence shall be addressed with *positive directness* to the disputed point, but we mean evidence which, according to the common course of events, "either taken by itself or in connection with the testimony, proves, or renders probable the past, present or future existence or nonexistence of the other."²⁸ "It is not necessary," continue the Indiana court, "that the fact offered in evidence should bear immediately and directly on the main issue; for, again to quote from Stephen, 'facts which, though not in issue are so connected with a fact in issue as to form part of the same transaction or subject matter, are relevant to the fact with which they are so connected.'"²⁹ Dr. Wharton defines relevancy as being that which conduces to the proof of a pertinent hypothesis.³⁰

§ 387. **Substance of Conversation or Admission.**—While a witness testifying to declarations, conversations or admissions, should give, if possible, the exact words used, yet a general answer embodying the substance or purport of the declarations, conversations or admissions, is not objectionable where that is all that the witness can

²⁶ Schuchardt v. Allens, 1 Wall. (U. S.) 359; Deal v. St., 140 Ind. 354, 39 N. E. 930; Cohn v. Seidel, 71 N. H. 558, 53 Atl. 800.

²⁷ Steph. Pl. 25.

²⁸ Steph. Ev., art. 1; Bent. Ev. 257, n.; Seller v. Jenkins, 97 Ind. 430, 438. See also Cole v. Lake Shore etc. R. Co., 81 Mich. 156, 45

N. W. 983; Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55.

²⁹ Seller v. Jenkins, 97 Ind. 430, 438; citing Stephen's Ev., art. 3; L. etc. R. Co. v. Crayton, 69 Miss. 152, 12 South. 271; Wade v. Love, 69 Tex. 522, 7 S. W. 225.

³⁰ 1 Whart. Ev., § 20.

remember.³¹ But it has been held that the rule is not satisfied with a statement of anything else than the substance of the language which was employed, and does not permit the witness to state merely his conclusion from the testimony. Thus, where, eight years after an alleged conversation, a witness in a case in chancery testified concerning the party, "that he fully admitted his liability on the note,"—it was held that this was a mere conclusion, and hence inadmissible.³² On the other hand, it has been held that, where a witness is unable to state what a conversation was, it is improper to refuse to allow him to state the *impression* which the conversation made on his mind.³³

§ 388. **Rule where a Witness Remembers a Part only of a Conversation.**—The fact that the witness remembers only a part of the conversation does not render the rest incompetent. Although it is a rule of evidence that, where testimony of a confession of the accused person is given the whole of what he said must be detailed, and the State will not be allowed to extract a part of it and detail that to the jury only;³⁴ yet where there is no attempt on the part of the State to violate this rule, the fact that the State's witness is not able to remember all the conversation between himself and the prisoner, but details it so far as he can remember it, does not afford ground for striking out and excluding what he does remember and detail.³⁵

§ 389. **Source of Information or Belief must be given.**—Where a question calls for the knowledge of the witness with reference to

³¹ Chambers v. Hill, 34 Mich. 523; Kittredge v. Russell, 114 Mass. 67.

³² Helm v. Cantrell, 59 Ill. 525, 531; St. v. Gadbois, 87 Iowa, 25, 56 N. W. 272; Gardner v. Crenshaw, 122 Mo. 79, 27 S. W. 612; Penna. Ins. Co. v. Phila. etc. R. Co., 165 Pa. 216, 30 Atl. 928; Steers v. Holmes, 79 Mich. 430, 44 N. W. 922; Hayes v. Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249. The same rule applies to confessions by an accused. St. v. Desroches, 48 La. Ann. 30, 19 South. 250; Irwin v. Nolde, 164 Pa. 205, 30 Atl. 246; Buzzard v. McAnulty, 77 Tex. 438, 14 S. W. 138.

³³ Wilder v. Peabody, 21 Hun (N. Y.), 376; ante, § 376. But see Miles

v. Roberts, 34 N. H. 245, which supports the view that a witness may state what he *understood* to be the effect of a conversation. Where witness stated that he "understood" from a conversation, etc., this was competent where not objected to at the time. Carlisle v. Humes, 111 Ala. 672, 20 South. 462.

³⁴ 1 Greenl. Ev., § 218; Coon v. St., 13 Smed. & M. (Miss.) 246, 250; Brown's Case, 9 Leigh (Va.), 634; Webb v. St., 100 Ala. 47, 14 South. 865; St. v. Novak, 109 Iowa, 717, 79 N. W. 465; Com. v. Russell, 160 Mass. 8, 35 N. E. 84.

³⁵ Wright v. St., 35 Ark. 640, 654.

a particular fact or transaction, and the witness, instead of answering the question directly, details that he found out certain facts, his answer is correctly excluded, unless he gives the source of his information.³⁶

§ 390. **Compound Questions when not Admissible.**—Where a compound question is propounded to a witness, part of which is admissible and part inadmissible, it is rightfully excluded as a whole.³⁷

§ 391. **Negative Testimony when too Remote.**—A witness cannot, on principle, be allowed to testify that he was not cognizant of a fact, unless he lays a *foundation* for so testifying, by saying that he was in a position in which he would have been cognizant of the fact if it had taken place. Thus, a witness having testified to a material conversation in the family of a deceased person, it was held not competent, for the purpose of contradicting him, to call a neighbor to testify merely that he had never heard such a conversation in the family. Such negative testimony has no legal value.³⁸

³⁶ Rosenthal v. Middlebrook, 63 Tex. 334, 336.

³⁷ Wyman v. Gould, 47 Me. 159; George v. Norris, 23 Ark. 121; Whiteford v. Burckmeyer, 1 Gill (Md.), 127; U. S. Sugar Refinery v. Providence Steam etc. Co., 62 Fed. 375, 10 C. C. A. 422. If part of a question, which is proper, is inseparably connected with what is objectionable, so as to form a single question, it should be excluded. Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69. The rule, too, is to exclude questions, which are ambiguous or general, to the extent that irrelevant evidence might be given or the mingling of relevant and irrelevant evidence occur in the answer. Parham v. St., 147 Ala. 57, 42 South. 1.

³⁸ Chambers v. Hill, 34 Mich. 523; Horn v. R. Co., 54 Fed. 301, 4 C. C. A. 346. As to what constitutes a sufficient laying of the foundation, there can be no certain rule, as the

non-observing by sight or hearing of one thing might amount to very little as tending to show it did not occur or exist, and the non-observing of another might be very persuasive of the conclusion, that it did not occur or was not present at a certain time or place. As to persuasiveness, or the lack thereof, under similar circumstances and conditions, there also may be a wide difference of opinion. For instances in which negative testimony was received, see Burton v. St., 115 Ala. 1, 22 South. 585; People v. Sanders, 114 Cal. 216, 46 Pac. 153; Gray v. St., 42 Fla. 174, 28 South. 53; McMahon v. McHale, 174 Mass. 320, 54 N. E. 854; St. v. Mims, 36 Or. 315, 61 Pac. 888; Rhodes v. U. S., 79 Fed. 740, 25 C. C. A. 186. This kind of testimony occurs most frequently in damage suits, where the question is of giving of proper warning by bells or gongs, or displaying lights or signals, but such testi-

§ 392. Putting the Testimony of two Witnesses together.—

There is authority for the conclusion that a fact may be proved by putting the testimony of two witnesses together. Thus, if one witness knew the fact at the time and told it to the other, and then forgot it, but the other remembers it as the former told it, and the former is able to testify that he told it correctly, the latter may detail it to the jury as the former told it to him.³⁹ In like manner, where the plaintiff testified that he made *entries* in accordance with statements made to him by other witnesses, the latter testified that such statements were true,—the evidence was held to be admissible.⁴⁰

§ 393. Rule as to the Declarations of Conspirators.—It is a well established rule that, where several persons are proved to have combined together for the same illegal or fraudulent purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act of the whole party. It follows as a corollary from this rule, that any acts or verbal expressions, being acts in themselves, or accompanying and explaining other acts, in furtherance of the common design, and for this reason part of the *res gestæ*, which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were made and used in furtherance of the common purposes of the conspiracy. But, on obvious grounds, before one party can be bound by the declarations of another party on the ground that the two are co-conspirators, the *fact* of the conspiracy must be shown, and then the declarations must

mony has been competent as given by parties in certain situations or relations, from which it may be presumed attention was or would have been given to the occurring of what is inquired about had it occurred.

³⁹ Thus, on the trial of an action for breach of a contract in reference to gathering hay, the question in issue was the number of loads of hay which had been delivered at a particular time. A witness stated that he could not remember the number, but that he knew it at the time and then told it to the plaintiff. The plaintiff was then called and allowed, against objection, to

state that the number of loads given him by the previous witness was fourteen. It was held that the evidence was admissible. *Shear v. Van Dyke*, 10 Hun (N. Y.), 528.

⁴⁰ *Payne v. Hodge*, 7 Hun (N. Y.), 612; *Miller v. Shay*, 145 Mass. 163, 13 N. E. 468. It was said by Andrews, J., in *Mayor v. R. Co.*, 102 N. Y. 572, 7 N. E. 905, that "Business could not be carried on and accounts kept, in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned." *Contra*, *Snow Hardware Co. v. Loveman*, 131 Ala. 221, 31 South. 19.

appear to have been made in furtherance of the common design. Regularly, proof of the plot or combination must *precede* the proof of the declarations; but this is a matter which yields to the sound *discretion* of the trial court. In order to make such evidence admissible, it must be shown that the conspiracy or combination was entered into before the declaration was made, though the conduct, acts and declarations of the separate individuals, in the planning or the execution of the joint scheme, may be shown as evidence of the common design. If admissible, the acts and declarations must be those only which were done and made during the pendency of the wrongful enterprise, shown to have been undertaken jointly and in furtherance of its objects.⁴¹ The preliminary question of the existence of such a common purpose must be passed on by the court, for the purpose of deciding on the admissibility of the evidence of such acts and declarations. The question of the probative value of the acts and declarations is ultimately to be decided by the jury.⁴²

⁴¹ Page v. Parker, 40 N. H. 47, 62. See also People v. Parish, 4 Denio (N. Y.) 153; Williamson v. Com., 4 Gratt. (Va.) 547; St. v. Simons, 4 Strobb. L. (S. C.) 266; Reg. v. Mears, 1 Eng. L. & Eq. 581; St. v. Ripley, 31 Me. 386; Glory v. St., 13 Ark. 236; Apthorp v. Comstock, 2 Paige (N. Y.), 482, 488; Craige v. Sprague, 12 Wend. (N. Y.) 41; Willes v. Farley, 3 Carr. & P. 395; Patten v. Gurney, 17 Mass. 182; Lovell v. Briggs, 2 N. H. 218; Sheple v. Page, 12 Vt. 519; Talbot v. Cains, 5 Met. (Mass.) 520; Brannock v. Bouldin, 5 Ired. L. (N. C.) 61. But, as a general rule, a foundation must have been laid by evidence sufficient to establish the fact of the conspiracy *to the satisfaction of the court*, or at least by evidence reasonably tending to establish it, *before* such declarations can be admitted. Sometimes, however, the court may, in its *discretion*, under *peculiar and urgent circumstances*, let such declarations go to the jury before sufficient proof is given of the conspiracy, the State undertak-

ing to supply such proof afterwards. Lawson v. St., 32 Ark. 220; 1 Greenl. Ev., § 111; St. v. Caine, 134 Iowa, 147, 111 N. W. 443; St. v. Darling, 199 Mo. 168, 97 S. W. 592; Sprinkle v. U. S., 141 Fed. 811, 73 C. C. A. 285; St. v. Philips, 73 S. C. 296, 53 S. E. 370. And so acts done by one of the conspirators, e. g. where a prison guard was murdered by convicts pursuant to an agreement, evidence of the killing of another in furtherance of the success of the agreement, is admissible, though there is no evidence of the agreement to kill the latter. St. v. Vaughan, 200 Mo. 1, 98 S. W. 2. See also St. v. Allen, 34 Mont. 403, 87 Pac. 177. Where an abortion had been committed, declaration of the female dying therefrom, that it had been committed in pursuance of an agreement between her and defendant and physician, are competent independently of its being competent as a dying declaration. St. v. Crofford, 133 Iowa, 478, 110 N. W. 921.

⁴² Com. v. Brown, 14 Gray (Mass.),

CHAPTER XVI.

OF THE USE BY WITNESSES OF MEMORANDA TO REFRESH RECOLLECTION.

SECTION

398. Statement of the General Rule by Prof. Greenleaf.

399. By Whom Made.

400. Time when Made.

401. How Made—May Consist of what.

(1.) Stenographic Writings.

(2.) Copies.

(3.) Previous Testimony, Deposition or Affidavit of the same Witness.

(4.) Books of Account, Bills of Particulars, etc.

(5.) Newspaper Report made by Witness.

402. How Used at the Trial.

(1.) Not Necessary that the Witness Should have an Independent Recollection of the Fact.

(2.) Right of the Other Party to Inspect the Document.

(3.) Manner in which Memorandum Used by Witness.

(4.) Whether Memorandum can be Put in Evidence.

§ 398. Statement of the General Rule by Prof. Greenleaf.—

Prof. Greenleaf's statement of the general rule has been so often quoted with approval by the judicial courts, that the writer takes the liberty of reproducing it here: "Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so, if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So also where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he

419, 432; *St. v. White*, 48 Or. 416, 87 Pac. 1371; *St. v. Roberts*, 201 Mo. 702, 100 S. W. 484. It is in the discretion of the court to admit the acts or declarations of a conspirator before sufficient evidence is given

of the conspiracy, but the proper connection must be made for such acts or declarations for them to be considered by the jury. *St. v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862.

then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for if inadmissible in itself, as for want of a stamp, it may still be referred to by the witness. But where the witness neither recollects the fact, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said."¹ The rule is applicable to *criminal* as well as to civil cases. A witness called by the prosecution in a criminal case to prove statements made by the defendant, may, while on the stand, refresh his recollection by referring to a written memorandum made by him at the time of making such statements or soon after.²

§ 399. By Whom Made.—In conformity with the above text of Greenleaf, the prevailing, though not universal³ view now is, that it is not necessary that the memorandum which a witness may use

¹ 1 Greenl. Ev., § 436. The following, among other authorities, are in substantial support of the text. *Folsom v. Apple River Log Driving Co.*, 47 Wis. 602 (where the text is quoted with approval); *Huff v. Bennett*, 6 N. Y. 337; *Howland v. Sheriff*, 5 Sandf. (N. Y.) 219; *Harrison v. Middleton*, 11 Gratt. (Va.) 527; *Talbot v. Cusack*, 17 Ir. L. (N. S.) 216; *Chicago etc. R. Co. v. Adler*, 56 Ill. 344; *Mead v. McGraw*, 19 Ohio St. 55. The rule as formulated by Prof. Greenleaf and the treatment, in this chapter, of memoranda used by witnesses in testifying, seems to ignore, or not to emphasize, a very important distinction between memoranda, which are but aids to recollection, and those which, not aiding present recollection, are used to show past recollection. The latter memoranda can never be competent evidence, except as on their face they are relevant to the subject-matter be-

fore the court, and therefore strict tests should be applied to them. Every day experience, however, shows that memory of a forgotten transaction may be refreshed or revived in various, indefinable ways, and that a later circumstance, having no perceptible relation to the former may do this, when what directly connects one therewith may bring no recollection of it to the mind. For illustrative cases see *Long v. Reagan*, 119 Pa. 403, 13 Atl. 442; *National etc. Bank v. Madden*, 114 N. Y. 280, 21 N. E. 905; *Overtorn v. R. Co.*, 181 Ill. 223, 54 N. E. 898; *Woodruff v. St.*, 61 Ark. 157, 32 S. W. 102; *People v. Ammernan*, 118 Cal. 23, 50 Pac. 15; *O'Brien v. Stambach*, 101 Iowa, 40, 69 N. W. 1133; *Davis v. St.*, 51 Neb. 301, 70 N. W. 984.

² *People v. Cotta*, 49 Cal. 166.

³ See, for instance, *St. v. Rhodes*, 1 *Houst. (Del.) Crim. Cas.* 476, 480.

to refresh his recollection, should have been made by the witness himself, provided that, after reading it he can speak to the facts from his recollection,⁴ or can swear positively to them from the memorandum,⁵ and provided also it is used for the sole purpose of refreshing his recollection, and not for the purpose of acquiring original information.⁶ It is, therefore, scarcely necessary to say that, where a witness swears that he has a complete recollection of the facts, it makes no difference that the memoranda which he uses to refresh his memory are not his own notes.⁷ Thus, a surgeon may

⁴ *Berry v. Jourdan*, 11 Rich. L. (S. C.) 67; *Davis v. Field*, 56 Vt. 426, 428; *Com. v. Ford*, 130 Mass. 64; *Huff v. Bennett*, 6 N. Y. 337; *Henry v. Lee*, 18 Eng. C. L. 273 (2 Chit. Rep. 124); 1 Whart. Ev., § 516; *St. v. Lull*, 37 Me. 246; *Fay v. Walsh*, 190 Mass. 374, 77 N. E. 44; *Breese v. U. S.*, 106 Fed. 680, 45 C. C. A. 535; *Com. v. Edgarton*, 200 Mass. 318, 86 N. E. 768.

⁵ *Martin v. Good*, 14 Md. 398; *Coffin v. Vincent*, 12 Cush. (Mass.) 98; *Hill v. St.*, 17 Wis. 675. Compare *McCormick v. Mulvihill*, 1 Hilt. (N. Y.) 131.

⁶ *Erie Preserving Co. v. Miller*, 52 Conn. 444; *Jaques v. Horton*, 76 Ala. 239, 243.

⁷ *Cameron v. Blackman*, 39 Mich. 108; *St. L. etc. R. Co. v. Wills* (Tex. Civ. App.), 102 S. W. 733. As putting an unnecessary limitation on the use of memoranda to refresh recollection, it has been held, that, if it was made in the presence of the witness and its accuracy verified at the time it may be used. *Crystal Ice Mfg. Co. v. San Antonio Brewing Assn.*, 8 Tex. Civ. App. 1, 27 S. W. 210; *Eder v. Reilly*, 48 Minn. 437, 51 N. W. 226. Or was read to him and expressed his recollection at the time. *Hazer v. Streich*, 92 Wis. 505, 66 N. W. 720. A broader rule says, that a memorandum made by any one may be used, if witness after inspecting

same has his recollection refreshed. *Calver v. Scott & Warston Lumber Co.*, 53 Minn. 360, 55 N. W. 552; *Spring v. South Bound R. Co.*, 46 S. C. 104, 24 S. E. 166. In Pennsylvania it was expressly ruled, that this principle is limited to memoranda, with which the witness is in some way connected. *Steele v. Wisner*, 141 Pa. 63, 21 Atl. 527. Also a paper, not known by the witness to be correct, has been held not usable. *Walker v. St.*, 117 Ala. 42, 23 South. 149; *Burks v. St.*, 40 Tex. Cr. R. 167, 49 S. W. 389. And yet it may be imagined, that a paper, which contained an incorrect statement of a matter, noticed at the time, might for that reason be more effective to revive recollection of the real facts, than if it had contained no error. The error, by reason of having been noticed, might have served to impress recollection. For illustrative cases see, *Stanley v. Stanley*, 112 Ind. 145, 13 N. E. 261; *St. v. Slaton*, 114 N. C. 813, 19 S. E. 96; *Hurley v. St.*, 46 Ohio St. 323, 21 N. E. 645. As showing a case, where the witness could not know personally that his data whereby a memorandum was made up, but permitted to be used to refresh memory see *Kahn v. Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059, 67 Am. St. Rep. 47. In that case plaintiff sued on a fire insurance policy and his bookkeeper refreshed his memory from a schedule of

use for this purpose the *record* of a hospital, although not made by him, provided he speaks from his own recollection.⁸

§ 400. **Time When Made.**—Professor Greenleaf says: “It is most frequently said that the writing must have been made at the time of the fact in question, or recently afterwards. At the farthest it ought to have been made before such a period of time had elapsed as to render it probable that the memory of the witness might have become deficient. But the practice in this respect is governed very much by the circumstances of the particular case.”⁹ The memorandum must have been reduced to writing at, or shortly after, the transaction, and while the transaction must have been fresh in the memory of the witness. It must have been “presently committed to writing,”¹⁰ “while the occurrences mentioned in it were recent and fresh in his recollection;”¹¹ “written contemporaneously, with the transaction,”¹² “or contemporaneously or nearly so, with the facts deposed to.”¹³ Where the witness uses a *copy* of his memo-

goods destroyed soon after the fire made by him and plaintiff partly from memory and partly from duplicate invoices from the sellers of goods. If the tests mentioned had been applied this would not have been permitted, a result which would strike few as being just.

⁸ *St. v. Collins*, 15 S. C. 373, 40 Am. Rep. 697.

⁹ 1 Greenl. Ev., § 438; *Ahern v. Boyce*, 26 Mo. App. 558; *Steinman v. Home Ins. Co.*, 43 Id. 513. For instance of exclusion see *Bergman v. Shondy*, 9 Wash. 331, 37 Pac. 453. This rule would seem to have better application to memoranda to show past, than to revive present, recollection. The primary question is, does a memorandum used to revive recollection revive it? If it does, it would seem unnecessary for it to state the essential recollection about an incompletely remembered transaction. If, as has been said it might state the very opposite of correct memory, as after discovered either through reflection or by reason of

some later event showing misapprehension on the part of him who made the memorandum.

¹⁰ *Lord Holt in Sandwell v. Sandwell*, Comb. 445; *Holt*, 295; *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518; *Johnson v. Ins. Co.*, 106 Mich. 96, 64 N. W. 5; *Williams v. Wager*, 64 Vt. 326, 24 Atl. 765. In opposition stands the common practice of allowing a witness to refresh his memory, either on direct or cross-examination, by referring to a deposition or report of former testimony. *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568; *St. v. Finley*, 118 N. C. 1161, 24 S. E. 495; *Bass v. St.*, 1 Ga. App. 728, 57 S. E. 1054.

¹¹ *Lord Ellenborough in Burrough v. Martin*, 2 Camp. 112; *A. T. & S. F. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968.

¹² *Tindal, C. J., in Steinkeller v. Newton*, 9 Carr. & P. 313; *Com. v. Clancy*, 154 Mass. 128, 27 N. E. 1001.

¹³ *Wilde, C. J., in Whitfield v. Aland*, 2 Carr. & K. 1015. To the same effect see *Burton v. Plummer*,

random for the purpose of refreshing his memory, it is immaterial when the copy was made, if it sufficiently appear that it is a correct copy.¹⁴ It is said that in respect of the time when a memorandum was made, much must be left to the discretion of the trial court, who sees the witness and hears him testify. Accordingly, where the witness said that he made the memorandum within a month or so, but that he remembered it until he wrote it down, it was held that there was no error in allowing him to use it to refresh his recollection. The court said: "The witness having testified that he remembered the items of labor when he wrote them down, the lapse of time was not such, considering the nature of the account, as to forbid the court, in the exercise of its discretion, allowing the witness to use the account to refresh his memory."¹⁵ "The reasons," said Justice Gray, "for limiting the time within which the memorandum must have been made are, to say the least, quite as strong when the witness, after reading it, has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum."¹⁶

2 Ad. & El. 341, 4 Nev. & Man. 315; Wood v. Cooper, 1 Carr. & K. 645; Morrison v. Chapin, 97 Mass. 72, 77; Spring Garden Ins. Co. v. Evans, 15 Md. 54; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 337; Ins. Co. v. Weide, 9 Wall. 667, and 14 Wall. 375; Chaffee v. U. S., 18 Wall. 516. Instances: *Two weeks*, too long. O'Neale v. Walton, 1 Rich. L. (S. C.) 234. So, under circumstances, the *next day*. Ballard v. Ballard, 5 Rich. L. 495. So, of *sixteen months*. Swartz v. Chickering, 58 Md. 291, 298. So, of a memorandum made *five months* after the transaction at the request of a party. Spring etc. Ins. Co. v. Evans, 15 Md. 54; Adams v. Internal Imp. Fund, 37 Fla. 266, 20 South. 266.

¹⁴ Lawson v. Glass, 6 Colo. 134; Anderson v. Imhoff, 34 Neb. 335, 51 N. W. 854.

¹⁵ Ibid; City of Kearney v. Thermanson, 48 Neb. 74, 66 N. W. 996; Grunberg v. U. S., 145 Fed. 81 (C.

C. A.). Where witness made out list of goods sued for in conversion from time to time as he remembered them—sufficient. Ward v. Mow etc. Co., 119 Mo. App. 83, 95 S. W. 964.

¹⁶ Maxwell v. Wilkinson, 113 U. S. 656, 658; citing Halsey v. Sinsebaugh, 15 N. Y. 485; Marclay v. Shults, 29 N. Y. 346, 355; St. v. Rawls, 2 Nott & McC. (S. C.) 331; O'Neale v. Walton, 1 Rich. L. (S. C.) 234. The restrictions placed on the use of memoranda, which do not refresh, but can be used only to prove past, recollection are proper, on the theory that the same test in cross-examination is not afforded as in testimony in regard to present recollection. Therefore the courts have a preference for present recollection and put past recollection on somewhat the same plane as secondary evidence. See People v. McLaughlin, 150 N. Y. 356, 44 N. E. 1017; Vicksburg R. Co. v. O'Brien, 119 U.

§ 401. **How Made—May Consist of What.**—(1.) *Stenographic Writings.*—It seems to be no objection that the memorandum used by a witness to refresh his memory, if written by himself, is in characters which he alone can read. This opinion was held in a case where the memorandum was written in phonographic characters peculiar to the witness.¹⁷

(2.) *Copies.*—It is not necessary that the writing used for this purpose should be an original writing, but a copy taken by the witness may be used, provided that, after inspecting the copy the witness can speak to the facts from his recollection.¹⁸ “The rule is subject to the limitation, that the witness must be able to testify that the original entry, when made, was a true statement of the facts, and the copy must be verified.”¹⁹ A clerk may also use for this purpose copies of papers on file in his office, which relate to the business which passes under his supervision.²⁰

S. 99; *Gurley v. MacLendon*, 17 D. C. App. 170; *Stahl v. Duluth*, 71 Minn. 341. The following cases refer to memoranda to be used as evidence of a past recollection. The court must be satisfied as to accuracy and this is shown in different ways. (1) By uniform custom governing the matter appearing in memorandum. *Matthias v. O'Neill*, 94 Mo. 525, 6 S. W. 253; *Howard v. R. Co.*, 11 D. C. App. 300; (2) By the showing of personal knowledge of the facts stated and remembered at the time *Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. 807; *R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286; *Pingree v. Johnson*, 66 Vt. 225, 39 Atl. 202; (3) By showing he recognized them as containing the facts and still so believes. *Anderson v. English*, 121 Ala. 272, 25 South. 748; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418; *Union Cent. etc. Co. v. Smith*, 119 Mich. 171, 77 N. W. 706; *Bourda v. Jones*, 110 Wis. 52, 85 N. W. 671.

¹⁷ *St. v. Cardoza*, 11 S. C. 195, 238; *Ellis v. St.*, 25 Fla. 702, 6 South. 708; *St. v. George*, 60 Minn. 503, 63

N. W. 100. It has been held in some jurisdictions, that a stenographer need have no recollection, but may testify solely from his notes. *Shepard v. Richmond & D. R. Co.*, 35 S. C. 467, 14 S. E. 952.

¹⁸ *Lawson v. Glass*, 6 Colo. 134; *Jaques v. Horton*, 76 Ala. 238, 244; *Berry v. Jourdan*, 11 Rich. L. (S. C.) 67; *Denver etc. R. Co. v. Wilson*, 4 Colo. App. 355, 36 Pac. 67. The copy, merely to refresh, need not be a proved copy. *New York etc. Co. v. Fraser*, 130 U. S. 611, 32 L. Ed. 1031.

¹⁹ *Calloway v. Varner*, cited in *Jaques v. Horton*, 76 Ala. 244; *City of Birmingham v. McPoland*, 96 Ala. 363, 11 South. 427.

²⁰ *Erie Preserving Co. v. Miller*, 52 Conn. 444, 446, 52 Am. Rep. 607. Use of copy of *defaced* copy of *defaced* original permitted. *Folsom v. Apple River etc. Co.*, 41 Wis. 602, 606. Witness may testify from a summary or memoranda of books or writing made by him. *Arkansas etc. Ins. Co. v. Woolverton (Ark.)*, 102 S. W. 226.

(3.) *Previous Testimony, Deposition or Affidavit of the Same Witness.*—There is a difference of opinion whether the previous deposition, testimony, or affidavit of a witness can be used by him for the purpose of refreshing his memory. In one jurisdiction the deposition of a witness, previously made by him, may be so used,²¹ and it is not error to allow a witness, on a criminal trial, to refresh his memory by reference to the minutes of his testimony given before the grand jury, although the minutes are not in his handwriting.²² In another jurisdiction, it is ruled that a witness in a criminal trial may, for the purpose of refreshing his memory as to certain dates, be permitted to read over the minutes of his testimony as given on the preliminary examination before a magistrate, where, after so refreshing his memory, he testifies from memory to the facts.²³ These rulings conform to the view above stated,²⁴ that it is not necessary that the memorandum should have been made by the witness himself. But, if they are sound in principle, what becomes of the rule that the memorandum should be made at, or near the time of the transaction to which the testimony relates? It is believed that they are unsound in principle, and that the true view is that taken in Pennsylvania, that a party cannot refresh the memory of his own witness by reading to him notes of testimony given by him in a former proceeding, touching the same subject-matter;²⁵ though in that State the rule seems to be otherwise in a case of a witness, who, since the former trial, has lost his health and memory.²⁶ But the mere fact that a witness fails to recollect what he had previously sworn to, where he has not, by reason of old

²¹ *Hull v. Alexander*, 26 Iowa, 569. See *Atkin v. St.*, 16 Ark. 568; *Burney v. Ball*, 24 Ga. 505; *Beaubien v. Cicotte*, 12 Mich. 459, 469; *Proctor v. St.* (Tex. Civ. App.), 112 S. W. 770.

²² *St. v. Miller*, 53 Iowa, 154, 4 N. W. 900. Compare *Com. v. Phelps*, 11 Gray (Mass.), 73.

²³ *White v. St.*, 18 Tex. App. 57, 62. See also *Hubby v. St.*, 8 Tex. App. 597; *Crotty v. City of Danbury*, 79 Conn. 379, 65 Atl. 147; *Louisville & N. R. Co. v. Hurt*, 101 Ala. 34, 13 South. 130; *People v. Palmer*, 105 Mich. 568, 63 N. W. 656. In Ohio it is held there must be the predicate

of surprise at former testimony. *Hurley v. St.*, 46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161.

²⁴ *Ante*, § 399.

²⁵ *Velott v. Lewis*, 102 Pa. St. 326. See also *Brown v. St.*, 28 Ga. 199; *Putnam v. U. S.*, 162 U. S. 687, 40 L. Ed. 1118. And see *Bass v. St.*, 1 Ga. App. 892, 57 S. E. 1054. Where the witness is somewhat hostile discretion is exercised. *Spaulding v. R. Co.*, 98 Iowa, 205, 67 N. W. 227; *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540.

²⁶ *Rothrock v. Gallaher*, 91 Pa. 108.

age or otherwise, lost his memory, will not be sufficient to admit the notes of a former trial. The court said: "He probably failed to recollect what he had previously sworn to but if this were enough to admit the notes of the former trial, we might as well abandon original testimony altogether, and supply it with previous notes and depositions. It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always be thus led to the exact words of his former evidence. As we are not yet prepared for an advance of this kind, we must accept the ruling of the court below as correct."²⁷ On the same view it has been held that an affidavit, made by the witness some three years after the occurrence of the transaction in question, and shortly before the trial, at the request of the defendant's counsel, could not be so used by the witness, since it "would be calculated to stimulate his courage rather than his veracity." The court said: "We think the practice of procuring such papers, and then using them, ostensibly for the purpose of refreshing the recollection of a witness who appears to be adverse, but really to intimidate him, ought not to be encouraged or sanctioned. The proper course is to examine the witness in the usual way, and, if his testimony be in contradiction of written statements previously made by him, to interrogate him respecting the latter, for the purpose of probing his recollection, and of obtaining an explanation of his inconsistency."²⁸ But where a witness is cross-examined as to his testimony in a previous deposition, there is no good reason why he should not be allowed to refresh his memory by looking at the deposition.²⁹

(4.) *Books of Account, Bills of Particulars, etc.*—This question must be kept distinct from the question under what circumstances books of account, shown to have been correctly kept, are admissible as original evidence. On grounds already suggested, books of account kept by the witness, or known by him to be correct, may be used by him as memoranda for the purpose of refreshing his recollection.³⁰ Thus, an invoice book, known by the witness to be in the plaintiff's handwriting, the witness having been present when it

²⁷ *Velott v. Lewis*, 102 Pa. St. 326, 333, opinion by Gordon, J.

²⁸ *Honstine v. O'Donnell*, 5 Hun, 472; citing *Bullard v. Pearsall*, 53 N. Y. 230. Compare *Harvey v. St.*, 40 Ind. 516.

²⁹ *George v. Joy*, 19 N. H. 544; *People v. Kelly*, 113 N. Y. 647, 21 N. E. 122.

³⁰ *White v. Tucker*, 9 Iowa, 100; *Flower v. Downs*, 6 La. Ann. 539; *Davidson v. Lallande*, 12 La. Ann.

was made, and it being correct so far as the witness knows, has been held such a memorandum as the witness might look to, for the purpose of refreshing his memory as to the character of the goods mentioned therein and their value.³¹ So, where the question relates to the nature and value of property sold at an administrator's sale, it is competent for a witness to refresh his memory from an account of the sales kept by himself, and also to read the terms of the sale as they were read just before the sale commenced.³² So, where the question was whether or not the defendant had deposited \$1,000 with the plaintiff's bank on a given date and an offer was made to show that he had deposited the amount in another bank on that date, and that the entry had been made by the teller of such other bank in the wrong pass-book, that is to say, in the pass-book which contained the entries of the plaintiff's bank, and the book-keeper of such other bank was prepared to testify from an inspection of his daily figuring book, made in course of business at the time,—it was held that the testimony should have been received, whether the books were admissible or not.³³ So, in a criminal trial the prisoner was time-keeper, and the witness was pay-clerk, of a colliery. The prisoner gave a time-list to a clerk, who entered it in the time-book, and on pay-day the prisoner read from the time-book the number of days each man had worked to the witness, who paid accordingly and who saw the entries of that time. It was held that, for the purpose of proving these payments, the witness might refresh his recollection by referring to the time-book.³⁴ For this purpose a

826; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Columbia v. Harrison*, 2 Treadw. (S. C.) 213; *Treadwell v. Wells*, 4 Cal. 260; *Chiapella v. Brown*, 14 La. Ann. 189; *Massey v. Hackett*, 12 Id. 54; *Jones v. Johns*, 2 Cranch C. C. (U. S.) 426; *Reed v. Jones*, 15 Wis. 40; *Schettler v. Jones*, 20 Wis. 412; *Johnson v. St.*, 125 Ga. 243, 54 S. E. 184; *Anderson v. Lumber Co.*, 131 Wis. 34, 110 N. W. 788.

³¹ *Miller v. Jannett*, 63 Tex. 82. So as to the invoices themselves, received with the goods by a *factor*. *Bartlett v. Hoyt*, 33 N. H. 151. Or a ledger where all the other books have been burned. *K. C. So. R.*

Co. v. Grain Co. (Tex. Civ. App.), 114 S. W. 436.

³² *Cowles v. Hayes*, 71 N. C. 230.

³³ *Lawrence v. Stiles*, 16 Bradw. (Ill.) 489. The owner of deposit book may testify from entries made in his presence. *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149.

³⁴ *Reg. v. Langton*, 2 Q. B. Div. 296. See also *Orr v. Farmer's Alliance etc. Co.*, 97 Ga. 241, 22 S. E. 937. Where mill was burned and foreman kept books showing marks and weight of cotton bales, this may be used in tracing a bale to another's possession. *Jenkins v. St.*, 31 Fla. 196, 12 South. 677.

witness may use a book kept by another clerk, if, from his connection with the business, he knows that the entries are correct, and testifies therefrom according to his own recollection.³⁵ So, a plaintiff testifying in his own behalf, may refresh his recollection, where he knows the facts, by reading from his bill of particulars, when that is a duplicate of the account rendered on which he sues, even though it was kept by his clerk from entries in his book, as to which the witness cannot say, without seeing them, whether or not he made them himself.³⁶ So, in a suit to recover the pay for boarding a lot of workmen, the plaintiff in his testimony referred to the bill of particulars made out by another person under his direction, and testified that he knew it to be correct. He testified from recollection to the number of men boarded, the rate per week at which they were boarded, and the aggregate amount due therefor. It was held that it was proper to allow him to refer to this account, although he could not give the name of each man who boarded with him.³⁷ And where a bill of particulars contains many items, so that no person could be expected to remember them or to state them in detail without the aid of some memorandum made by himself or under his direction, it is discretionary to allow the witness to take the bill of particulars for the purpose of answering the question whether or not it contains a correct list.³⁸ It is sometimes admissible to permit a witness to refresh his memory by his books of account, although such books do not contain the original entries. The fact, however, that books of original entries have been lost or destroyed is ordinarily a suspicious circumstance proper to be considered by the jury.³⁹ Where the question was whether a party was a resident of the State at a particular date, and a witness was testifying, who made the tax-list, and who had signed and sworn to it, it was held that he might use it as a memorandum to refresh his recollection.⁴⁰ Whether the writing be used merely as an instrument for restoring the recollection of a fact, or be offered to be read as containing a true account of transactions entirely forgotten, it must, in conformity with the general principles of evidence, be the best

³⁵ *International etc. R. Co. v. Blanton*, 63 Tex. 109. *Semble, Madenkunk etc. Co. v. F. E. Allen Clothing Co.*, 102 Me. 257, 66 Atl. 537.

³⁶ *Hudnutt v. Comstock*, 50 Mich. 596, 601, 16 N. W. 157; *Snyder v. Patton & Gibson Co.*, 143 Mich. 350, 106 N. W. 1106.

³⁷ *Chicago etc. R. Co. v. Liddell*, 69 Ill. 639.

³⁸ *Cool v. Snover*, 38 Mich. 562. See also *Smith v. Pickands*, 148 Mich. 558, 112 N. W. 122.

³⁹ *Murray v. Cunningham*, 10 Neb. 167, 4 N. W. 953.

⁴⁰ *Davis v. Field*, 56 Vt. 426. See

evidence for the purpose that the case admits of.⁴¹ When, therefore, the subject of the testimony is what took place at an interview between a person and the reporter of a newspaper, the reporter's notes of the interview, if in existence, would be the proper memoranda to be used by the witness in refreshing his recollection. But where the reporter testified that his notes of such an interview had been destroyed, and that he had read the published account of the interview printed from his minutes, had compared it mentally with his minutes and had found it to be correct, it was held that the printed article was the best evidence that the case admitted of, and that it might be used by the reporter, testifying as a witness, for the purpose of refreshing his memory as to what took place at the interview.⁴² But where it is sought to introduce the newspaper article itself as evidence, and not to allow a witness to use it for the purpose of refreshing his memory, the rule is said to be that it would be material to show, as a foundation for the introduction of the article, that the original manuscript from which it had been printed had been lost.⁴³

(5.) *Newspaper Report made by Witness.*—A newspaper reporter, testifying as a witness, may be permitted, for this purpose, to look at a newspaper report of the transaction made by him at the time, although the absence of his written report, from which the newspaper report was printed, is not accounted for.⁴⁴

§ 402. *How Used at the Trial.*—(1.) *Not Necessary that the Witness Should have an Independent Recollection of the Fact.*—The old idea seems to have been that the use of the memorandum by the witness was permitted strictly for the purpose of refreshing

also *Sisk v. St.*, 28 Tex. App. 432, 13 S. W. 647; *St. v. Finley*, 118 N. C. 1161, 24 S. E. 495.

⁴¹ 1 Stark Ev. 178.

⁴² *Clifford v. Drake*, 14 Bradw. (Ill.) 75, affirmed, 110 Ill. 135. See also *Topham v. McGregor*, 1 Carr. & K. 320; *Com. v. Ford*, 130 Mass. 64; *Railroad Co. v. Addler*, 56 Ill. 344; *Strader v. Snyder*, 67 Ill. 404; *Adams v. Kelly, Ry. & M.* 157; *Burton v. Plummer*, 2 Ad. & El. 341.

⁴³ *Clifford v. Drake*, 14 Bradw. (Ill.) 75.

⁴⁴ *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Waite v. High*, 96 Iowa, 742, 65 N. W. 397. And such report may as well be used to refresh the recollection of any other witness—thus to fix the time of the happening of the event to which it refers. *Brass Mfg. Co. v. City of New York*, 141 Fed. 118 (C. C. A.). Where a newspaper was shown to be standard authority for prices in a particular trade, its quotations of a certain date may be used to refresh witness's memory as to current

his previous recollection of the fact—revivifying it, so to speak,—and that it was for the witness then to testify, from his recollection, so refreshed, what the fact was.⁴⁵ But this idea seems to be pretty much exploded. At least, in several modern jurisdictions, it is held that all that is required is that the witness be able to swear that the memorandum is correct, although he may have forgotten the facts themselves.⁴⁶ “There seems,” said Rowell, J., “to be two classes of cases on this subject: 1. Where the witness, by referring to the memorandum, has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection. 2. Where the witness, after referring to the memorandum, undertakes to swear to the fact, yet, not because he remembers it, but because of his confidence in the correctness of the memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon. In the former, the oath being grounded upon actual recollection, and in the latter on the faith imposed in the verity of the memorandum, in which case, in order to judge of the credibility of the oath and the reliance to be placed upon the testimony of the witness, the memorandum must be original, and contemporary, and produced in court.”⁴⁷ The idea upon which many modern decisions unite is that it is sufficient if the witness is able to swear that he knows, from the memorandum, that certain

price. *Blanding v. Cohen*, 101 App. Div. 442, 92 N. Y. S. 93; affirmed 184 N. Y. 538, 76 N. E. 1089.

⁴⁵ *Redden v. Spruance*, 4 Harr. (Del.) 217; *Key v. Lynn*, 4 Litt. (Ky.) 338; *Harrison v. Middleton*, 11 Gratt. (Va.) 527; *Holmes v. Gayle*, 1 Ala. 517; *Vastbinder v. Metcalf*, 3 Ala. 100; *Bank v. Brown*, *Dudley* (Ga.), 69; *Huckins v. People's etc. Ins. Co.*, 31 N. H. 238; *Clark v. St.*, 4 Ind. 156; *Calvert v. Fitzgerald*, Litt. Sel. Cas. (Ky.) 388; *Lawrence v. Barker*, 5 Wend. (N. Y.) 301; *Owings v. Shannon*, 1 A. K. Marsh. (Ky.) 188.

⁴⁶ *Davis v. Field*, 56 Vt. 426, 428; *Downer v. Rowell*, 24 Vt. 343; *Halsey v. Sinesbaugh*, 15 N. Y. 485; *Russell v. Hudson etc. R. Co.*, 17 N.

Y. 134; *St. v. Colwell*, 3 R. I. 132; *O'Neale v. Walton*, 1 Rich. L. (S. C.) 234; *Mattocks v. Lyman*, 16 Vt. 113; *Eby v. Eby*, 5 Pa. St. 435; *St. v. Rawls*, 2 Nott & McCord (S. C.), 331. Well illustrated, in the case of an old and feeble witness, by *Cooper v. St.*, 59 Miss. 267, 272. See authorities to note 3, sec. 399, ante. If the memorandum was not made by him and he has no personal knowledge of the truth of the statements therein, the witness cannot use it at all. *Proctor & Gamble Co. v. Blakely Oil etc. Co.*, 128 Ga. 606, 57 S. E. 879. If his recollection is refreshed thereby as to facts he formerly knew, he may use it. *Lobaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102.

⁴⁷ *Davis v. Field*, 56 Vt. 426, 429.

facts are true, although, independently of the memorandum, he may have no present recollection of them.⁴⁸ The same idea is sometimes expressed by saying that the witness may, from his memorandum, testify to his supposition and belief of the fact which is stated in the memorandum. Thus, a witness has been allowed to testify to his supposition and belief as to the time when a transaction took place, although he had no recollection as to the time independently of the entry in his cash book.⁴⁹ So, a notary's belief that protest and notice were given, based on his entry in his books, his habit being to make such entries on the happening of the event, is evidence, though he has no recollection of the fact independently of his books.⁵⁰ The same rule is applied when a surveyor uses his field book to refresh his memory.⁵¹ So, where a witness was shown a receipt given for the payment of money signed by himself, he was permitted to say that he had no doubt that he received the money, although he had no recollection of it, and this was held sufficient parol evidence of the payment.⁵² So, in regard to an attesting witness, it is not generally necessary that he should be able to recollect the circumstances attending his attestation, or the fact that he saw the maker of the instrument sign it. It is enough, *prima facie*, if he answers to his signature, and testifies that it would not have been affixed to the instrument but for the purpose of attestation.⁵³ But where a witness, testifying to transactions relating to the sale and delivery of goods which were the subject

⁴⁸ *St. v. Rawls*, 2 Nott & McC. (S. C.) 331; *Dugan v. Mahoney*, 11 Allen (Mass.), 572; *Cowles v. St.*, 50 Ala. 454; *Wright v. Bolling*, 27 Ala. 259; *Stephens v. People*, 19 N. Y. 549. See also *Rex v. Ramsden*, 2 Carr. & P. 603; *Guy v. Mead*, 22 N. Y. 462; *Ins. Co. v. Weide*, 9 Wall. (U. S.) 677; *Ins. Co. v. Weides*, 14 Wall. (U. S.) 375; *Reynolds Steph. Ev.*, art. 136; 1 Greenl. Ev., § 437; *Woodruff v. St.*, 61 Ark. 157, 32 S. W. 102. Thus he may swear to a date of which he has no present recollection. *Billingslea v. St.*, 85 Ala. 323, 5 South. 157.

⁴⁹ *Mattocks v. Lyman*, 16 Vt. 113; *Holden v. Ins. Co.*, 191 Mass. 153, 77 N. E. 309; *O'Brien v. U. S.*, 27 App. D. C. 263. Thus where witness tes-

tifies he made a record of certain transactions and he would not have done so, if the record were not true. *Franklin v. Atlanta etc. R. Co.*, 74 S. C. 332, 54 S. E. 578. In Texas this has been held to make the record itself the best evidence. *Ft. Worth & D. C. R. Co. v. Garlington*, 41 Tex. Civ. App. 340, 92 S. W. 270.

⁵⁰ *Davis v. Field*, 56 Vt. 426, 428, per Rowell, J.

⁵¹ 1 Whart. Ev., § 518.

⁵² *Maugham v. Hubbard*, 8 Barn. & Cres. 14. Or from amounts on check stubs made out by him. *San Antonio etc. R. Co. v. Turner*, 42 Tex. Civ. App. 532, 94 S. W. 214.

⁵³ *Alvord v. Collins*, 20 Pick. 418; *Burling v. Patterson*, 9 Carr. & P. 570; 1 Whart. Ev., § 739.

of a book account, said, "I have no present recollection of the transaction, and can only speak now of the amount by what I swore on a former trial of this action,"—it was held that his testimony was properly rejected;⁵⁴ the court reasoning, according to the old idea, that the witness must testify from his recollection as thus refreshed. If a document, made by the witness and containing an account of the transaction about which he is called upon to testify, is handed to him to refresh his memory, and he does not need it for that purpose, no error will be committed by allowing him to take the document. To place in his hands the memorandum, under such circumstances, is regarded as the doing of an idle thing, which does not prejudice the party against whom he testifies.⁵⁵

(2.) *Right of the other Party to Inspect the Document.*—Where a paper is handed to a witness in order to refresh his memory, the other party has a right to inspect it for the purpose of cross-examination, and it is error to deny this right.⁵⁶ But he has only the right to inspect such parts of it as the witness consults to aid his memory, or as relate to the subject of his testimony.⁵⁷ And this rule seems to apply only in cases where the memorandum is used by the witness in court; it has been held that the memorandum itself need not be produced in court, but that notes taken from it may be used.⁵⁸ Accordingly, where the superintendent and house surgeon of a hospital, after having refreshed their memories by the records of the hospital, testified, from their own recollection, as to certain facts therein contained as to the admission of a patient into the hospital, etc., it was held that the court committed no error in receiving this testimony without the production of the books in

⁵⁴ *Howie v. Rea*, 75 N. C. 326.

⁵⁵ *Chute v. St.*, 19 Minn. 271.

⁵⁶ *Chute v. St.*, 19 Minn. 271; *Rex v. Ramsden*, 2 Carr. & P. 603; *Hardy's Case*, 24 How. St. Tr. 824; *Merrill v. Ry. Co.*, 16 Wend. 586, 600; 1 Greenl. Ev., § 466; *Tibbetts v. Sternberg*, 66 Barb. 201; *Com. v. Jeffs*, 131 Mass. 5; *Com. v. Haley*, 13 Allen (Mass.), 587; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330. It should be first shown to opposing counsel. *Morris v. U. S.*, 149 Fed. 123 (C. C. A.). But, if used by cross-examiner and shown to

witness and portions of it read to him, the cross-examination may proceed without the paper being first submitted to inspection of adverse party. *St. v. Rowell*, 75 S. C. 494, 56 S. E. 23.

⁵⁷ *Com. v. Haley*, *supra*.

⁵⁸ *Hamilton v. Rice*, 15 Tex. 382; *ante*, § 401, subsec. 2; *People v. Vann*, 129 Cal. 118, 61 Pac. 776. And if the testimony is wholly independent of the memorandum, it need not be produced. *Nabors v. Goldforb*, 77 Miss. 661, 27 South. 641.

open court.⁵⁹ A witness, it seems, may refresh his memory from memoranda made by him in books, without being required to produce the books;⁶⁰ at most, the production of them, if he has not been summoned to produce them, will be a matter within the sound discretion of the trial court.⁶¹

(3.) *Manner in Which Memorandum Used by Witness.*—A witness may be *required*, in the *discretion* of the trial court, to look at a memorandum or papers, for the purpose of aiding his recollection.⁶² The manner in which a witness shall be allowed to refresh his recollection, by referring to a writing, must be left to some extent to the discretion of the presiding judge; a discretion to be exercised with reference to the circumstances of the case, and sometimes it is presumed, with reference to the conduct and bearing of the witness upon the stand.⁶³ Thus, it is within the discretion of the court to refuse to require the witness to examine all the memoranda before giving his testimony, and then to lay them aside and not to refer to them again while testifying, especially where they consist of numerous large books.⁶⁴ If the witness cannot read

⁵⁹ *St. v. Collins*, 15 S. C. 373, 40 Am. Rep. 697; *Lowrie v. Taylor*, 27 App. D. C. 522. If the memorandum or record is to establish past recollection it should be produced. *St. v. Mayers*, 36 Or. 38, 58 Pac. 892.

⁶⁰ *Trustees v. Bledsoe*, 5 Ind. 133; *St. v. Cheek*, 13 Ired. L. (N. C.) 114. This ruling will not apply to *books of account*, which, on proof of their having been correctly kept, become, in some jurisdictions, original evidence. See *Furman v. Peay*, 2 Bail. (S. C.) 394; *St. v. Cardoza*, 11 S. C. 195, 239; *Bank v. Zorn*, 14 S. C. 444.

⁶¹ *Com. v. Lannan*, 13 Allen (Mass.), 563. Contra, that the books must be produced. *Hall v. Ray*, 18 N. H. 126.

⁶² *Chapin v. Lapham*, 20 Pick. (Mass.) 467. Whether it be presented to him either on direct or cross-examination. *St. v. Staton*, 114 N. C. 813, 19 S. E. 96.

⁶³ *Johnson v. Coles*, 21 Minn. 108,

111. See *Caldwell v. Bowen*, 80 Mich. 382, 45 N. W. 185. Where the witness says the memorandum was made by him and he recollects the facts, but cannot state the items as to certain injuries to property, he may use it to refresh his memory. *Brown v. Galesburg etc. Co.*, 132 Ill. 648, 24 N. E. 522. May permit reference to a letter without permitting same to be read aloud by either counsel. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

⁶⁴ *Ibid.* It is proper to allow witnesses to refer to a book of original entries made by himself for the purpose of *fixing dates*. *McCausland v. Ralston*, 12 Nev. 195. Thus a witness may, to fix a date, look at different entries in connection with each other, while he is testifying. *Continental Ins. Co. v. Ins. Co. of Penna.*, 51 Fed. 884, 2 C. C. A. 535.

and write, but has nevertheless made his mark to a certain memorandum produced to refresh his recollection, it may not be read to the witness in the presence of the jury, but the witness may be permitted to withdraw, with one of the counsel on each side, and the paper may there be read over to him without comment, after which he may testify from his recollection as thus refreshed.⁶⁵

(4.) *Whether the Memorandum can be put in Evidence.*—Upon this point it is difficult to state a uniform or satisfactory rule. One idea admits the memorandum in evidence in connection with the testimony of the witness.⁶⁶ But the general rule seems to be, that the fact that the recollection of the witness has been refreshed by the use of a memorandum, so that he is able to testify to the fact, does not entitle either party to put the memorandum in evidence.⁶⁷ On the other hand, it is held that, “if the witness, after examining the memorandum, cannot state the facts from independent recollection, but can testify that he knew the contents of the memorandum at or about the time it was made, and knew them to be true, both the memorandum and the testimony of the witness are admissible.”⁶⁸ Or, negatively, the memorandum itself is not admissible in evidence, except in cases where the witness, at the time of testifying, has no recollection of what took place, further than that he accurately reduced the whole transaction to writing.⁶⁹ In other words, the entries or memoranda of transactions made by a witness are admissible only when the memory of the witness is at fault. If

⁶⁵ *Com. v. Fox*, 7 Gray (Mass.), 585.

⁶⁶ *Watson v. Walker*, 23 N. H. 471; *Webster v. Clark*, 30 N. H. 245; *Tuttle v. Robinson*, 33 N. H. 104; *Laas v. Scott*, 26 App. D. C. 354.

⁶⁷ *Com. v. Jeffs*, 132 Mass. 5; *Field v. Thompson*, 119 Mass. 151; *Alcock v. Royal Exchange Ins. Co.*, 13 Ad. & El. (N. S.), 292; *Com. v. Ford*, 130 Mass. 64; *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117; *Curtis v. Bradley*, 65 Conn. 99, 31 Atl. 591; *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. 326; *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396.

⁶⁸ *Jacques v. Horton*, 76 Ala. 238, 243; *Acklen v. Hickman*, 63 Ala. 494; *Garden City v. Heller*, 61 Kan. 767, 60 Pac. 1060; *Dunlap v. Hopkins*, 95 Fed. 231, 37 C. C. A. 52; *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013. Even though, if offered as a document independently of the guarantee of correctness, it were not admissible for some technical reason, e. g. not being stamped. *Birchall v. Bullough*, 1 Q. B. 325.

⁶⁹ *Kent v. Masson*, 1 Bradw. (Ill.) 466; *St. v. Brady*, 95 Iowa, 410, 69 N. W. 290; *Alabama & V. R. Co.*, 81 Miss. 314, 33 South. 74.

he can refresh his memory by an inspection of the writing, and then testify from personal recollection, the written *data* will be excluded from evidence.⁷⁰ When, therefore, a witness had testified from his own recollection to certain transactions in which he took part, *e. g.*, interviews between himself and the defendant, it was error to admit in evidence a written memorandum of such transactions kept by him, the entries in which were made at the time of the transactions, for the purpose of corroborating his testimony.⁷¹ As already seen,⁷² it is the right of the opposite party to inspect the memorandum and to cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein contained, but for the purpose of showing that it would not properly refresh the memory of the witness. But even in such a case, only those portions of the memorandum which relate to the cause on trial and the testimony of the witness can be put in evidence."⁷³ It is scarcely necessary to say that, where a witness uses a memorandum which itself is admissible in evidence, it is no objection that he reads from it to the jury, instead of its being read to the jury by counsel, according to the usual practice.⁷⁴

⁷⁰ *Halsey v. Sinebaugh*, 15 N. Y. 485; *Russell v. Hudson River Co.*, 17 N. Y. 134; *Guy v. Mead*, 22 N. Y. 462; *Marcy v. Shultz*, 29 N. Y. 346; *Brown v. Jones*, 46 Barb. (N. Y.) 400; *Driggs v. Smith*, 45 How. Pr. (N. Y.) 447; *Flood v. Mitchell*, 68 N. Y. 507; *Wightman v. Overhiser*, 8 Daly (N. Y.), 282; *Meacham v. Pell*, 51 Barb. (N. Y.) 65; *Butler v. Benson*, 1 Id. 526.

⁷¹ *Wightman v. Overhiser*, *supra*. Compare *Folsom v. Apple River etc. Co.*, 41 Wis. 602, 607.

⁷² *Supra*, subsec. 1.

⁷³ *Com. v. Jeffs*, 132 Mass. 5. Opinion by Endicott, J. Citing *Com. v. Haley*, 13 Allen (Mass.), 587; *Mt. Terry M. Co. v. White*, 10 S. D. 620, 74 N. W. 1060. The right of cross-examination includes the right to see and have the jury see the memorandum. *Smith v. Jackson*, 113 Mich. 511, 71 N. W. 843.

⁷⁴ *Raynor v. Norton*, 31 Mich. 210.

CHAPTER XVII.

OF THE CROSS-EXAMINATION.

ARTICLE I.—IN GENERAL.

ARTICLE II.—AMERICAN RULE OF STRICT CROSS-EXAMINATION.

ARTICLE III.—QUESTIONS AFFECTING CREDIBILITY.

ARTICLE I.—IN GENERAL.

SECTION

405. Object of Cross-examination.
406. Right to Cross-examine.
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423. Whether Admissibility of Matter on Cross-examination depends upon its Admissibility on Direct Examination.
424. Cross-Examining an Adverse Witness whose Deposition has been Taken.
425. Not Necessary to State what Facts the Question will Elicit.

§ 405. **Objects of Cross-examination.**—All cross-examination expends itself in three efforts: 1. To sift, explain or modify what has been said on the direct examination. 2. (Under the English rule in force in some American State courts) to develop new matter favorable to the cross-examining party. 3. To discredit the witness.

§ 406. **Right to Cross-examine.**—"The benefit of cross-examination is an essential condition to the reception of direct testimony;"¹ that is to say, testimony is not admissible, if the party against whom it is to be used, or those in privity with him, have no opportunity of cross-examining the witness.² The right of cross-examination being a substantial and a very important right, it is *error to restrict it*, so far as to prevent the cross-examining party from going fully into all matters connected with the examination in chief. "The importance of the right of full cross-examination," says Scott, J., "can scarcely be overestimated. As a test of the accuracy, truthfulness and credibility of testimony, it is invaluable. It is the clear right of the cross-examining party to elicit suppressed facts, which weaken or qualify the case of the party examining in chief, or support the case of the cross-examining party."³ In any view, the right of cross-examination extends to all matters connected with the *res gestæ*.⁴ A witness may be cross-examined as to

¹ Heath v. Waters, 40 Mich. 457, 471; Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752. A witness merely summoned (Milton v. St., 40 Fla. 251, 24 South. 60), or called and sworn only (Harris v. R. Co., 115 Mo. App. 527, 91 S. W. 1010; St. v. Lucas, 124 N. C. 825, 32 S. E. 962. Contra Mason v. R. Co., 58 S. C. 70, 36 S. E. 440), or even called, sworn and given answers excluded as irrelevant (Fall Brook C. Co. v. Hewson, 158 N. Y. 150, 52 N. E. 1095), or merely asked preliminary questions (Watkins v. U. S., 5 Okl. 729, 50 Pac. 88), is not a witness subject to cross-examination. It has been held, that the fact of complainant's counsel filing with the master in suit for accounting for infringement of a patent a statement, which could not constitute original evidence, did not entitle defendant's counsel to cross-examine him thereon. Goss etc. Co. v. Scott, 148 Fed. 394, (C. C. A.).

² Sperry v. Moore, 42 Mich. 353, 361, 4 N. W. 13; Buller N. P. 239, 242; 1 Stark. Ev. 61, 62, 409, 34;

Best Ev. (Woods' ed.), § 496; 1 Greenl. Ev. § 163; 1 Whart. Ev., § 177; Graham v. Larrimer, 83 Cal. 173, 23 Pac. 286.

³ Citing Pow. Ev. 380; Wefel v. Stillman, 151 Ala. 249, 44 South. 203. Thus whether he had not been informed as to a matter of which he asserted ignorance. Fulton v. Sword Medicine Co., 145 Ala. 331, 40 South. 393. Where direct examination apparently showed a single motive for the doing of an act, cross-examination may develop the situation as tending to show another. Pinch v. Hotaling, 142 Mich. 521, 106 N. W. 69. And so any inference of an unfavorable nature may be rebutted by further showing of the facts. St. v. Harvey, 130 Iowa, 394, 106 N. W. 938; Denver etc. Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

⁴ Citing Whart. Ev., § 529; Gossin v. Williams, 151 Ala. 592, 44 South. 611; Huyck v. Bernice, 151 Cal. 411, 90 Pac. 929. And to develop the motive connected therewith. Dikeman v. Arnold, 83 Mich. 218,

his examination in chief in all its bearings, and as to whatever goes to explain or modify what he has stated in his examination in chief," and *prejudice* will be *presumed* where this right is denied.⁵ A *party*, called by his opponent as a witness, has a right to be cross-examined by his own counsel. Accordingly, where the plaintiff had examined the defendant as a witness, it was error to prevent the defendant, on cross-examination, from answering questions relevant to the matter of the examination in chief, and favorable to his side of the case.⁶ It is error to refuse permission to cross-examine a witness for the prosecution, in a criminal case, for the purpose of showing hostility.⁷

§ 407. **Leading Questions.**—Leading questions may always be put on cross-examination, whether the witness is a willing or adverse one for the party calling him;⁸ except where, under the American rule of strict cross-examination, the cross-examining party transcends the limits of the direct-examination, and thereby makes the witness his own.⁹

§ 408. **Sifting, Modifying and Extending the Direct Examination—Making it more Explicit.**—A primary object of cross-examination is to enable the opposing party to sift the statements made by the witness on his direct examination; to supply omissions, to test the accuracy of his recollection, to develop facts which diminish

47 N. W. 113. See also *Gurden v. Stevens*, 146 Mich. 489, 109 N. W. 856.

⁵ *Martin v. Elden*, 32 Ohio St. 282, 287; citing *Wilson v. Wager*, 26 Mich. 452; *So. R. Co. v. Lester*, 151 Fed. 573, 81 C. C. A. 53; *Smalley v. McGraw*, 148 Mich. 384, 111 N. W. 1093. Where a witness asserts a certain thing to be true, he may be asked, if he did not know of a certain circumstance, which tended to show it was not true. *Little v. Lichkoff*, 98 Ala. 321, 12 South. 429.

⁶ *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378; *Mellini v. Duly*, 83 Miss. 219, 40 South. 546.

⁷ *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 662.

⁸ *Parkin v. Moon*, 7 Carr. & P. 408; *Townsend's Succession*, 40 La. Ann. 67, 3 South. 488; *Hempton v. St.*, 111 Wis. 127, 86 N. W. 596; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96. This does not mean, that a question may assume as true what has not been proven. *Bostic v. St.*, 94 Ala. 45, 10 South. 602; *St. v. Labuzan*, 37 La. Ann. 489.

⁹ *Post*, § 433; *People v. Court of Oyer & Terminer*, 83 N. Y. 436. Also it was held, where two defendants were making separate defenses, each endeavoring to cast the fault on the other, that the right to ask leading questions of plaintiff's witnesses might be restricted. *Mt. Adams etc. R. Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596.

the probability of his statements, and to *extend* his statements as to matters touched upon in his direct examination, so as to make them more *explicit* and *complete*. Within reasonable limits, a cross-examining party has a *right* to demand *details* and *particulars* of the matters stated in general terms by the witness on his direct examination, and it is *error* to deny this right. The *reason* is that "cross-examination is important, not only as a means of getting out, in full detail, all the facts within the range of the subject matter of the direct examination, but it is also an important means of testing the memory of a witness, as well as a potent means of ascertaining the truth of his statements."¹⁰ But this right does not extend so far as to allow the cross-examining party to put *fishing questions*, for the purpose of ascertaining facts which may assist him in his prosecution or defense, such as the names of other witnesses acquainted with the subject of the inquiry. "Litigants," said Mr. Justice Clifford, "ought to prepare their cases for trial before the jury is impaneled and sworn; and, if they do not, they cannot complain if the court excludes questions propounded merely to ascertain the names of persons whom they desire to call as witnesses to disprove the case of the opposite party."¹¹

§ 409. [Continued.] Illustrations.—Thus where a witness who was an administrator testified to some facts touching his adminis-

¹⁰ Hyland v. Milner, '99 Ind. 308, 310, opinion by Elliott, J.; Fadley v. R. Co., 153 Fed. 514, 82 C. C. A. 464; Green v. Skoquist, 57 N. J. L. 617, 31 Atl. 228; People v. Foo, 112 Cal. 17, 44 Pac. 453. Where a matter has been gone into partially on direct examination, cross-examiner may probe it fully. St. v. Nugent, 116 La. 99, 40 South. 581. The statement of the doing of an unusual thing, as the reason for being able to remember another, makes proper cross-examination as to the reason for doing the unusual thing. Thomas v. Miller, 151 Pa. 482, 25 Atl. 127. Also where a reason is given for the doing of a certain thing, witness could be asked, if the true reason was not a certain other thing. People v. Dixon, 94 Cal. 255,

29 Pac. 504. As testing recollection one stating a fact, may be asked how it happened to occur or be brought about. Reynolds v. R. Co., 69 Fed. 808, 16 C. C. A. 808. Where one testified he did certain work properly and in same manner he did similar work at another place, he may be cross-examined as to the similar work and contradicted by showing he did it negligently. So. Bell Tel. Co. v. Watts, 66 Fed. 460, 13 C. C. A. 579. The truth of an explanation may be tested by cross-examination. Davis v. Hayes, 89 Ala. 563, 8 South. 131; Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; St. L. etc. R. Co. v. Clements (Ark.), 99 S. W. 1106.

¹¹ Storm v. U. S., 94 U. S. 76, 84.

tration, it was held that he might be interrogated *fully* in regard thereto,—meaning so far as the matters sought to be drawn out affected his credibility or related to the issues.¹² So, a defendant who becomes a witness in his own behalf, and undertakes, on his direct examination, to state all that transpired between two points of time, may be asked on cross-examination whether he has *omitted anything* pertinent to the case; and his attention may be directed to the precise point, by asking him if some specified thing did not occur.¹³ So, where the question in dispute was as to the *execution* of a *note*, and the witness for the plaintiff had testified as to such execution, it was held competent and proper to cross-examine him (under the English rule)¹⁴ as to all the circumstances connected with it, and, among others, as to the *consideration* of the note.¹⁵ So, a witness having testified that he managed certain property as the agent of the plaintiff, the witness' wife,—which property had been attached, at the suit of one Newman, as the property of the witness, —was asked on cross-examination: "What was the understanding between yourself and Newman, relative to attaching these cattle, just previous to the commencement of the attachment suit?" It was held that this question was proper on cross-examination, and that the court erred in excluding it.¹⁶ So, where a witness, called by the defendant in a criminal trial, is interrogated as to the conduct and presence of the accused up to and at the *time* of the alleged commission of the crime, it is not improper to cross-examine him as to the conduct and presence of the accused *after* that date, without limiting the State's counsel to the *exact time* mentioned in the examination in chief.¹⁷ So, on the cross-examination of the prosecuting witness on an indictment for *larceny*, who claims to have been *robbed* of a large sum of money, questions tending to elicit the fact that he was *indebted considerably* and straightened at the time of the alleged larceny, and that his stock of goods was small, and also tending to show that he had made statements on the preliminary examination of the prisoners, which made out his in-

¹² *Barker v. Blount*, 63 Ga. 424.

¹³ *People v. Russell*, 46 Cal. 121.

¹⁴ *Post*, § 430.

¹⁵ *Lemprey v. Munch*, 21 Minn. 379. And so prosecutrix in rape case, living with defendant and his wife, testified his wife went out and left her alone with defendant and

that she was afraid, may be asked why she did not go out with the wife. *People v. Knight*, 110 Cal. XVII, 43 Pac. 6.

¹⁶ *Steinberg v. Meany*, 53 Cal. 425.

¹⁷ *Marion v. St.*, 20 Neb. 233, 29 N. W. 911.

ventory to be very much larger than he knew it to be in fact,—were held admissible, as bearing upon the probabilities, for the purpose of testing his character and credit. The court said: “The authorities do not recognize such an inquiry as so connected with the merits as to be open to impeachment, but it is within the range of a proper cross-examination.”¹⁸ So, a witness who has testified as to *character* may, of course, be cross-examined as to details, times and places.¹⁹

§ 410. [Further Illustration.] **Circumstances Attending a Conspiracy.**—On the trial of an indictment for burning a barn to defraud an insurance company, Henry Hamilton, a witness for the prosecution, gave testimony respecting what took place at a certain party or dance at Joseph Hamilton’s house on the night of the fire. He was asked whether the dance was not talked of some time before it was gotten up; but the court ruled this out, under objection of the defendant. Another witness for the prosecution, named Fuller, had given an account of a plan proposed by the conspirators for burning the barn, which was in substance that, in order to prevent any suspicion, a dance should be gotten up at another person’s house, and that, during the course of the evening, one of the Hamiltons should go out for a supply of cider and take advantage of that opportunity to light a candle, which would take some time to burn down to the straw, so that they would be away at the party at the time the fire should break out, and thus escape suspicion. The Supreme Court held that the ruling of the court, in thus curtailing the cross-examination of Hamilton was error. Campbell, J., said: “If the party had been arranged and invitations given, earlier than the alleged interview with Fuller, then his whole story would be falsified. This was then a vital point in the case. It was very clearly legitimate on cross-examination, upon the strictest rules. It referred to the very dance concerning which the witness had been

¹⁸ People v. Morrigan, 29 Mich. 5. Compare Wilbur v. Flood, 16 Mich. 40.

¹⁹ Jackson v. St., 78 Ala. 471; Weaver v. St. (Ark), 102 S. W. 713; Randall v. St., 132 Ind. 539, 32 N. E. 305; Basye v. St., 45 Neb. 261, 63 N. W. 811; Holmes v. St., 88 Ala. 26, 7 South. 193, 16 Am. St. Rep. 17. Also this may be done when repu-

tation is testified to, as testing sources of knowledge and credibility of witness. St. v. Crow, 107 Mo. 341, 17 S. W. 745. If, however, the testimony is as to reputation up to a certain time, cross-examination may come down to a subsequent period. Morrison v. Press Pub. Co., 133 N. Y. 538, 30 N. E. 1148.

examined in chief, and was offered as relevant to the subject as any of the other circumstances on which he had been questioned.”²⁰

§ 411. [Further Illustrations.] Length and Circumstances of Possession, etc.—Applying the rule that the cross-examination may properly be carried into all the surrounding circumstances, for the purpose of testing fully the accuracy and credibility of the witness, it has been held, in an action of replevin by A. against B., a sheriff, to recover possession of goods levied upon by B. under process against C., where A., in support of his title, offered a witness who testified that, on the day of the levy he, the witness, was in possession of the goods as the agent or servant of A., the court did not err in permitting the defendant to cross-examine the witness as to the time during which he had been in possession, in whose employ he had been during such time, and the manner in which he entered into the employ of the plaintiff.²¹ So, in an action of replevin, brought against an attaching creditor of the plaintiff’s vendor, the plaintiff having shown no title but possession merely, it was held competent for the defendant to cross-examine as to the nature and length of the possession, for the purpose of showing that it was colorable and of testing the witness’ means of knowledge.²²

§ 412. [Further Illustrations.] Right to the whole of a Conversation.—Where a conversation is called out by one party, it is the right of the other party, upon cross-examination, to develop the whole of the conversation, so far as it may bear upon the issues or affect the credibility of the witness;²³ and this rule applies equally, whether the conversation was brought out on direct examination or on cross-examination; it may, therefore, apply in respect of the re-examination.²⁴ So, where a witness on his direct examination

²⁰ *Hamilton v. People*, 29 Mich. 173, 181. It was held in Illinois where murder was committed in an affray in which witnesses for the prosecution participated, that the very greatest latitude should have been allowed on cross-examination, and the direct examination have been correspondingly restricted. *Sutton v. People*, 119 Ill. 250, 10 N. E. 376.

²¹ *Blake v. Powell*, 26 Kan. 320.

²² *Thornburgh v. Hand*, 7 Cal. 554.

²³ *Addison v. St.*, 48 Ala. 478; *Phares v. Barber*, 61 Ill. 272; *Sager v. St.*, 11 Tex. App. 110; *Metzer v. St.*, 39 Ind. 596; *Fletcher v. St.*, 49 Ind. 124, 19 Am. Rep. 673; *Harness v. St.*, 57 Ind. 1; *Early v. Winn*, 129 Wis. 291, 109 N. W. 633; *Home Ben. Assn. v. Sargent*, 142 U. S. 691, 35 L. Ed. 1160; *Williams v. Dickinson*, 28 Fla. 90, 9 South. 847.

²⁴ *Roberts v. Roberts*, 85 N. C. 9; *McIntyre v. Thompson*, 14 Bradw. (Ill.) 554; *Hatch v. Potter*, 2 Gilm. (Ill.) 725; *Phares v. Barbour*, 61

testified that a witness for the opposite party had, on another trial, testified to certain facts, it was proper, on cross-examination, to ask the witness what *other facts* such other witness testified to on such other trial.²⁵

§ 413. [Further Illustration.] Reasons for Opinion as to Value. Where a witness has, on his examination in chief, given his opinion as to value, he may be cross-examined in full respecting his reasons for such opinion; and here the rule applies that *great latitude* should be allowed in cross-examination,²⁶ the limits of which, where no rule of law is violated, are within the *discretion* of the presiding judge.²⁷ A question is proper which enables the jury to see upon *what basis* the witness has made his estimate of value, or which connects his general estimates of value with the thing in respect of which the injury is predicated.²⁸

§ 414. Instances Under the Last Rule.—Where a witness testified that a horse was worth \$9,000, it was not error to ask him, on cross-examination, whether he would give \$3,000 for the horse; and the witness having testified that he had no money, it was not error to ask him whether he would give his note for that price.²⁹ A

Ill. 271; 1 Greenl. Ev., § 201; 2 Whart. Ev., §§ 1108, 1109.

²⁵ Carey v. Richmond, 92 Ind. 259. Compare Harper v. Harper, 57 Ind. 547. But, it has been ruled that where the party's *own witness* first speaks of the conversation, although on cross-examination, the party is not thereby entitled to make all that was said evidence in his own behalf. Addison v. St., 48 Ala. 478.

²⁶ Mo. etc. R. Co. v. Haines, 10 Kan. 439; Central Branch etc. R. Co. v. Andrews, 30 Kan. 590; Atchison etc. R. Co. v. Blackshire, 10 Kan. 477, 486; Markel v. Moudy, 13 Neb. 323, 327, 14 N. W. 409; Buck v. City of Boston, 165 Mass. 509, 43 N. E. 496.

²⁷ Miller v. Smith, 112 Mass. 470.

²⁸ Atchison etc. R. Co. v. Blackshire, 10 Kan. 477. Witnesses as to

value can base their opinions on actual sales of which they have knowledge, but cannot, it has been ruled, be cross-examined as to what they have offered to sell similar property for. Thompson v. Moiles, 46 Mich. 42, 8 N. W. 577. He may be questioned particularly as to value of improvements and their cost, and then of the land, where he gave a round sum for the property as improved. Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. Where witness stated, that for railroad to go across the owner's farm would greatly depreciate the remainder, he might be cross-examined whether he knew of other farmers having their lands depreciated in value from a like circumstance. Eldorado etc. R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281.

²⁹ Miller v. Smith, 112 Mass. 470.

witness, called to testify as to the value of property, fixed it at \$3,000. On his cross-examination, he was asked whether he had not, as an insurance agent, offered and written a policy of insurance on the same property at a valuation of \$1,000. It was held error to reject this question. It was admissible, upon the principle which permits statements made by witnesses out of court, different from those which they have testified to at the trial, to be shown. Lake, C. J., said: "The value of the proposed testimony, as tending to discredit the witness, rests upon the very reasonable presumption that he would not, in the very important matter of taking an insurance risk, value the property higher than what he really believed it to be worth."³⁰ In a proceeding to condemn land for a railroad, the following questions and answers were given on cross-examination: "Q. Take plaintiff's land just as it is, and suppose the railroad ran through the valley without running through the land, what is the difference of value, compared with the value as the road now is? A. I would rather have the land without the road running through it, but don't know what the effect on the general market would be." "Q. Have you not a piece of land in the neighborhood of plaintiff which you are offering to sell, and desirous to sell, through which the railroad runs? A. Yes, I have." "Q. State whether or not these facts might not bias your judgment as to value of Mr. Blackshire's land? A. I think not." It was held that there was no error in permitting this latitude of cross-examination.³¹ In another like case, on a trial before a justice, the plaintiff was examined as a witness in his own behalf. Upon his examination in chief, he testified, among other things, that he was acquainted with the value of property in his vicinity, in the neighborhood of his lots, at the time the railway was constructed in the

³⁰ Markel v. Moudy, 13 Neb. 323, 327, 14 N. W. 409. It has been held that, while witnesses, called to testify as to value, have right to give their opinion based upon actual sales known by them to have been made; yet it would be going too far to hold that the trial court errs in rejecting an offer to prove a mere proposition by the witness to sell property similar to that in dispute, for the purpose of fixing its value. Thompson v. Moiles, 46

Mich. 42, 8 N. W. 577. The proposition is not well reasoned by the court, and the conclusion is unsatisfactory. An offer to sell similar property at a different value would be, in some sense, equivalent to a statement made by the witness out of court contradicting a similar statement made by him in court, and such evidence is always admissible.

³¹ Atchison etc R. Co. v. Blackshire, 10 Kan. 477, 486.

alley-way, and it was his opinion that, immediately before the railroad was there constructed, his property was worth \$10,000, and that, immediately afterwards, it was worth only \$6,000, and that the depression of the value by reason of the construction of the railway was \$4,000. Afterwards, upon cross-examination, he was asked the following questions: "What would be the value of a strip of ground fifteen feet wide, taken from the south end of these lots (around the east end) out to Main street; beginning at Tenth street, take a strip fifteen feet wide off; then again from the south, north on the east side out to Main street?" "What, in your opinion, would be the depreciation of the value of the remaining property, as an entirety, by reason of the taking from them fifteen feet off the south end of the lots, and fifteen feet off the side of the property to Main street?" Upon objection of the plaintiff, these questions were excluded. The plaintiff having recovered a verdict and judgment for \$2,000 damages, the jury finding specially that the plaintiff's property without the alley-way was worth \$5,000 and with the alley \$7,000, it was held on appeal that, under the circumstances of the case, great latitude should have been allowed in the cross-examination of the witnesses, giving evidence merely as to their opinions in respect of value and damages, and that the court below erred in restricting the cross-examination of the plaintiff as a witness.³²

§ 415. **Great Latitude allowed.**—The general rule, therefore, is that a cross-examination should be permitted as to all matters developed on the direct examination,³³ and that great latitude should be allowed in conducting the same,³⁴ the extent and limits of which.

³² Cent. Branch etc. R. Co. v. Andrews, 30 Kan. 590, 2 Pac. 677.

³³ Schuster v. Stout, 30 Kan. 529, 2 Pac. 642; Commissioners v. Craft, 6 Kan. 145; Sumner v. Blair, 9 Kan. 521; Callison v. Smith, 20 Kan. 28; 1 Greenl. Ev., § 445; Tex. & P. R. Co. v. Newsome & Williams (Tex. Civ. App.), 98 S. W. 646; Register v. Register, 104 Md. 1, 64 Atl. 286.

³⁴ Atchison etc. R. Co. v. Blackshire, 10 Kan. 477, 487; Ingram v. St., 67 Ala. 67, 71. See also Stoudenmeier v. Williamson, 29 Ala. 558; Re Carmichael, 36 Ala.

514. On the trial of an indictment for murder, it has been said that the broadest latitude should be allowed the defendant in the cross-examination of such of the *state's witnesses* as were active partisans in the difficulty which led to the killing, and who are hostile in their feelings toward the defendant; and, on the other hand, that the examination of such witnesses by the people should be correspondingly restricted. Sutton v. People, 119 Ill. 250, 10 N. E. 376. Boyd v. St., — Tex. Cr. R. —, 99 S. W. 561;

where no rule of law is violated, rest in the sound *discretion* of the trial court.³⁵ The rule, then, is that, for the purpose of testing the accuracy of the recollection of the witness or of affecting his credibility, the cross-examination may in general be extended into *all the circumstances* surrounding or affecting the transaction which he has detailed in his direct examination. "A cross-examination," said Brewer, J., "is not limited to the very day and exact fact named in the direct examination. It may extend to *other matters* which limit, qualify or explain the facts stated in the direct examination, or modify the inferences deducible therefrom, provided only that such matters are directly connected with the facts testified to in chief."³⁶ But, while great latitude is allowed to the cross-exam-

C. P. & St. L. R. Co. v. People, 130 Ill. App. 2. Where accused testified he neither killed nor employed any one to kill deceased, he may be asked as to his whereabouts at the time the crime was committed. People v. Soeder, 150 Cal. 12, 87 Pac. 1016. Also accused may be asked, if he were not intoxicated before the homicide and threatened to kill a third person. St. v. Rowell, 75 S. C. 494, 56 S. E. 23. Unreasonable or oppressive cross-examination not favored. See St. v. Waldron (La.) 54 South. 1009.

³⁵ Miller v. Smith, 112 Mass. 470, 476; Hathaway v. Crocker, 7 Metc. 262, 266; Com. v. Sacket, 22 Pick. (Mass.) 394; Winship v. Neale, 10 Gray (Mass.), 382; Swan v. Middlesex, 101 Mass. 173; Johnston v. Jones, 1 Black (U. S.), 209, 226; Fry v. Bennett, 3 Bosw. (N. Y.) 200; Knight v. Cunningham, 6 Hun (N. Y.), 100; Wallace v. Taunton Street Ry. Co., 119 Mass. 91; Ledford v. Ledford, 95 Ind. 283; Oliver v. Pate, 43 Ind. 132; Wachstetter v. St., 99 Ind. 290, 50 Am. Rep. 94. The Supreme Court of Kansas say: "Great latitude is and should be allowed in the cross-examination of a witness as to his interest in the suit, his friendships or hostility towards the parties, his motives

and prejudices." St. v. Collins, 33 Kan. 77, 80, 5 Pac. 368. The Supreme Court of Wisconsin has said: "On the cross-examination of a witness, anything which shows his friendship or enmity to either of the parties to the suit is commonly a proper subject of inquiry. So also is everything which tends to show that, in the circumstances in which he is placed, he has a strong temptation to swear falsely. It is to be remembered that the jury are the sole judges of the credibility of the witness, and that whatever tends to assist them, in the judgment which they are to form upon this subject, ought not to be withheld from them." Kellogg v. Nelson, 5 Wis. 125, 131.

³⁶ Blake v. Powell, 26 Kan. 320, 326. See to the same effect Coates v. Hopkins, 34 Mo. 135; Detroit etc. R. Co. v. Van Steinburg, 17 Mich. 99, 109; Maynes v. Lewyard, 33 Mich. 319; Ferguson v. Rutherford, 7 Nev. 385; Atchison etc. R. Co. v. Blackshire, 10 Kan. 477; Field v. Davis, 27 Kan. 400; Reiser v. Portere, 106 Mich. 102, 63 N. W. 1041; Louisville etc. R. Co. v. Maybin, 66 Miss. 83, 5 South. 401; Cowles v. Cowles, Adm., 81 Vt. 498, 71 Atl. 191. Where plaintiff claimed to be a lessee, it was proper to show in

ining counsel in putting questions having tendency to disclose the *animus* of the witness toward the parties, yet it is plain that questions may be asked under this head, which so far *exceed* the *bounds* of *courtesy* and *propriety*, that it is no error to refuse to allow the witness to answer them. It was so held, on the trial of a criminal prosecution for theft, where counsel for the defendant, on cross-examination of the prosecuting witness, asked, "Don't you love the defendant?" ³⁷

§ 416. [Continued.] Especially where Fraud is involved.— "Great latitude," said Marston, J., "has always been allowed the cross-examination in this class of cases, especially where one of the *parties* to the alleged fraudulent transaction is upon the stand. In cases of fraud no definite fixed rule can be laid down; as to do so would but, in many cases, be laying down rules for the guidance of parties about to perpetrate frauds. Much must be left to the discretion of the trial judge."³⁸ For obvious reasons, where the question relates to the *bona fides* of a *transfer* of a merchant's stock of goods, or whether a particular conveyance was concocted for the purpose of hindering, delaying or defrauding the creditors of the vendor, the widest latitude, in the cross-examination of a *party* to the conveyance, should be allowed.³⁹ It is proper to extend the inquiry into *all the circumstances* of the *transfer* of the goods to the witness, which tend to show its fraudulent character and purpose, and the fraudulent nature of his possession of them.⁴⁰ But, whilst this is so, it has been held, under the American rule,⁴¹ that a cross-examination concerning *other transfers* not referred to in the examination in chief, is not permissible,⁴²—a conclusion which

cross-examination, that another than plaintiff insured the property on the premises. *Dosch v. Diem*, 176 Pa. 603, 35 Atl. 207.

³⁷ *Blunt v. St.*, 9 Tex. App. 234.

³⁸ *Jacobson v. Metzger*, 35 Mich. 103. So held in *Anderson v. Walter*, 34 Mich. 113; *Whipple v. Preece*, 24 Utah, 364, 67 Pac. 1072; *Klotz v. James*, 96 Iowa, 1, 64 N. W. 648, 59 Am. St. Rep. 348; *Adams & Burke Co. v. Cook*, 82 Neb. 684, 118 N. W. 662.

³⁹ *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296. And so where plaintiff in attachment, whose alleged

indebtedness was put in note form the same day or the next day, and there was evidence tending to show plaintiff was secreting his own property. *Eames v. Kaiser*, 142 U. S. 488, 35 L. Ed. 1091.

⁴⁰ *Bowers v. Mayo*, 32 Minn. 241, 20 N. W. 186; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Cohen v. Coldberg*, 65 Minn. 473, 67 N. W. 1149; *St. Francis Mill Co. v. Sugg*, 206 Mo. 148, 104 S. W. 45.

⁴¹ Post, § 432.

⁴² *Clark v. Reininger*, 66 Iowa 507, 24 N. W. 16.

may be regarded as doubtful, since the question is largely one of intent.⁴³

§ 417. [Continued.] Illustrations.—Thus, it appearing, from the cross-examination of a *mortgagee of a stock of merchandise*, that he and the mortgagor had an interview, shortly after the giving of the mortgage and before the attachment was levied,—it was held that the defendant should have been allowed to ask further questions adapted to elicit from the witness evidence as to whether, at such interview, the mortgagor had informed the plaintiff that he was making large sales of mortgaged goods and receiving large sums of money therefor, without accounting to the plaintiff for the same.⁴⁴ In another case, where the question in issue was the *bona fides* of a sale of a stock of goods, it appeared that the sale was made in haste, the vendor not taking an invoice or otherwise determining the amount of the goods, and leaving the country immediately, with the cash portion of the purchase price. The purchaser having testified, on direct examination, that the reason the vendor gave for the hasty sale was that he was in a scrape with a girl and was afraid of prosecution thereupon, a question was asked one of the witnesses, on cross-examination, what kind of trouble the vendor said he was in with the girl, and one or two other questions were asked tending in the same direction, all of which were ruled out by the court. It was held that this was error. On cross-examination, the party denying the *bona fides* of the sale should have been allowed to inquire as to all that the vendor said in reference to the scrape with the girl; and this for two reasons: (1) A full cross-examination might have disclosed that the pretended reason was wholly fictitious, and so understood by the purchasers; or (2) it might have disclosed that he was seeking to evade liability in a bastardy action, for the support of an illegitimate child, and so informed the purchasers—in either of which cases the evidence would have been material;⁴⁵ since a conveyance made to avoid one's liability for the support of a bastard child is a conveyance in fraud of creditors, and void.⁴⁶

§ 418. Control of the Limits of Cross-examination.—So, the limit to which a cross-examination shall be extended and the mode

⁴³ Ante, §§ 432, et seq.

⁴⁵ *Schuster v. Wingert*, 30 Kan.

⁴⁴ *Kalk v. Fielding*, 50 Wis. 339,
7 N. W. 296.

529, 2 Pac. 642.

⁴⁶ As held in *Damon v. Bryant*, 2
Pick. (Mass.) 411.

in which it shall be conducted, are, as we shall still further see, subject in a very large measure to the *discretionary* control of the trial court. The propriety of allowing a question on *cross-examination*, which *misrecites the testimony* of the witness, and is calculated to lead him into error, is within the discretion of the court. "On this point," said the Supreme Court of Georgia, "we simply rule this: It is the duty of the court, both to protect the witness under cross-examination from being unfairly dealt with, and to allow a searching and skillful test of his intelligence, memory, accuracy and veracity. As a general rule, it is better that cross-examination should be too free than too much restricted. This is a matter that necessarily belongs to and abides in the discretion of the court. * * * There must be allowed some degree of skill, if not sharpness, in conducting cross-examinations; because a witness, however fair and honest and truthful, may not be careful enough; and it is to the interest of justice to expose the blundering of a witness, as well as his willful departures from veracity. A jury ought to be made to know what character of mind they have before them on the witness stand; whether they have a careful, cautious witness, or one who is disposed to take things on trust. That is quite essential. But the court is there watching the proceedings, and acquainted with all the surroundings; it is proper to leave such a question to the discretion of the court."⁴⁷

§ 419. **Court may curtail Needless Repetitions.**—As a general rule it is not error for the court to refuse to allow cross-examining counsel to require the witness to *repeat* in detail what he has *fully stated* on his direct examination.⁴⁸ It was so held where a conver-

⁴⁷ Harris v. Central R. Co., 72 Ga. 525, 3 S. E. 355. So also as to the allowance of irrelevant questions. U. S. v. Eliason, 7 Mackey, 104. Or inquiry into immediate matters. Village of Claggett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Spear v. Sweeney, 88 Wis. 545, 60 N. W. 1060. The court should protect witness from questions asked merely to get a discreditable matter before the jury. Ephland v. R. Co., 57 Mo. App. 147. Or which harshly assume a want of veracity. See People v. Cahoon, 88 Mich. 456, 50

N. W. 384; St. v. Rutten, 13 Wash. 203, 43 Pac. 30; Rains v. St., 88 Ala. 91, 7 South. 315.

⁴⁸ Simon v. Home Ins. Co., 58 Mich. 278, 25 N. W. 190; Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906. Court may also protect counsel by preventing opposing counsel from making frivolous objections to rapid cross-examination, thus giving witness opportunity to fabricate answers. St. v. Duncan, 116 Mo. 288, 22 S. W. 699. As to discretion in stopping tedious cross-examination, see Richardson v. St.,

sation, partly in a foreign language, had been testified to and interpreted by the witness on cross-examination.⁴⁹ How many times the *same question* shall be repeated on cross-examination, and how far the witness shall be compelled to answer, are obviously matters within the *discretion* of the presiding judge, and not the subject of exception.⁵⁰ But, as elsewhere seen,⁵¹ this rule cannot be applied so as to restrain the cross-examining party from calling out the details of matters which have been stated by the witness, on his direct examination, in general terms only.

§ 420. **Prescribe what Counsel shall Examine and Cross-examine.**—It is said by Lake, J., speaking for the Supreme Court of Nebraska: “A court may doubtless make reasonable rules for the regulation and examination of witnesses, and go so far even as to require the attorney who begins either the examination in chief or the cross-examination, to complete it. To this, however, there must necessarily be some exceptions,—as where, during an examination, the attorney, from any cause, is disabled to proceed; in such case it may, of course, be concluded by another. But no rule can be upheld that arbitrarily dictates which of several attorneys in a case—there being no disagreement between them—shall examine or cross-examine a witness, or that requires the same attorney who took part in the examination in chief, to conduct the cross-examination. A rule of this sort could serve no good purpose, and would unwarrantably interfere with the constitutional right of a party to select his own counsel to represent him in the several branches of the case. One attorney may be employed with special reference to the examination or cross-examination of witnesses, or of a particular witness, another to argue questions of law to the court, and still another to sum up the case to the jury, and to do this is a right which no court can rightfully deny.”⁵²

80 Ark. 201, 96 S. W. 752; Barnes v. Squier, 193 Mass. 21, 78 N. E. 731.

⁴⁰ Ulric v. People, 39 Mich. 245, 251.

⁵⁰ Demeritt v. Randall, 116 Mass. 331. Gilliam v. Davis, 14 Wash. 183, 44 Pac. 152; Jones v. Stevens, 36 Neb. 849, 55 N. W. 251; Gulf etc. R. Co. v. Pool, 70 Tex. 713, 8 S. W. 535. Often this is permis-

sible as testing recollection and credibility, when directed to a particular phase or characteristic. Zucker v. Karpeles, 88 Mich. 413, 50 N. W. 373.

⁵¹ Ante, §§ 406; 408.

⁵² Olive v. St., 11 Neb. 4, 26, 7 N. W. 444. Under Michigan circuit court rule No. 63, providing that, on the trial of issues of fact, *one counsel only on each side shall*

§ 421. **Prescribe Order in Case of Several Defendants having separate Defenses.**—The order in which several defendants, having separate defenses, shall cross-examine the plaintiff's witnesses, present their defense, and make their argument, rests in the sound discretion of the trial judge.⁵³ Although their defenses may be separate, yet if their interests are identical, this discretion will not be abused by confining the cross-examination on behalf of all the defendants to one counsel, the same as though their defense were joint.⁵⁴

§ 422. **Allow Re-cross-examination on the Same Subject.**—To allow a witness to be recalled and cross-examined again on the same subject is a matter purely *discretionary* with the trial court, and is the subject of exception only when the discretion is abused.⁵⁵

§ 423. **Whether Admissibility of Matter on Cross-examination Depends upon its Admissibility on Direct Examination.**—Upon this subject, it was said by Mr. Justice Brewer: "As a rule, the admissibility of a cross-examination depends upon the admissibility of the direct examination. If, upon any matter, the testimony in chief is excluded, no cross-examination thereon is allowed. The

examine and cross-examine witnesses, an assistant counsel is not prevented from objecting to questions put in cross-examination to a witness, who had been cross-examined in chief by his coadjutor on the same side. *Baumeier v. Antiau*, 65 Mich. 31, 31 N. W. 888. May require that the same counsel, who conducted the cross-examination, shall cross-examine, on the witness being recalled. *Cook v. Ins. Co.*, 86 Mich. 554, 49 N. W. 474.

⁵³ *Fletcher v. Crosbie*, 2 Mood. & Rob. 417; *State v. Howard*, 35 S. C. 197, 14 S. E. 481. See also *Succession of Townsend*, 40 La. Ann. 66, 3 South. 488, relating to intervenors, whose interests are opposed by both plaintiff and defendant. In consolidated cases, the privilege of cross-examination is given accordingly as witnesses are called and

as or not they appear adverse. *Sullivan v. Fugazzi*, 193 Mass. 518, 79 N. E. 775. Where there are several defendants in a criminal case, one testifying in his own behalf may be cross-examined by counsel for the others upon what is material to their clients, as well as by the district attorney generally. *Com. v. Mullin*, 150 Mass. 394, 23 N. E. 51.

⁵⁴ *Chippendale v. Masson*, 4 Camp. 174; *Mason v. Ditchbourne*, 1 Mood. & Rob. 462 *n.* Aliter where they have no separate counsel. *St. v. Davis*, 13 Mont. 384, 34 Pac. 182.

⁵⁵ *Knight v. Cunningham*, 6 Hun (N. Y.), 100; *Sperbeck v. R. Co.*, 74 N. J. L. 6, 64 Atl. 1012. So to refuse to allow such to be done. *Pigg v. St.*, 145 Ind. 560, 43 N. E. 309.

fact that testimony has been taken by deposition before the trial in no manner affects the question of the competency of each and every part of it. Its competency is determined in the same manner, and upon the same principles, as though the witness was present on the stand and being interrogated in person. A question which, if the witness were present, counsel could not ask, cannot be asked in deposition; and if asked and answered, must be stricken therefrom." Accordingly, where the answers to the direct interrogatories in a deposition were excluded for want of sufficient identification in respect of time and place, it was held that the party offering the deposition could not read the answers given in response to the cross-interrogatories.⁵⁶ But it has been held that this rule cannot be made to work, as it were, in a converse manner, so as, where the irrelevant evidence has been admitted on the direct examination, to allow the opposite party to follow up and extend the irrelevant inquiry on the cross-examination. In order that this restriction shall work no hardship or inequality, it is ruled that, when this privilege is denied to the cross-examining party, he may ask the court to *rule out* the evidence already received in chief, so far as it is irrelevant, and if the court should refuse to do this, it would be ground for a new trial. The court, in thus holding that the error of one party does not justify the continued propagation of the error by the other, said: "The maxim '*similia similibus curantur*' has been applied to some extent in *medicine*, but the principle has never been applied to the cure of errors in *law*.'" ⁵⁷

§ 424. Cross-examining an Adverse Witness, whose Deposition has been taken.—Statutes exist in many jurisdictions enabling a party to compel the attendance of an adverse witness whose deposition has been taken, and to cross-examine him in respect of his testimony given in such deposition. It is a sound conclusion, in the construction of these statutes, that a party who thus subpoenas and cross-examines the adverse witness, does not thereby make him his own witness.⁵⁸

⁵⁶ Callison v. Smith, 20 Kan. 28, 37.

⁵⁷ Phelps v. Hunt, 43 Conn. 194, 200, opinion by Loomis, J.

⁵⁸ By § 3842 of the Code of Tennessee, edition of 1858, it was provided that, "if the adverse party

should desire to have any witness cross-examined in open court whose deposition has been taken, he may compel the attendance of such witness, as in other cases, unless the witness is exempted by law from the usual penalties."

§ 425. **Not Necessary to State what Facts the Question will Elicit.**—It is not necessary, on cross-examination, to state what facts it is expected the answer will elicit; on direct examination this is essential, but not on the cross-examination.⁵⁹ The reason is, that the cross-examiner does not call the witness for the purpose of *proving anything*; the witness is called by the adverse party, and the cross-examiner is seeking to extort from him a qualification of his testimony in chief. He cannot be presumed to know what the answers of the witness will be to questions propounded in a proper cross-examination, nor would he be bound by such answers. "The value of a cross-examination, as a test of truth, would be lost in the case of a crafty and unreliable witness, if the examiner were bound to disclose in advance the purpose and intent of every question asked."⁶⁰ In one jurisdiction there is a *modified view* that, even where a *party* is under cross-examination, the court may exercise a sound *discretion*, in requiring counsel to make the relevancy of his questions apparent.⁶¹

This, it is said, is merely an extension of the provisions of § 3836 of the same code, enabling the adverse party to compel the attendance of such witness and subjecting him to the usual penalties against witnesses for failing to obey subpoenas. When such a witness is brought into court under this section, or under § 3836, he continues to be the witness of the party who took his deposition, and is subject to cross-examination as such. It is therefore error for the trial court to rule that, by summoning his adversary's witness for cross-examination under this statute, the party makes the witness his own. *Sweat v. Rogers*, 6 Heisk. (Tenn.) 117, 122. In *Ford v. Ford*, 11 Humph. (Tenn.) 89, a similar ruling was made construing a similar

statute. Even though the deposition itself has not been put in evidence. *Marx v. Leinkauff*, 93 Ala. 453, 9 South 818. Where statute merely makes an affidavit prima facie evidence of the contents, this rule is held not to apply. *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727.

⁵⁹ *Hyland v. Milner*, 99 Ind. 308, 310; *Wood v. St.*, 92 Ind. 269; *Harness v. St.*, 57 Ind. 1; *Brown v. St.*, 88 Miss. 166, 40 South. 737.

⁶⁰ *Martin v. Elden*, 32 Ohio St. 282, 289. To the same effect see *Burt v. St.*, 23 Ohio St. 394, 402.

⁶¹ *City Bank v. Kent*, 57 Ga. 285. If defendant is being cross-examined as to matters about which nothing is asked in rebuttal, this may be required. *St. v. Kennow*, 48 La. Ann. 1192, 14 South. 187.

ARTICLE II.—AMERICAN RULE OF STRICT CROSS-EXAMINATION.

SECTION

430. English Rule that the Witness may be Cross-examined on the Whole Case.
431. Applications of this Rule.
432. American Rule of Strict Cross-examination.
433. Scope of the American Rule.
434. Defendant cannot Introduce his Defense by Cross-examination.
435. Confined to the Testimony in Chief of the Particular witness, or Extended to all the Plaintiff's Evidence.
436. Liberality in applying the Rule—How far Relaxed in Discretion.
437. [Illustration.] Witness to prove Execution not Cross-examined as to Consideration.
438. [Continued.] Witness to Prove Identity not Cross-examined as to Consideration.
439. [Continued.] Defendant's Title in Ejectment.
440. [Continued.] Further Illustrations of the Rule.
441. [Continued.] Illustrative Cases not within the Rule.
442. Effect of the Rule—When makes Adversary's Witness one's own.
443. Leading Questions Developing new Matter.
444. [Continued.] Reason of the Rule which admits Leading Questions
445. [Continued.] Cross-examination of the Adverse Party.
446. Cross-examination in Criminal Cases.

§ 430. English rule that the Witness may be Cross-examined on the whole case.—The English rule on cross-examination is that, when a witness has been introduced, sworn and examined as to any material point in the case, the other party may cross-examine him as to the whole case, including any new matter of defense; but the extent to which he may be allowed to press the witness with *leading questions* will depend upon the circumstances of the case, the demeanor of the witness, his apparent bias and other considerations, and must, to a great extent, be left to the sound *discretion* of the trial judge.⁶² This rule is adopted by several of the American State courts.⁶³ Its reason has been thus stated: "The oath admin-

⁶² 2 Phil. Ev. 896-911; Morgan v. Brydges, 2 Stark. 314; Rex v. Brooke, Id. 472.

⁶³ *Massachusetts*: Webster v. Lee, 5 Mass. 335; Merrill v. Berkshire, 11 Pick. (Mass.) 269, 274; Moody v. Rowell, 17 Pick. (Mass.) 490, 498, 28 Am. Dec. 317; Blackington v. Johnson, 126 Mass. 21; Beal v. Nichols, 2 Gray (Mass.),

262. *New York*: Varick v. Jackson, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571; Fulton v. Stafford, 2 Wend. (N. Y.) 483. [But doubtful: see next section.] *Vermont*: Linsley v. Lovely, 26 Vt. 123. *Ohio*: Legg v. Drake, 1 Ohio St. 286. *Missouri*: Page v. Kankey, 6 Mo. 433; Brown v. Burrus, 8 Mo. 26; St. Louis etc. R. Co. v. Silver, 56

istered to a witness requires him to speak the truth, *the whole truth*, and nothing but the truth; and therefore when a witness is put upon the stand, he ought to be allowed an opportunity for stating *all* the facts within his knowledge bearing upon the issues involved in the case, and should not be confined to those facts only, about which the party who offers him as a witness chooses to interrogate him. It is very true that the other party may put him on the stand as his witness and examine him as to any facts within his knowledge which he may desire to bring before the court. But he is not obliged to do so; and it may, and often does happen, that the other party would prefer to forego the opportunity of bringing out such other facts, rather than adopt one of his adversary's witnesses as his own. In such case the result would be that the witness would have no opportunity of telling *the whole truth*, as he had been sworn to do."⁶⁴

§ 431. **Applications of the Rule.**—Under the English rule, where a witness has been called by one party, the other party may cross-examine him, although *no question* has been asked him in chief.⁶⁵ But if the plaintiff's counsel calls a witness *by mistake*, he cannot be cross-examined.⁶⁶ And if a witness is called, and has only answered an *immaterial question*, when his examination is stopped

Mo. 265; St. v. Sayres, 58 Mo. 585; Green v. R. Ass'n, 211 Mo. 35, 109 S. W. 715. *Wisconsin*: Knapp v. Schneider, 24 Wis. 70. *Louisiana*: Durnford v. Clark, 1 Mart. (La.) 202; Davidson v. Lallande, 12 La. Ann. 826, 828; Nicholson v. Desobry, 14 La. Ann. 81, 84; King v. Atkins, 33 La. Ann. 1057, 1064. *South Carolina*: Kibler v. McIlwain, 16 S. C. 551. It was assumed that this was the rule in Clinton v. McKenzie, 5 Strobb. L. 36, 41. *Alabama*: Kelly v. Brooks, 25 Ala. 523; Fralick v. Presley, 29 Ala. 457, 461.

⁶⁴ Kibler v. McIlwain, 16 S. C. 550, 557. *Alabama*, Johnson v. Armstrong, 97 Ala. 731, 12 South. 72; People v. Keith, 136 Cal. 19, 68 Pac. 816; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; O'Connell v. Don, 182 Mass. 541, 66 N. E. 788; Michigan, Hemminger v. Assur.

Co., 95 Mich. 355, 54 N. W. 949; St. v. Hathhorn, 166 Mo. 229, 65 S. W. 756; Montana, Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805; North Carolina, St. v. Allen, 107 N. C. 805, 11 S. E. 1016; St. v. McGee, 55 S. C. 247, 33 S. E. 253; Sands v. R. Co., 108 Tenn. 1, 64 S. W. 478. In Missouri where the liberal as opposed to the restrictive federal or American rule, as sometimes called, has been long applied, courts admit exceptions. Thus if a witness is called to contradict as to a particular fact. St. v. Seigenthaler, 121 Mo. App. 510, 97 S. W. 271. Rule even more liberal in trial before court without a jury. McCullough v. Ins. Co., 113 Mo. 606.

⁶⁵ Phillips v. Middlesex, 1 Esp. 355.

⁶⁶ Clifford v. Hunter, 3 Car. & P. 16; Mood, & M. 103; Wood v. Mackinson, 2 Mood. & Rob. 273.

by the judge, the opposite party will have no right to cross-examine him.⁶⁷ And where a witness has said *nothing* in chief, he cannot be cross-examined to *discredit* him.⁶⁸

§ 432. **American Rule of strict Cross-examination.**—The Supreme Court of the United States and the courts of some of the American States have adopted the contrary rule, which is sometimes called, by way of distinction, the American rule, and sometimes the rule of the Supreme Court of the United States. This rule is, that a party has no right to cross-examine except as to facts and circumstances connected with the matter stated in the direct examination of the witness, and that, if he wishes to examine him as to other matters, he must do so by making him his own witness, and by calling him as such in the subsequent progress of the cause.⁶⁹

⁶⁷ Creevy v. Carr, 7 Car. & P. 64.

⁶⁸ Bracegirdle v. Bailey, 1 Fost. & Fin. 536.

⁶⁹ Philadelphia etc. R. Co. v. Stimpson, 14 Pet. (U. S.) 448; Houghton v. Jones, 1 Wall. (U. S.) 702; Wills v. Russell, 100 U. S. 621; 1 Greenl. Ev., § 445. This rule has been adopted in the following states: *Pennsylvania*: Hughes v. Westmoreland Coal Co., 104 Penn. St. 207, 213; Monongahela Water Co. v. Stewartson, 96 Pa. St. 436; Jackson v. Litch, 62 Pa. St. 451. *Maryland*: Herrick v. Swomley, 56 Md. 439, 455; Griffith v. Diffenderfer, 50 Md. 466, 478. *Indiana*: Stinhouse v. St., 47 Ind. 17; Aurora v. Cobb, 21 Ind. 493; Patton v. Hamilton, 12 Ind. 256. *Illinois*: Stafford v. Fargo, 35 Ill. 481; Lloyd v. Thompson, 5 Bradw. (Ill.) 90, 96; Stevens v. Brown, 12 Bradw. (Ill.) 619, 622; Bell v. Prewitt, 62 Ill. 361. *Iowa*: Glenn v. Gleason, 61 Iowa, 28, 32; Pellersells v. Allen, 56 Iowa, 717, 10 N. W. 261. *Nebraska*: Clough v. St., 7 Neb. 320, 341; Boggs v. Thompson, 13 Neb. 403, 14 N. W. 393; Davis v. Neligh, 7 Neb. 84; Cool v. Roche, 15 Neb.

24, 17 N. W. 119. *New York*: Neil v. Thorn, 88 N. Y. 270, 275; Hartness v. Boyd, 5 Wend. (N. Y.) 563. [In Neil v. Thorn, supra, it is said that the trial court may, in its discretion, relax the rule, so as to allow the cross-examining party to go beyond the limits of the direct examination.] *California*: McFadden v. Mitchell, 61 Cal. 148. *Nevada*: Ferguson v. Rutherford, 7 Nev. 385, 390. *Arizona*: Rush v. French, 1 Ariz. 99, 139. Later federal cases seem more liberal than formerly, so far at least as sustaining discretion of the trial court in allowing a more extensive scope to the cross-examination. See Fourth Nat'l Bank v. Albaugh, 188 U. S. 734, 47 L. Ed. 673; Sauntry v. U. S., 117 Fed. 132, 55 C. C. A. 148. The states following the federal rule with more or less strictness are *Florida*: Peaden v. St., 46 Fla. 124, 35 South. 204. *Illinois*: Wheeler etc. Co. v. Barrett, 172 Ill. 610, 50 N. E. 325; *Indiana*: Chandler v. Beal, 132 Ind. 596, 32 N. E. 597; *Iowa*: St. v. Farington, 90 Iowa, 673, 57 N. W. 606; *Kansas*: Coon v. R. Co., 75 Kan. 282, 89 Pac.

§ 433. **Scope of the American Rule.**—According to a very learned and accurate writer, “the limits of a strict cross-examination, within the meaning of this rule, include whatever tends to qualify or explain his testimony, or rebut or modify any inference resulting from it.”⁷⁰ In Pennsylvania it is said in a late case: “It has been reiterated in this State that cross-examination must be confined to matters which have been stated in examination in chief, and to such questions as may tend to show bias and interest in the witness; that to permit a party to lead out *new matter*, constituting *his own case*, under the guise of a cross-examination, is disorderly and often unfair to the opposite party; and that these rules are established for the purpose of eliciting truth and preserving the equality of rights of parties in trials of causes.”⁷¹ In a case in Arizona, where this question was very exhaustively and thoughtfully discussed by Dunne, C. J., the following rules were laid down as applications of the American doctrine: “1. When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the adverse party, upon all matters pertinent to the case of the party calling him, except exclusively new matter; and nothing shall be deemed new matter except it be such as could not be given under a general denial. 2. The fact that evidence, called forth by a legitimate cross-examination, happens also to sustain a cross-action or counter-claim, affords no reason why it should be excluded. 3. The party entitled to cross-examine may waive his right to do so at the time, and recall the witness and cross-examine him after

682; Nebraska: Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744; Pennsylvania: Sutch's Estate, 201 Pa. 305, 50 Atl. 943; Glenn v. Philadelphia etc. Co., 206 Pa. 135, 55 Atl. 860; South Dakota: Bedtkey v. Bedtkey, 15 S. D. 310, 89 N. W. 479; Virginia: Miller v. Miller's Adm'r, 92 Va. 570, 23 S. E. 891; Washington: Bishop v. Averill, 17 Wash. 209, 49 Pac. 237; Coey v. Darknell, 25 Wash. 518, 65 Pac. 760; Wisconsin: Lauterbach v. Netzo, 111 Wis. 322, 87 N. W. 230. In some states the rule to be followed is statutory. See Ficken v. Atlanta, 114 Ga. 970,

41 S. E. 58; St. v. Larkins, 5 Idaho, 200, 47 Pac. 945.

⁷⁰ Abb. Tr. Brief, 46; citing Wilson v. Wagar, 26 Mich. 452; Campau v. Dewey, 9 Id. 381, 419; Haynes v. Ledyard, 33 Id. 319; Ferguson v. Rutherford, 7 Nev. 385; Baird v. Daly, 68 N. Y. 547, 550; Mayer v. People, 80 N. Y. 364, 378. See also Smith v. Philadelphia Traction Co., 202 Pa. 54, 51 Atl. 345; Norfolk Nat. Bank v. Job, 48 Neb. 774, 67 N. W. 781; Zelenka v. Union S. Y. Co., 82 Neb. 511, 118 N. W. 103.

⁷¹ Hughes v. Westmoreland Coal Co., 104 Pa. St. 207, 213.

he opens his case. 4. The court, in its discretion, may forbid the cross-examining party putting leading questions, when objection is made that the witness is biased in favor of the party cross-examining, and the court is satisfied that the objection is good.”⁷²

§ 434. **Defendant cannot introduce his Defense by Cross-examination.**—Where this rule prevails a defendant cannot, by cross-examining a witness for the plaintiff, except by consent of parties and permission of the court, open up his own defense by interrogating the witness as his own witness.⁷³ But he may cross-examine as to all that constitutes the cause of action, though not with regard to matters in confession and avoidance.⁷⁴ He may, according to principles already stated,⁷⁵ sift and probe the direct examination to the fullest extent. As was well said by Mr. Justice Christiancy: “All testimony elicited on cross-examination, consisting, as it does, of facts which, relating to the direct examination, may have been omitted or concealed in that examination, or facts tending to contradict, explain or modify some inference which might otherwise be drawn from them, must, in the nature of things, constitute a part of the evidence given in chief, and both alike and taken together must therefore be treated as evidence given on the part of the party calling the witness.”⁷⁶

§ 435. **Confined to the Testimony in Chief of the Particular Witness, or Extended to all the Plaintiff's Evidence.**—In jurisdictions where this rule prevails, a tendency is discovered to relax its strictness, so far as to allow the defendant to cross-examine the

⁷² *Rush v. French*, 1 Ariz. T. 99, 139, 25 Pac. 816.

⁷³ *Da Lee v. Blackburn*, 11 Kan. 190; *Malone v. Dogherty*, 79 Pa. St. 46; *Elmaker v. Buckley*, 16 Serg. & R. 72; *MacKinley v. McGregor*, 3 Whart. (Pa.) 370; *Floyd v. Bovard*, 6 Watts & S. (Pa.) 75; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 398; *Hopkins v. R. Co.*, 2 Idaho, 300, 13 Pac. 343; *Britton v. St.*, 115 Ind. 55, 17 N. E. 254; *Story v. Nidiffer*, 146 Cal. 549, 80 Pac. 692. It has been held discretionary for the court to allow this to be done. See *Huntsville R. Co. v. Corpening*, 97 Ala. 681, 12 South. 295. See also

Willoughby v. R. Co., 32 S. C. 410, 11 S. E. 339.

⁷⁴ *Henderson v. Hydraulic Works*, 9 Phila. (Pa.) 100; *Haines v. Snedigar*, 110 Cal. 18, 42 Pac. 462; *Briggs v. Gardner*, 60 Hun, 543, 15 N. Y. S. 335. If cross-examining merely tends to disprove plaintiff's case, it is allowable. *Wendt v. R. Co.*, 4 S. D. 476, 59 N. W. 226; *Washburn v. R. Co.*, 84 Wis. 251, 54 N. W. 504.

⁷⁵ *Ante*, § 408. *Stiles v. Estabrook*, 66 Vt. 535, 29 Atl. 961.

⁷⁶ *Wilson v. Wager*, 26 Mich. 452; quoted with approval in *Callison v.*

plaintiff's witnesses as to all the facts which have been developed by the testimony given for the plaintiff, whether delivered by the particular witness or by other witnesses. Thus, in Pennsylvania, while it is conceded that "cross-examination, as a general thing, is only regular when confined to the testimony given by the witness in chief," the *modified view* has been laid down, that it ought not to transcend the testimony in chief, taken as a whole, or in other words, the case which the *witnesses* on the other side are called to prove. If it is confined to narrower limits, the plaintiff may distribute the case arbitrarily among the witnesses, and, by restricting each to a particular line, prevent the disclosure of truths which he desires to conceal."⁷⁸ The Supreme Court of Nevada have also laid down a modified rule, by stating that the one invariable *test* by which to determine whether the cross-examination can be permitted is, Does it concern new matter of defense or not?⁷⁹

§ 436. **Liberality in Applying the Rule—How far Relaxed in Discretion.**—One court has gone so far as to hold, even in civil cases, that when such cross-examination is carried to an unreasonable length on new matters, whereby improper testimony is obtained, it is error.⁸⁰ But another court has said: "The purpose of the rule might often be defeated by a rigid enforcement of the rule in all cases. In the order of examination of witnesses and the introduction of testimony, much must be left to the *discretion* of the court below. This court has rarely, if ever, reversed for an error in permitting a violation of the rules relating to cross-examination, which does not result to the prejudice of the party."⁸¹ In the opinion of another court we find the following language: "As to what are and what are not circumstances connected with the testimony in chief, is sometimes very difficult of determination,

Smith, 20 Kan. 28, 37. See also Ireland v. R. Co., 79 Mich. 163, 44 N. W. 426.

⁷⁷ Helser v. McGrath, 52 Pa. St. 531. See also Appeal of Nicely, 130 Pa. 261, 18 Atl. 737.

⁷⁸ Henderson v. Hydraulic Works, 9 Phila. (Pa.) 100, opinion by Hare, P. J. Such also is the *rule* of the *common law* as practiced in New York, Massachusetts and Vermont. Fulton Bank v. Stafford, 2 Wend.

(N. Y.) 483; Moody v. Rowell, 17 Pick. (Mass.) 490, 497; Beal v. Nichols, 2 Gray (Mass.), 262; Linsley v. Lovely, 26 Vt. 123; Sullivan v. R. Co., 175 Pa. 361, 34 Atl. 798.

⁷⁹ Ferguson v. Rutherford, 17 Nev. 390. See also Buckley v. Buckley, 12 Nev. 423, 14 id. 262.

⁸⁰ Bell v. Pruitt, 62 Ill. 362.

⁸¹ Hughes v. Westmoreland Coal Co., 104 Pa. St. 207, 213.

owing to the remote connection between the direct examination and the facts sought to be elicited by the cross-examination; and, unless a trial court should so far overstep the bounds as to admit that in cross-examination which clearly has no connection with the direct testimony, an appellate court would not be justified in reversing a judgment for such cause, especially where the cross-examination is upon facts competent to be proved under the issues in the case. In such questions, very much must be left to the *discretion* of the trial court.”⁸² Another court, in applying the rule, holds that it is *not necessary* that the *precise subject* should have been called to the attention of the witness on the direct examination, but the cross-examination should be allowed to extend to any matter not foreign to the subject of the direct examination, and tending to limit, explain or modify the same.⁸³ In another court, where the action was upon a promissory note, and its genuineness was put in issue, a witness who had testified in chief that he knew the defendant’s handwriting and that the note was in his handwriting, was asked, on cross-examination, when he first saw the note. It was held, applying the same liberal rule, that this question grew legitimately out of the direct examination, since it had a tendency to elicit from the witness what opportunities he had had of examining the signature.⁸⁴ For the same reason, it was permitted to ask the witness on cross-examination, who showed him the note.⁸⁵ So, another court has held that, on the cross-examination of a witness who has given evidence making out a *prima*

⁸² Glenn v. Gleason, 61 Iowa, 28, 32, 15 N. W. 659.

⁸³ Haynes v. Ledyard, 33 Mich. 319. See as to the Michigan rule, Chandler v. Allison, 10 Mich. 460; Thompson v. Richards, 14 Mich. 172; Detroit etc. R. Co. v. Van Steinberg, 17 Mich. 99. Thus it was held proper in action for fire loss and the question was of renewal, to ask agent, who held plaintiff’s check for premium for two weeks without objection, if he would have presented same had no fire occurred. Long v. Ins. Co., 137 Pa. 535, 20 Atl. 1014, 21 Am. St. Rep. 879. And so where note of

deceased was signed by his mark, proper to ask who were present and what was said. Dultera v. Babylon, 83 Md. 536, 35 Atl. 64. And where indorser claimed note had been raised by adding a word and a figure in blank spaces, proper to ask him, why this was not prevented and whether he cared whether the note was left so it could be changed. Pearson v. Harden, 95 Mich. 360, 54 N. W. 904.

⁸⁴ Herrick v. Swomley, 56 Md. 439, 455. Compare Griffith v. Diefenderffer, 50 Md. 466, 478.

⁸⁵ Herrick v. Swomley, *supra*.

facie case for the plaintiff, it is competent to draw out any facts which would tend to destroy the case thus made out.⁸⁶

§ 437. [Illustration.] **Witness to prove Execution not Cross-Examined as to Consideration.**—A frequent instance, and one which throws into contrast the English and American rule, is that, under the English rule, a witness called by the plaintiff for the purpose of proving the *execution* of the written contract which is the foundation of the suit, may be cross-examined by the defendant as to its *consideration*, and the defendant may contradict his statements concerning such consideration.⁸⁷ But, under the American rule, a witness called by the plaintiff for the purpose of proving the execution of the contract sued on, cannot be cross-examined as to its consideration; but if the defendant would have his testimony on that point, he must call him as his own witness.⁸⁸

§ 438. [Continued.] **Witness to Prove Identity not Cross-Examined as to Consideration.**—By parity of reasoning, under the American rule, witnesses called to prove identity cannot be cross-examined as to consideration. Thus, in a contest between the mortgagee of chattels and an alleged purchaser, the mortgagee called the mortgagor as a witness and proved by him the single fact that the chattels were the same which were described in the mortgage. The court then permitted, against objection, a lengthy cross-examination of the witness, in regard to the consideration of the mortgage and various other matters not touched upon in the examination in chief, and a verdict resulted against the mortgagee. It was held that for this error the judgment must be reversed.⁸⁹

⁸⁶ Jacobson v. Metzger, 35 Mich. 103. For other examples of liberal extension of the right of cross-examination on this principle see Perdue v. R. Co., 100 Ala. 535, 14 South. 366; McFadden v. R. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; St. v. Johnson, 41 La. Ann. 1076, 6 South. 802.

⁸⁷ Lamprey v. Munch, 21 Minn. 379. In Iowa the fact, that note purported to have been signed by a decedent, made it allowable to cross-examine as to consideration as touching upon credibility, and

witness might be asked for all the circumstances. Glenn v. Gleason, 61 Iowa, 28, 15 N. W. 659.

⁸⁸ Youmans v. Carney, 62 Wis. 580, 582, 23 N. W. 20; McFadden v. Mitchell, 61 Cal. 148. Compare Leavitt v. Stansell, 44 Mich. 424, 6 N. W. 855. Or merely to show balance due on a note. Evans v. Varnish Co., 59 Ill. App. 87; First Nat'l Bank v. Smith, 8 S. D. 101, 65 N. W. 439.

⁸⁹ Bell v. Pruitt, 62 Ill. 362. But it has been ruled, that, where defendant's bookkeeper was merely

§ 439. [Continued.] Defendant's Title in Ejectment.—The defendant's title in ejectment is not new matter, within the meaning of this rule; and therefore questions may be asked, on cross-examination of the plaintiff's witness in ejectment, eliciting answers which set up the defendant's title.⁹⁰ But in Illinois it has been held that, where the plaintiff in ejectment files an affidavit that he claims title through a common source with the defendant, and the defendant, or his agent or attorney, denies under oath that he claims title through such source, or states that he claims title through some other source,—the latter will not be subject to a cross-examination as to his source of title. So held as to the effect of a statute touching the action of ejectment.⁹¹

§ 440. [Continued.] Further Illustrations of the Rule.—An illustration of the ridiculous consequences which flow from a strict application of the American rule is found in a case in Indiana, where the relatrix in a prosecution for *bastardy* having testified as a witness, the defendant asked her what was the *color* of the *hair* and *eyes* of the *child*. It was held that this question was properly excluded, on the ground that it was an attempt to introduce new defensive matter by cross-examining a witness for the plaintiff, which was inadmissible.⁹²

§ 441. [Continued.] Illustrative Cases not within the Rule.—On the trial of an indictment for seduction under a promise of marriage, witnesses had testified, on behalf of the State, that the defendant kept company with the female alleged to have been seduced, and that they had walked and rode together a few times. It was held that these witnesses might be asked, on cross-examination, whether *other men* had not kept company with her in like manner. The court said: "The fact stated by the witnesses, in their direct examination, was introduced to corroborate the testimony of the girl, and as tending to show that a promise of marriage had been made by the appellant. The object of the cross-examination was to over-

asked to identify the signature to a receipt, the fact of its being offered to show payment in full made him subject to cross examination as to money he had received and paid out for plaintiff. *Patchen v. Mach. Co.*, 6 Wash. 486, 33 Pac. 976.

⁹⁰ *Marshall v. Shafter*, 32 Cal. 176; *Rush v. French*, 1 Ariz. T. 99, 139, 25 Pac. 816.

⁹¹ *Thatcher v. Olmstead*, 110 Ill. 26.

⁹² *Hull v. St.*, 93 Ind. 128.

throw or weaken the effect of the evidence. For that purpose it was proper, and the court erred in refusing it.”⁹³ Where, in an action against executors on certain promissory notes purporting to be those of the testator, the plaintiff was allowed, without objection, to testify that the testator had signed the notes, and the notes were thereby admitted in evidence, making a *prima facie* case for the plaintiff, it was held competent for the defendant to cross-examine the plaintiffs as to where, when, under what circumstances, and for what consideration, the notes were signed.⁹⁴ In a suit by a passenger on a stage coach against the proprietors as common carriers, to recover damages for personal injuries sustained by the upsetting of the coach, the plaintiff, testifying as a witness, stated that he was received by the driver, as a passenger from Boulder to Helena, without charge, and that one of the defendants had said, since the accident, that the driver had orders to carry him without fare to Helena. On cross-examination, he was asked whether his fare was not demanded before the accident at Jefferson—a station between Boulder and Helena,—whether he had not refused to pay it, or to leave the coach when required to do so. These cross-questions were objected to, and the objection sustained by the trial court. It was held that they related to the transaction inquired of in chief, and should have been allowed.⁹⁵ In a suit by a commission merchant to recover of the person for whom he had made the purchase, for loss on a resale, for want of putting up a further margin, the defendant had the right, in Illinois, on cross-examination, it was held, to inquire when, where, and in what manner the purchase was made for him, and whether the plaintiff has settled the purchase, and if so, what was paid to him, and the manner it was paid,—for the purpose of showing whether the mode of dealing was fair and free from fraud and injustice or wrong to him.⁹⁶

§ 442. **Effect of the Rule—When makes Adversary’s Witness One’s Own.**—The effect of the American rule is that, where a party, on the cross-examination of a witness, draws out new matter not inquired about in the examination in chief, he makes the witness his own in respect of such new matter, and gives the right to the party

⁹³ *Stinhouse v. St.*, 47 Ind. 17.

⁹⁵ *Oldershaw v. Knowles*, 101 Ill.

⁹⁴ *Glenn v. Gleason*, 61 Iowa, 28, 31, 15 N. W. 659.

117; see *City of Spring Valley v. Gavin*, 182 Ill. 232; *Kerfoot v. Chicago*, 195 Ill. 235.

⁹⁶ *Gilmer v. Higley*, 110 U. S. 47.

originally calling the witness, to cross-examine him on such new matter.⁹⁷

§ 443. **Leading Questions in Developing New Matter.**—Under the English rule, as applied in several American jurisdictions,⁹⁸ the cross-examining counsel may put leading questions to the witness, even while developing new matter not touched upon in the examination in chief.⁹⁹ Other courts, which follow the so-called American rule,¹ have declared that, when the cross-examiner proceeds to develop new matter, the witness becomes so far *his own witness*, that it is not proper for him to ask leading questions in respect of such new matter.² “A different rule,” says Finch, J., in giving the opinion of the Court of Appeals of New York, “would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that, it becomes the direct and affirmative evidence of the party, and should be subjected to the appropriate restraints. There is no reason, in the nature of the case, why a direct examination should be guarded against the evil and danger resulting from leading questions, which does not apply to an effort upon cross-examination to introduce a new and affirmative defense.”³ A modified view is found in the decisions of several of the courts which follow the American rule,

⁹⁷ So held in *Bassham v. St.*, 38 Tex. 622, and cases in the next section.

⁹⁸ Ante, § 430.

⁹⁹ *Dickenson v. Shee*, 4 Esp. 67; *Moody v. Rowell*, 17 Pick. (Mass.) 490, 498, 28 Am. Dec. 317; *Beal v. Nichols*, 2 Gray (Mass.), 264; *Jackson v. Varrick*, 7 Cow. (N. Y.) 238.

¹ Ante, § 432.

² *Harrison v. Rowan*, 3 Wash. C. (U. S.) 580; *Landsberger v. Gorham*, 5 Cal. 451; *Aitken v. Mendenhall*, 25 Cal. 213; *Wetherbee v. Dunn*, 32 Cal. 106; *Harper v. Lamping*, 33 Cal. 641, 647; *Ferguson v. Rutherford*, 7 Nev. 385, 390. See

also *Houghton v. Jones*, 1 Wall. (U. S.) 705; *Jackson v. Feather R. W. Co.*, 14 Cal. 19, 24; *Thornton v. Hook*, 36 Cal. 223; *Ellmaker v. Buckley*, 16 Serg. & R. (Pa.) 72, 77; *Philadelphia etc. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448; *Castor v. Bavington*, 2 Watts & S. (Pa.) 505; *Floyd v. Bovard*, 6 Watts & S. (Pa.) 75; *Jackson v. Son*, 2 Caines (N. Y.), 178; *People v. Moore*, 15 Wend. (N. Y.) 419; *Hayward v. Scott*, 114 Ill. App. 531. The statute of Idaho so provides, R. S. 1887, sec. 6079. *Bispham v. Turner* (Ark.), 103 S. W. 1135.

³ *People v. Oyer & Terminer*, 83 N. Y. 438, 459; affirming 19 Hun

which is to the effect that a leading question in respect of new matter, though objectionable, may be allowed ⁴ or denied ⁵ in the *discretion* of the court. The courts which adhere to this rule generally hold that a party cannot cross-examine his adversary's witness as to new matter, in order to introduce his own case, untrammelled by the rules of direct examination.⁶ In New York it was early laid down that the cross-examination of a witness in such a matter as to call forth new matter, made him the witness of the cross-examining party,⁷ and it was said that the court ought not, except in peculiar cases, to permit a direct examination, meaning the examination of the adversary's witness on new matter, to assume the form of a cross-examination.⁸ The conclusion seems to be that the question rests largely in the discretion of the presiding judge.⁹

§ 444. [Continued.] **Reasons of the Rule Which Admits Leading Questions.**—In stating the reason of this rule in a leading case in Massachusetts, Chief Justice Shaw said: "On the whole, the court is of the opinion that the weight of authority is in favor of the right to put leading questions under the circumstances stated, and that this is confirmed by practice and experience. It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple and practical as possible, and that the distinctions should not be multiplied without good cause. It would be often difficult, in long and complicated examinations, to decide whether a question applies wholly to new matter, or to matter already examined into in chief. The general rule, admitted on all hands, is that, on a cross-examination, leading questions may be put; and the court is of the opinion that it would not be useful to engraft upon it a distinction not in general neces-

(N. Y.), 91, where the subject is fully and ably discussed by Brady, J. It seems that more cases are lost through over zealous and unskillful cross-examination than through any other single cause. See Ram on Facts, ch. Cross-Examination.

⁴ Harrison v. Rowan, 3 Wash. C. C. (U. S.) 580; Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85; Harold v. Ter., 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (U. S.) 604.

⁵ Ellmaker v. Buckley, 16 Serg. & R. (Pa.) 72, 77.

⁶ Castor v. Bavington, 2 Watts & S. (Pa.) 505; Floyd v. Bovard, 6 Ibid 75; Philadelphia etc. R. Co. v. Stimpson, 14 Pet. (U. S.) 448.

⁷ Jackson v. Son, 2 Caines (N. Y.), 178; People v. Moore, 15 Wend. (N. Y.) 419, 423.

⁸ People v. Mather, 4 Wend. (N. Y.) 229, 248. See People v. Leonard, 199 N. Y. 432, 92 N. E. 1060.

⁹ People v. Genet, 19 Hun (N. Y.), 91, 100, sub nom. People v. Oyer & Terminer, affirmed, 83 N. Y. 438.

sary to attain the purposes of justice in the investigation of the truth of facts; that it would often be difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary power of the court, where the circumstances are such as to require its interposition.”¹⁰ After many years’ experience of the workings of this rule, the Massachusetts court said in a more modern case: “Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party producing a witness. On the other hand, a different rule, by making it necessary for the court, during the examination of the witness, constantly to determine what is or what is not new matter, upon which the opposite party has a right to put leading questions, leads to confusion and delay in the progress of trials.”¹¹

§ 445. [Continued.] Cross-examination of the Adverse Party.—

A greater latitude is allowed, under the American rule, in the cross-examination of a party who testifies in his own behalf; but this matter rests very largely in the control of the trial court, in the exercise of a sound *discretion*, which is not reviewable on error.¹² A statute of Pennsylvania, of which there are no doubt counterparts in other States, read as follows: “A party to the record of any civil proceeding in law or equity, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose, may be compelled, in the same manner, and subject to the same rules of examination as any other witness to testify; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony.”¹³ Under this statute it is held that, when a party is called as a witness by his adversary, leading questions may be put to him, and there may be drawn from him any facts or admissions which weaken his case or strengthen his adversary’s.¹⁴

¹⁰ *Moody v. Rowell*, 17 Pick. (Mass.) 490, 499, 28 Am. Dec. 317.

¹¹ *Beal v. Nichols*, 2 Gray (Mass.), 264, opinion by Bigelow, J.

¹² *Rea v. Missouri*, 17 Wall. (U. S.) 532, 542; *Gurden v. Stevens*, 146 Mich. 489, 109 N. W. 856; *Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220; *Grimes v. Connell*, 23 Neb. 187, 36 N. W. 479.

¹³ Penn. Act April 15th, 1869; 1 Bright. Purd. Dig. 624, pl. 17. Repealed May 23, 1887. See 4 Purd. Dig. 1903, p. 5175; also *Close’s Estate*, 214 Pa. 141.

¹⁴ *Bubaker v. Taylor*, 76 Pa. St. 83; *Loveland v. Cooley*, 59 Minn. 259, 61 N. W. 138. For learned discussion on cross-examination see *Ram on Facts*, ch. Cross-Examination.

§ 446. **Cross-examination in Criminal Cases.**—Where the State introduces a witness and examines him, the defendant may, under the English rule, cross-examine him as to all matters involved in the case, no matter how formal or unimportant the examination in chief may have been.¹⁵ Indeed, the rules of evidence are the same in civil and criminal cases; and in both it is in the discretion of the judge, how far he will allow the examination in chief of a witness to be by leading questions, or to assume the form of a cross-examination.¹⁶ But in one jurisdiction a distinction is taken between the right of the State to cross-examine witnesses for the accused, and the right of the accused to cross-examine witnesses for the State. The accused must be allowed to cross-examine the witnesses of the State as to any fact tending to establish his defense, whether it be or be not connected with the facts testified to in his examination in chief.¹⁷ In a capital trial, where the defendant, upon cross-examination of a witness for the State, by direct questions, disclosed for the first time the commission of another crime by him than that for which he was on trial,—it was held no ground for reversing the judgment, that the State was afterwards permitted to prove, by another witness, the same facts, in relation to a crime which had already been brought out by such cross-examination.¹⁸

ARTICLE III.—QUESTIONS AFFECTING CREDIBILITY.

SECTION

450. Relations between Witness and Parties—Facts Showing Bias or Prejudice.
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¹⁵ St. v. Brady, 87 Mo. 142; St. v. Judspeth, 150 Mo. 31, 51 S. W. 483. But see R. S. Mo. 1909, § 6358.

¹⁶ Reg. v. Murphy, 8 Car. & P. 297.

¹⁷ St. v. Swayze, 30 La. Ann. 1323, 1327; St. v. Thomas, 32 La.

Ann. 349, 351. But see St. v. Rhyne, 109 N. C. 794, 13 S. E. 943, where the English rule is recognized and the cross-examination by defense was closely restricted.

¹⁸ St. v. Kring, 74 Mo. 612, 631.

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- 474. Where the opposite Party is a Witness.
- 475. Right of Witness to Explain.

§ 450. **Relations Between Witness and Parties—Facts Showing Bias or Prejudice.**—It is one of the objects of a cross-examination to discover the motives, inclinations and prejudices of the witness, for the purpose of reducing the effect which might otherwise be given to his evidence.¹⁹ Accordingly, it has been well said that "it is always competent to show the relations which exist between the witness and the party against, as well as for whom he was called."²⁰ The general rule is that anything tending to show bias or prejudice on the part of the witness may be brought out on his cross-examination. The reason for the rule is, that such matters affect the *credit* of the witness, and it is therefore material to indulge in such an inquiry.²¹ For this purpose it is competent to

¹⁹ 1 Greenl. Ev. (12th ed.), § 446; Barbierre v. Messner, 106 Minn. 102, 118 N. W. 258.

²⁰ Starks v. People, 5 Denio (N. Y.), 106. See also Newton v. Harris, 2 Seld. (N. Y.) 345; Cameron v. Montgomery, 13 Serg. & R. (Pa.) 128; Howard v. City Fire Ins. Co., 4 Denio (N. Y.), 502; Turnpike Co. v. Loomis, 32 N. Y. 127; Madden v. Koester, 52 Iowa, 693, 3 N. W. 790; People v. Furtado, 57 Cal. 346; Dance v. McBride, 43 Iowa, 624; Miles v. Sackett, 20 Hun (N. Y.), 68; Com. v. Gallagher, 126 Mass. 54; Cochran v. St., 113 Ga. 726, 39 S. E. 333; Keesier v. St., 154 Ind. 242, 56

N. E. 232; St. v. Fisher, 162 Mo. 169, 62 S. W. 690; Porath v. St., 90 Wis. 527, 63 N. W. 1061; St. v. Smith, 8 S. D. 547, 67 N. W. 619.

²¹ St. v. Krum, 32 Kan. 372, 373, 4 Pac. 621; Harris v. Tippet, 2 Camp. 637; Atty-General v. Hitchcock, 11 Jur. 478; Morgan v. Frees, 1 Am. L. Reg. 92; Chapman v. Coffin, 14 Gray (Mass.), 454; Davis v. Roby, 64 Me. 430; Cameron v. Montgomery, 13 Serg. & R. (Pa.) 128; Batdorff v. Bank, 61 Pa. St. 183; 1 Whart. Ev., § 566; 1 Greenl. Ev. (13th ed.), §§ 449, 455, 459, 461; Lowe v. Ring, 123 Wis. 107, 101 N. W. 381. Thus witness may be

inquire of the witness concerning acts, declarations and circumstances, showing the existence of *hostile feelings* or *prejudice*; and the latitude of cross-examination is not restricted by the fact that the witness is a party testifying in his own behalf.²² The *state of mind* and feelings of a witness may materially affect his testimony, and the credit of a witness, upon whose testimony in part the issue is to be determined, is not a *collateral* and *immaterial* matter.²³ "Otherwise, biased or dependent witnesses, a parent, child, brother, sister or person with strong motives for prejudice or partiality,—might be put on the stand by defendant, and, in the absence of any question by his counsel on the subject, the State would be prevented from putting the jury in possession of the fact of such *relationship*, which would be entitled to legitimate consideration, as affecting the weight and credibility of the testimony."²⁴ So, for the purpose of affecting the credibility of a witness, he may always be cross-examined as to his *interest* in the event of the suit.²⁵ It may, therefore, be laid down, as a general rule, that any question is proper which

asked, if he contributed money in aid of the prosecution and his purpose in so doing. *Miller v. Ter.*, 149 Fed. 330; *Glenn v. Philadelphia etc. Co.*, 206 Pa. 135, 55 Atl. 860.

²² *Watson v. Twombly*, 60 N. H. 491; *Brewer v. Crosby*, 11 Gray (Mass.), 29; *People v. Casey*, 72 N. Y. 393, 398; *St. v. Barber*, 13 Idaho, 65, 88 Pac. 418; *Porch v. St.* (Tex. Cr. R.), 97 S. W. 1122 (not reported in state reports).

²³ *Watson v. Twombly*, 60 N. H. 491; *Martin v. Farnham*, 25 N. H. 195; *Folsom v. Brawn*, Id. 114; *Combs v. Winchester*, 39 N. H. 13; *Carr v. Moore*, 41 N. H. 131; *Sumner v. Crawford*, 45 N. H. 416; *Collins v. Stephenson*, 8 Gray (Mass.), 438; *Day v. Stickney*, 14 Allen (Mass.), 255.

²⁴ *State v. Willingham*, 33 La. Ann. 537, opinion by Fenner, J. On this subject the Supreme Court of California has said: "It is perfectly well settled that, on cross-examination, a witness may be interrogated as to any circumstance which tends

to impeach his credibility, by showing that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party. No citation of authorities is needed on a point so well settled." *People v. Benson*, 52 Cal. 380.

²⁵ *Vaughan v. Westover*, 4 Thomp. & C. (N. Y.) 316; *Phoenix Ins. Co. v. Sholes*, 20 Wis. 35; *Cornell v. Barnes*, 26 Wis. 473; *Suit v. Bonnell*, 33 Wis. 180. See also *Starks v. People*, 5 Denio (N. Y.), 106; *People v. Cunningham*, 1 Denio (N. Y.), 524; *Newton v. Harris*, 6 N. Y. 345; *Wells v. Kelsey*, 37 N. Y. 143, 146; *McCabe v. Brayton*, 38 N. Y. 196; *People v. Albright*, 23 How. Pr. (N. Y.) 306; *Turner v. Austin*, 16 Mass. 181, 185; *Garfield v. Kirk*, 65 Barb. (N. Y.) 464; *Knight v. Forward*, 63 Barb. (N. Y.) 311, 320; *Frank v. Symons*, 35 Mont. 56, 88 Pac. 561; *People v. Harper*, 145 Mich. 402, 108 N. W. 689; *McCowan v. Northwestern & Co.*, 41 Wash. 675, 84 Pac. 614; *Haver v. R. Co.*,

tends to show that the personal situation, or interest of the witness, may have influenced the testimony given by him on direct examination.²⁶

§ 451. **Whether Details and Particulars of Witness's Ill-Will may be shown.**—To this end, it has been held that it is competent, on cross-examination, where the witness has admitted his ill-will toward a party, to go into the details and particulars of such ill-will, for the purpose of showing the extent of his bias and prejudice. Johnson, J., in giving the opinion of the court, said: "The defendants were entitled to know the character and extent of the feeling of enmity which the witness entertained toward them. The question of bias and prejudice, and how far her hostility towards the defendants may have affected her testimony, are for the jury, and they cannot properly determine this until they learn the *degree* and *intensity* of the hostile feeling."²⁷ In like manner, the Supreme Court of Minnesota has said: "The object of this kind of testimony is to show bias and prejudice on the part of the witness, for the purpose of leading the jury to scrutinize and perhaps to discredit the testimony. If testimony of this character is to be received, it should be received in its *most effective form*, so that the purposes for which it is introduced may be best accomplished. A mere vague and general statement that hostile feeling existed would possess little force. It certainly must be proper to ask what the expression of hostility was, for the purpose of informing the jury of the

64 N. J. L. 312, 45 Atl. 593; Koenig v. R. Co., 173 Mo. 698, 73 S. W. 837.

²⁶ Atchison etc. R. Co. v. Blackshire, 10 Kan. 477, 487; Atlantic etc. R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, Olson v. R. Co., 24 Utah, 460, 68 Pac. 148; Nesbit v. Crosby, 74 Conn. 554, 51 Atl. 550; St. v. Miles, 199 Mo. 530, 98 S. W. 25. Thus it was held allowable for witness for railroad company to be asked, if the company gave him transportation to place of trial. Kansas City etc. R. Co. v. Belknap (Ark.), 98 S. W. 366. It was held reversible error not to allow full cross-examination of witness, who said he was em-

ployed to detect violation of local option liquor law. People v. Rice, 103 Mich. 350, 61 N. W. 540. The fact, that a showing of the relations of a witness to an accused may create prejudice against him is no legal objection to evidence. St. v. McGanay, 3 N. D. 293, 55 N. W. 759.

²⁷ St. v. Collins, 33 Kan. 77, 81, 5 Pac. 368. It is a matter in the court's discretion, whether or not details should be gone into. Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148. Bertoli v. Smith, 69 Vt. 425, 38 Atl. 76; St. v. Baird, 65 Vt. 257, 65 Atl. 101. See also Wright v. City of Anniston, 151 Ala. 465, 44 South. 151.

extent and nature of the hostile feeling, so that they may determine how much allowance is to be made for it."²⁸ But, in the opinion of another court, the rule is that the witness may be interrogated as to the *state* of his feelings toward one of the parties, but that it is not competent to inquire into the *cause* of such feelings.²⁹ On a somewhat similar view, in a criminal trial, it has been held error to permit the State's counsel, in cross-examining the defendant's witnesses, to inquire of them as to the *particulars* of a difficulty which they have had with the prosecutor, they having denied ill-feeling toward him.³⁰

§ 452. **Remoteness of Ill-Feelings in Point of Time.**—But the unkind feeling must be shown to exist when the evidence is given. The witness may have been angry at the party years before the trial, and the anger may have entirely disappeared. Unless it is made to appear that the unkind feeling exists *at the trial*, or that it has arisen so recently that it may be presumed to have continued down to the trial, evidence to show it is inadmissible.³¹

§ 453. **Attempts to Suborn other Witnesses.**—For the purpose of affecting the credibility of the witness by showing his *animus* against the cross-examining party and the extent to which he is willing to go in defeating the latter, it is competent to ask the witness on cross-examination, with the requisite circumstances of time, place and person, whether he has not attempted to suborn or get out of the way other witnesses subpoenaed on behalf of the cross-examining party.³² But, as was decided by the judges in an an-

²⁸ St. v. Dee, 14 Minn. 35, 39. See also Batdorf v. Bank, 61 Pa. St. 179, 183; Davis v. Roby, 64 Me. 427, 430; McFarlin v. St., 41 Tex. 23; Blanchard v. Blanchard, 191 Ill. 450, 61 N. E. 481; Davis v. St., 51 Neb. 301, 70 N. W. 984; St. v. Goodbier, 48 La. Ann. 770, 19 South. 755.

²⁹ Conyers v. Field, 61 Ga. 258; Bishop v. St., 9 Ga. 260. That is the *details* of the cause cannot be inquired into. Bolden v. Thompson, 60 Kan. 856, 56 Pac. 131.

³⁰ Patman v. St., 61 Ga. 379. It is respectfully submitted that the conception of this court is unsound,

for the reasons given by the Kansas and Minnesota courts, as above.

³¹ Higham v. Gault, 15 Hun (N. Y.), 383. As to other circumstances, from which there is no inference of present hostility, see St. v. Punshon, 133 Mo. 44, 34 S. W. 25.

³² The Queen's Case, 2 Brod. & Bing. 312; Morgan v. Frees, 15 Barb. (N. Y.) 352; St. v. Downs 91 Mo. 19, 3 S. W. 219. Compare Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 296; St. v. Thornhill, 177 Mo. 691, 76 S. W. 948; Matthews v. Lumber Co., 65 Minn. 372, 67 N. W. 1008; People v. Wong

swer to a question propounded by the Lords,³³ it is not competent to prove such attempts at subornation or tampering with witnesses, without first laying a *foundation* therefor, by interrogating the witness whom it is intended thus to accuse.³⁴

§ 454. **Previous Offer of the Prosecutor to settle.**—It has been held that the prosecuting witness, in a criminal case, cannot be asked, on cross-examination, whether he had not frequently, during the session of the court, offered to the prisoner that if the prisoner would settle the subject matter of the indictment, he, the prosecuting witness, would leave the court and not appear against the prisoner. The reason was, that this testimony did not tend to impair the credibility of the prosecuting witness.³⁵

§ 455. **Other Illustrations of the Foregoing Principles.**—Accordingly, in an action brought by certain executors against a co-executor, to recover the value of a certain promissory note given by the latter to the testator, a witness called by the plaintiffs, whose testimony tended to establish the defendant's liability, was asked, on cross-examination, whether it was not after a request to the executors to pay a sum which they alleged she owed the estate, that she

Chuey, 117 Cal. 624, 49 Pac. 833; St. v. Van Tassel, 103 Iowa, 6, 72 N. W. 497; Pace v. St. (Tex. Cr. R.), 79 S. W. 531 (not reported in state reports). So it has been held competent to show attempt to corrupt a juror at prior trial of the case. Beck v. Hood, 185 Pa. 32, 39 Atl. 842.

³³ The Queen's Case, *supra*.

³⁴ So held in Bates v. Holladay, No. 3864, St. Louis Court of Appeals, MS. In Lord Stafford's Case, 7 How. St. Tr. 1294, 1400, witnesses for the crown were allowed to testify to attempts at subornation, of which the prisoner protested his innocence, without a previous foundation being laid. But this decision, although sometimes cited by American courts, should not be regarded as of any authority upon the point. It was held, that where

the questions put to the witness would not, if answered either way, elicit answers tending to show this, they are properly excluded. Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 296. On a criminal trial in Missouri a witness for the State stated on his cross-examination that he did not, at a designated time and place, say to a relative of the defendant that he and another witness would leave, and not be witnesses against the defendant, if the person addressed would pay him \$100. It was held that the defendant had the right to contradict this denial—to prove by the person to whom this offer had been made that the witness had made it. The question was not collateral to the case on trial. St. v. Downs 91 Mo. 19, 3 S. W. 219.

³⁵ People v. Genung, 11 Wend. 19.

first gave the information of the facts to which she had testified. It was held that the referee erred in refusing to allow this question to be put.³⁶ So, it has been held within the discretion of the trial judge, to allow a witness for the defendant in a criminal case to be asked, on cross-examination, whether he has offered a certain person money to be surety on the defendant's appeal bond.³⁷ On the cross-examination of the State's witness in a criminal case, he may be asked whether he has not told the defendant that he had been his friend, but was then his enemy, and intended to have him prosecuted on the charge for which he was then being tried.³⁸ Where a defendant was on trial for a homicide committed while an attempt was being made to expel him from premises claimed by the deceased, it was held that a witness for the prosecution might properly be asked, on cross-examination, whether he, the witness, had agreed to be present and to aid the deceased in the expulsion of the defendant. The court said: "The defendant had a right to have that question answered, and to have the jury give it such weight as they might think it entitled to. The question whether the witness had a right to participate in the expulsion of the defendant is quite immaterial, as the object of the question was to draw out a statement which would enable the jury to determine what relations, if any, the witnesses sustained toward the deceased and the defendant respectively."³⁹ Where, in an action against a corporation, it appears that its president and treasurer are members of another corporation, having persons in its employ, and the plaintiff's counsel,

³⁶ *Miles v. Sackett*, 30 Hun (N. Y.) 68. Also it has been held that inquiries, directed to one's being surety on a bond, are proper. See *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *People v. Glennon*, 175 N. Y. 45, 67 N. E. 125; *Braden v. McCleary*, 183 Pa. 192, 38 Atl. 623. So also whether a witness is to share in any reward, if defendant is convicted. *Hollingsworth v. St.*, 53 Ark. 387, 14 S. W. 41; *Myers v. St.*, 97 Ga. 76, 25 S. E. 252. Related to the question of ordinary suretyship in bail or appeal bonds is that of employers' liability insurance. But the courts have frequently ruled out these inquiries,

when intended to refer to the credibility of a defendant protected by such insurance. *Demars v. Mfg. Co.*, 67 N. H. 404, 40 Atl. 902; *Shoemaker v. Bryant etc. Co.*, 27 Wash. 637, 68 Pac. 380. Though New Jersey Supreme Court has held, that allowing inquiry to be made was within discretion, as upon the question of a defendant so insured exercising due care towards its employes. *Day v. Donohue*, 62 N. J. L. 380, 41 Atl. 934.

³⁷ *Com. v. Gallagher*, 126 Mass. 54.

³⁸ *Sager v. St.*, 11 Tex. App. 110.

³⁹ *People v. Furtado*, 57 Cal. 346. opinion by Sharpstein, J.

in examining a witness for the defendant, asks him if he is not an employee of the latter corporation, for the purpose of showing bias, no exception lies to the exclusion of the evidence. Such evidence was admissible only within the discretion of the judge, and it did not appear that in excluding it, his discretion had been abused.⁴⁰

§ 456. [Continued.] **Further Illustrations.**—In a civil action for damages for the seduction of the plaintiff's wife, a witness for the plaintiff, Lohman, testified that he went to the plaintiff's house one day to see the plaintiff; that the front door was open; that he went in without rapping, or ringing the bell, or otherwise announcing himself; that he went to the door of the bed-room, which was shut, and, without even rapping at the door or otherwise announcing himself, opened it and saw the defendant standing in the room and Mrs. Dance (the plaintiff's wife) on the bed with her person somewhat exposed. In cross-examination, the defendant's counsel asked the witness what he wanted to see Mr. Dance about, to which the plaintiff's counsel objected and the court sustained the objection. It was held that this was error. Adams, J., said: "This question, we think, should have been allowed. If the object of the visit was really not to see Mr. Dance, but to penetrate to Mrs. Dance's bed-room, whether on a voyage of pleasure or discovery, it was proper that the jury should know it. The evidence tends to show that Lohman was an unsuccessful candidate for Mrs. Dance's favor, and this fact also, as well as his familiarity or boldness in the plaintiff's house, made him a worthy subject of cross-examination within all reasonable latitude."⁴¹ In the same trial, the witness Lohman was asked, on cross-examination, whether he did not write to Mrs. Dance (the plaintiff's wife) while she was in Michigan, in the fall of 1873. The plaintiff's counsel objected to the question, and the court sustained the objection. It was held that the court erred in this ruling. Adams, J., said: "The bed-room occurrence was in the fall of 1872. If, the next fall, he was writing her letters of either love or friendship, it would tend to show that the interpretation put by him on the bed-room occurrence was not at that time such as to impair his admiration for her. Again, it was proper to show, upon cross-examination of the witness, whether Mrs. Dance answered his letters, that the jury might judge, in case she did not, whether he was tes-

⁴⁰ Wallace v. Taunton Street Ry. Co., 119 Mass. 91.

⁴¹ Dance v. McBride, 43 Iowa, 624, 627.

tifying under bias or ill-feeling, either towards her or towards the defendant, who is supposed to have participated more largely in her favoritism.”⁴²

§ 457. [Continued.] Further Illustrations.—Counsel for the State, in a criminal prosecution, has the right, on the cross-examination of a witness for the defendant, to ask him what “the *feelings* are between him and one of the State’s witnesses, though nothing on this point has been brought out in the examination in chief.”⁴³ On this ground, on the trial of an indictment for *murder*, it was held competent to ask a witness the following question: “I will ask you now, Mr. Carroll, if, in Pike Payne’s saloon in the town of Red Bluff, in the presence of Mr. McGowan and Mr. Thatch, both witnesses in this case, you did not make the remark that Wasson [the defendant] ought to have been hung before he left Butte Creek?”⁴⁴ So, a witness may be asked on cross-examination, whether he has not been active in procuring testimony in the case, and if he denies this, he may be contradicted.⁴⁵ Whether the plaintiff (the witness) had not, prior to the date of the act for which the action was brought, made a *similar charge* against the defendant, may likewise be asked.⁴⁶

§ 458. Questions affecting Character of Witness.—It is sometimes laid down without qualification that, on cross-examination, a witness may be compelled to answer any questions which tend to test his credibility or to shake his credit by injuring his character, however irrelevant to the facts in issue, or however disgraceful the answer may be to himself, except where the answer would expose him to a criminal charge.⁴⁷ But the prevailing opinion seems to

⁴² *Dance v. McBride*, 43 Iowa, 624, 628.

⁴³ *St. v. Willingham*, 33 La. Ann. 537.

⁴⁴ *People v. Wasson*, 65 Cal. 538, 4 Pac. 555.

⁴⁵ *Hamilton v. People*, 29 Mich. 173, 182; *Geary v. People*, 22 Mich. 220.

⁴⁶ *Watson v. Twombly*, 60 N. H. 491.

⁴⁷ *Muller v. St. Louis Hospital Assn.*, 5 Mo. App. 390, affirmed, 73 Mo. 243; *St. v. Pancoast*, 5 N. D. 516,

67 N. W. 1052, 35 L. R. A. 518; *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. 757. Thus, reputation for chastity may be inquired of in a civil suit for personal injury. *York v. City of Everton*, 121 Mo. App. 640, 97 S. W. 604. But see *St. v. Pollard*, 174 Mo. 607, 74 S. W. 969, for dissenting views. That one may have a reputation for quarrelsomeness is irrelevant and collateral, as applied to an issue on trial. *St. v. Richardson*, 194 Mo. 326, 92 S. W. 649.

be that, except in cases where the witness is the prisoner on trial, the extent to which an inquiry will be allowed in his *past life*, with the view of affecting his credibility, rests in the *discretion* of the trial court.⁴⁸

§ 459. [Continued.] **Judicial Expressions on this Question.**—Many expressions are found in the judicial opinions to the effect that the trial courts should fix the limits of the cross-examination of the witnesses, where the questions tend to develop the real character of the witness, with great hesitation. Thus, in a case in New York it is said by Peckham, J.: "I wish to say that, in my opinion, as a general rule, evidence on cross-examination, tending to impeach the credibility of a witness, should be rejected with very great caution; its exclusion can rarely be proper."⁴⁹ So, in another case in the same court is said by Allen, J.: "In the latitude of cross-examination, and to enable the jury to understand the character of the witness they are called upon to believe, collateral evidence is allowed from the witness himself, tending to discredit and disgrace the witness under examination."⁵⁰ In a later case in the same court, where the question was elaborately examined, it is said by Grover, J.: "It is well settled that, for the purpose of impairing the credit of a witness, by evidence introduced by the opposite party, such evidence must go to his general character. * * * It is held, for the purpose of discrediting his testimony, the *witness* may be asked, upon cross-examination, as to *specific acts*. This shows that,

⁴⁸ *Real v. People*, 42 N. Y. 270; *Ryan v. People*, 19 Hun (N. Y.), 188. See also *Maine v. People*, 9 Hun (N. Y.), 113; *Vaughn v. Westover*, 2 Hun (N. Y.), 43; *Stokes v. People*, 53 N. Y. 164; *Russell v. St. Nicholas etc. Co.*, 51 N. Y. 643; *Allen v. Bodine*, 6 Barb. (N. Y.) 383; *Storm v. U. S.*, 94 U. S. 76, 85; *Sturgis v. Robbins*, 62 Me. 289, 293; *Prescott v. Ward*, 10 Allen (Mass.), 203, 209; *Wroe v. St.*, 20 Ohio St. 460; 1 Greenl. Ev., § 449; *People v. Arnold*, 40 Mich. 710; *Great Western etc. Co. v. Loomis*, 32 N. Y. 127; *Bank v. Slemmons*, 34 Ohio St. 142; *People v. Court*, 83 N. Y. 436, 460; *Gutter-son v. Morse*, 58 N. H. 165; *St. v. R.*

R., 58 N. H. 410, 412; *Plummer v. Ossipee*, 59 N. H. 55, 57; *Free v. Buckingham*, 59 N. H. 219; *Merrill v. Perkins*, 59 N. H. 343, 345; *Perking v. Towle*, 59 N. H. 583; *Tilton v. Am. Bible Society*, 60 N. H. 377, 384; *Zanone v. St.*, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556; *People v. Giblin*, 115 N. Y. 96, 21 N. E. 1062, 4 L. R. A. 757; *St. v. Caron*, 118 La. 349, 42 South. 960; *Flores v. St.*, (Tex. Cr. R.) 79 S. W. 808 (not reported in state reports).

⁴⁹ *Le Beau v. People*, 34 N. Y. 223, 234.

⁵⁰ *Newcomb v. Griswold*, 24 N. Y. 298.

upon a cross-examination of a witness, with a view of testing his credibility, inquiries are proper as to facts not competent to be proved in any other way. * * * In such examination the presumption is strong that the witness will protect his credibility, as far, at least, as truth will warrant. All experience shows this to be so. It would be productive of great injustice, often, if, where a witness is produced of whom the opposite party has before never heard, and who gives material testimony, and from some source, or from the manner and appearance of the witness, such party should learn that most of the life of the witness had been spent in jails and other prisons for crimes,—if this fact could not be proved by the witness himself, but could only be shown by records existing in distant counties, and perhaps States, which, for the purposes of the trial, are wholly inaccessible. No danger to the party introducing the witness can result from this class of inquiries, while their exclusion might, in some cases, wholly defeat the ends of justice. My conclusion is that a witness, upon cross-examination, may be asked whether he has been in jail, the penitentiary, or State prison, *or any other place that would tend to impair his credibility*, and how much of his life he has passed in such places.”⁵¹ In a civil case in Michigan, Campbell, J., in giving the opinion of the court said: “It has always been found necessary to allow the witnesses to be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. To this end a large latitude has been given, where circumstances seemed to justify it, in allowing a full inquiry into the history of witnesses, and into many other things tending to illustrate their true character. This may be useful in enabling the court or jury to comprehend just what sort of person they are called upon to believe, and such a knowledge is often very desirable. It may be quite as necessary, especially where strange or suspicious witnesses are brought forward, to enable counsel to extract from them the whole truth on the merits. It cannot be doubted that a previous criminal experience will depreciate the credit of a witness to a greater or less extent, in the judgment of all persons, and there must be some means of reaching this history. The rules of law do not allow specific acts of misconduct, or specific facts of a disgraceful character to be proved against a witness by others. * * * Unless the remedy is found in cross-examination

⁵¹ Real v. People, 42 N. Y. 270, 281.

it is practically of no account. It has always been held that, within reasonable limits, a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. * * * We think a witness may be asked concerning all antecedents, which are really significant, and which will explain his credibility. * * * He must be better acquainted than others with his own history, and is under no temptation to make his own case worse than truth will warrant. There can with him be no mistakes of identity. If there are extenuating circumstances, no one else can so readily recall them. We think the case comes within the well established rules of cross-examination, and that the few authorities which seem to doubt it have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining better credit than an abandoned ruffian.”⁵² In a criminal case subsequently before the same tribunal, the same learned justice said: “The quality of such testimony can never be regarded as entirely separated from the character which is indicated by their crimes; and, if the position they occupy indicates moral turpitude, there is a necessity for more thorough cross-examination, and nothing ought to be shut out which can sensibly aid in explaining their credibility, unless there is some fixed rule of law that excludes it.”⁵³

§ 460. [Continued.] Views of Dr. Greenleaf.—In his work on Evidence, while recognizing the fact that the courts are not in perfect harmony upon this subject, Dr. Greenleaf uses the following language: “There is certainly great force in the argument that, where a man’s liberty, or his life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted. They cannot look into his breast to see what passes there, but must form their opinion on the collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in this inquiry is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness whom they are called upon to believe, and to know whether, although he has not been convicted of any crime, he has not in some measure rendered him-

⁵² Wilbur v. Flood, 16 Mich. 40,
43.

⁵³ Foster v. People, 18 Mich. 266,
271. See also Johnson v. Ins. Co.,
106 Mich. 96, 64 N. W. 5.

self less credible by his disgraceful conduct. The weight of this argument seems to have been felt by the judges in several cases in which questions tending to disgrace the witness have been permitted in cross-examination. * * *, Nor does there seem to be any good reason why a witness should be privileged from answering a question touching his present situation, employment and associates, if they are of his own choice; as, for example, in what house or family he resides, what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons, and the like; for, however these may disgrace him, his position is one of his own selection. * * * The State has a deep interest in the inducements to reformation held out by the protecting veil which is thus cast over the past offenses of the penitent; but where the inquiry relates to transactions comparatively recent, bearing directly upon the present character and moral principles of the witness, and therefore essential to the due estimation of his testimony by the jury, learned judges have of late been disposed to allow it.”⁵⁴

§ 461. **Cross-examination as to Collateral Matters affecting Credibility.**—(1.) **View that such cross-examination is not permissible.**—Upon this subject there appear to be two views: 1. That a witness cannot be cross-examined at all, as to matters which are collateral to the issues on trial, and which do not concern his relations or feeling toward the parties or toward the action, for the purpose of affecting his credibility. 2. That such inquiries may be permitted by the court in the exercise of a sound discretion. There is also a third rule, upon which all courts are agreed, which is, that a witness cannot be cross-examined as to independent collateral facts, for the mere purpose of impeaching him by contradiction.⁵⁵ The English and some of the American courts hold that evidence of particular collateral facts cannot be adduced in any case, whether civil or criminal, in order to discredit a witness.⁵⁶

⁵⁴ 1 Greenl. Ev. (14th ed.), §§ 455, 456, 459.

⁵⁵ Post, § 469.

⁵⁶ *Rex v. Watson*, 2 Stark. 149; *Spencely v. DeWillott*, 7 East, 108, 3 Smith, 289; *Marks v. Hilsendegen*, 46 Mich. 336; *Bissell v. Starr*, 32 Mich. 299; *Tennant v. Hamilton*, 7 Cl. & Fin. 122. The Michigan cases

seem largely to rest in discretion, with a strong disinclination to permit inquiry as to particular acts, but not prohibiting entirely inquiry into past life, though, in discretion, inquiry as to particular acts has been allowed. See *Travis v. Stevens*, 127 Mich. 687, 87 N. W. 85. In California the statute making proof

§ 462. [Continued.] Illustrations of the Rule last Stated.—On the trial of an issue “whether (during a certain period) there arose from the works of the defendants noisome, offensive, noxious or unwholesome smoke, and other vapors, to the nuisance of the plaintiff, whereby the produce of his garden was deteriorated,” evidence was adduced, for the plaintiff, to show that the smoke and other vapors from the defendants’ works had injured the produce of other gardens in the neighborhood; and also, for the defendants, to show that their works did not injure the produce of any other grounds, and one of the defendants’ witnesses, having, on his examination in chief, described several gardens in the neighborhood of the works as in the utmost health, was asked, on cross-examination by the plaintiff’s counsel, whether he knew Glasgow Field (grounds in the neighborhood), and having answered that ‘he knew Glasgow Field, and never knew of any damage done there,’ he was asked whether he had known of any sum having been paid by the defendants to the proprietors of Glasgow Field for alleged damage there, occasioned by their works. It was held that the question was inadmissible, as leading to a new collateral inquiry, which, answered either way, could not affect the issue, or test the credit of the witness.⁵⁷ In an action of trover for converting pension money collected by the defendant for the plaintiff, it was held not error to refuse to allow a witness for the plaintiff to be cross-examined as to whether he had been arrested for conspiring to procure fraudulent pensions.⁵⁸ On the trial of an action on the warranty of a horse, the plaintiff cannot be asked, on cross-examination, how many other purchases of horses he had made and tried to set aside within the last twenty years.⁵⁹ On the trial of a bastardy suit, the prosecu-

thereof inadmissible is construed as excluding cross-examination with respect to them. *People v. Harlan*, 133 Cal. 16, 65 Pac. 9. Repeated inquiries by the prosecuting attorney as to collateral crimes has been held prejudicial error. *People v. Derbert*, 138 Cal. 467, 71 Pac. 564. The Idaho statute is the same as California and similarly applied. *St. v. Anthony*, 6 Idaho, 383, 55 Pac. 884. In Indian Territory such a statute was held not to control cross-examination. *Oxier v. U. S.*, 1 Ind. T. 93, 38 S. W. 331. The Kentucky

statute has been much discussed, and in *Welch v. Com.*, 23 Ky. Law Rep. 151, 63 S. W. 984, former cases are reviewed and the statute held not to exclude, on cross-examination, inquiry into life and associates and wrongful acts relevant to the cause proper.

⁵⁷ *Tennant v. Hamilton*, 7 Cl. & Fin. 122, 1 Rob. 821.

⁵⁸ *Marks v. Hilsendegen*, 46 Mich. 336. See also *Bissell v. Starr*, 32 Mich. 299.

⁵⁹ *Russell v. Cruttenden*, 53 Conn. 564, 4 Atl. 267.

trix, after being compelled, on cross-examination, to give a detailed account of the time, place and attending circumstances of the alleged illicit intercourse, was asked where she went and dined that day,—the counsel proposing to follow this up by showing that she had, on different occasions, made different statements in this respect. The court, having sustained an objection to the question, it was, on appeal, held no error,—the Supreme Court taking the view that the matters proposed to be drawn out were collateral; and also that, while it might have been proper to allow questions as to her movements and conduct, yet her answers on such collateral matters would be conclusive for the purpose of laying a ground to impeach her.⁶⁰

§ 463. [Exception.] Where Counsel Promise to show Relevance.—Upon a principle already explained,⁶¹ the judge may, even under this strict rule, in his discretion, allow the defendant's counsel to cross-examine as to facts which appear to be irrelevant, if he undertakes that it shall be shown by other evidence that they are relevant.⁶²

§ 464. [Continued.] (2.) Such Inquiries Permissible in Discretion.—The other and better view is, that it is within the *discretion* of the presiding judge to determine whether, in view of the evidence which has been introduced, and of the nature of the testimony given by the witness in chief, it is fit and proper that questions of the kind should be overruled, or to what extent such a cross-examination should be allowed.⁶³ In one jurisdiction this

⁶⁰ Moore v. People, 108 Ill. 484. But, under the English rule, in a prosecution for rape, it was held error to refuse to allow defendant's counsel to ask the prosecuting witness on cross-examination, what her object was in going to Scott's station, the place where the rape was alleged to have been committed. St. v. Hartnett, 75 Mo. 251.

⁶¹ Ante, § 351.

⁶² Haigh v. Belcher, 7 Car & P. 389.

⁶³ Storm v. U. S., 94 U. S. 76; Johnston v. Jones, 1 Black (U. S.),

209; St. v. Rollins, 77 Me. 380; People v. Blakeley, 4 Park. Cr. (N. Y.) 176; Pooler v. Curtiss, 3 Thomp. & C. (N. Y.) 228; Schenck v. Griffin, 38 N. J. L. 463, 471; Louisville etc. R. Co. v. Bizzell, 131 Ala. 429, 30 South. 777; St. v. Fergusson, 71 Conn. 227, 41 Atl. 769; Wallace v. St., 41 Fla. 547, 26 South. 713; Merricourt v. Norwalk F. L. Co., 13 Hawaii, 218; St. v. Greenburg, 59 Kan. 404, 53 Pac. 61; St. v. Haab, 105 La. 230, 29 South. 725; Caven v. Granite Co., 99 Me. 278, 59 Atl. 285; St. v. King, 88 Minn. 175, 92 N. W. 965; St. v. Shad-

rule has been stated thus: "How far justice requires a tribunal to go from the issue for the trial of collateral questions; how much time should be spent in the trial of such questions; what evidence may be excluded for its remoteness of time and place; and what evidence is otherwise too trivial to justify a prolongation of the trial,—are often *questions of fact* to be determined at trial."⁶⁴ It follows, where this rule prevails, that the decision of the judge, in the exercise of this discretion, is *not subject to review*, except in cases of manifest injustice or abuse;⁶⁵ but in one jurisdiction, as hereafter seen,⁶⁶ convictions have been reversed for trivial violations of this rule.

§ 465. [Continued.] Illustrations of this Rule.—Thus, it is within the sound discretion of the trial court to permit a witness to be cross-examined, for the purpose of affecting credibility, as to his *belief* in the existence of *God* and a state of future rewards and punishments;⁶⁷ or whether he has not committed a *particular act of immorality or criminality*, the fact of which, if true, would in-

well, 22 Mont. 559, 57 Pac. 281; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *St. v. Savage*, 36 Ore. 191, 60 Pac. 610; *Zanone v. St.*, 97 Tenn. 101, 36 S. W. 711; *Fla-Koo-Jelasee v. U. S.*, 167 U. S. 274; *St. v. Hill*, 52 W. Va. 296, 43 S. E. 160; *Murphy v. St.*, 108 Wis. 111, 83 N. W. 1112. In Massachusetts the rule seems unsettled. See *Com. v. Shaffer*, 146 Mass. 512, 16 N. E. 280; *Sullivan v. O'Leary*, 146 Mass. 322, 15 N. E. 775; *Com. v. Foster*, 182 Mass. 276, 65 N. E. 391. In Missouri, discretion appears to be merely as to the extent, not as to the right, of cross-examination upon all matters, which tend to test accuracy and credibility, however irrelevant the question may be to the facts in issue. *St. v. Boyd*, 178 Mo. 2, 76 S. W. 979. The discretion in other courts relates either to the character of collateral facts cross-examined about or is general, and in some of the states the rule excludes, absolutely, inquiry as to certain kinds of collateral facts.

⁶⁴ *Watson v. Twombly*, 60 N. H. 491, 493.

⁶⁵ *Great West. Turnp. Co. v. Loomis*, 32 N. Y. 127; *Le Beau v. People*, 34 N. Y. 223; *West v. Lynch*, 7 Daly (N. Y.), 247; *Gulf etc. R. Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068; *St. v. Neygaard*, 124 Wis. 414, 102 N. W. 899.

⁶⁶ *Post*, § 472.

⁶⁷ *Clinton v. St.*, 33 Ohio St. 27, 34; *Wroe v. St.*, 20 Ohio St. 460; *Stanbro v. Hopkins*, 28 Barb. (N. Y.) 270; *People v. McGarren*, 17 Wend. (N. Y.) 460; 2 Tayl. Ev., § 1258. Such a question has been held inadmissible under constitutional provision placing all persons on same footing as witnesses, without regard to religious beliefs. *Louisville etc. R. Co. v. Mayes*, 26 Ky. L. Rep. 197, 80 S. W. 1096. In Missouri it was held not error for court to permit a witness to be asked if he had not committed a certain detestable crime, he making no claim of privilege. *St. v. Long*, 201 Mo. 664, 100 S. W. 587.

juriously affect his credit as a witness,⁶⁸—as whether he has been *indicted* for assault and battery;⁶⁹ or whether he had *deserted* from the army, or had been charged with *crime*, no attempt having been made to impeach him by contradiction on these collateral matters;⁷⁰ or how many times he has been *in prison*;⁷¹ or whether he has been arrested for *vagrancy*.⁷² The extent of this discretion is also illustrated by a ruling that it is not error for which a judgment will be reversed, that the presiding judge allowed counsel to cross-examine a witness as to the contents of a paper which was incidental and collateral to the issues, when the object of the cross-examination was to affect the credibility of the witness merely.⁷³ In a prosecution for larceny from a store, committed while the merchant's attention was engaged by the defendant, he was tried as an accomplice, the merchant being the complaining witness; and, having said that he had once been a member of a banking firm, was asked on cross-examination the following question: "Did you not, while a member of that firm, extract from an envelope securities which were left in your vault for safe keeping, and use the proceeds for stock speculations in New York?" It was held that, although the witness might refuse to *criminate himself*, yet as this was a *personal privilege* which he might *waive*, the question should have been allowed.⁷⁴ So, in a civil action for indecent assault upon a woman, it was held proper to cross-examine the defendant, testifying as a witness in his own behalf, as to whether he had ever been arrested on a criminal charge made by another woman, and whether he had settled it by the payment of money. Graves, J., said: "The jury were required to decide on the value of his testimony tendered in his own behalf, and it was competent to call upon him to inform

⁶⁸ South Bend v. Hardie, 98 Ind. 577, 583. Compare Bersch v. St., 13 Ind. 434; Wilson v. St., 16 Ind. 392; Smith v. Yarvan, 69 Ind. 445, 35 Am. Rep. 232; Hathaway v. Goslant, 77 Vt. 199, 59 Atl. 835.

⁶⁹ Ryan v. People, 19 Hun (N. Y.), 188; distinguishing People v. Brown, 72 N. Y. 571. See also People v. Genet, 19 Hun (N. Y.), 92, 102.

⁷⁰ Hamilton v. People, 29 Mich. 173, 183.

⁷¹ People v. Hovey, 29 Hun (N. Y.), 383, 390. See Long v. U. S., 133 Fed. 201, 66 C. C. A. 255, holding the

inquiry to be within judicial discretion. In Texas it was said that jail sentence for a misdemeanor could be inquired of. Missouri etc. R. Co. v. Dumas (Tex. Civ. App.), 93 S. W. 493 (not reported in state reports). Contra, St. v. Barrington, 198 Mo. 23, 95 S. W. 235.

⁷² People v. Manning, 48 Cal. 335. But see post, § 467; Hill v. St., 42 Neb. 503, 60 N. W. 916.

⁷³ Klein v. Russell, 19 Wall. (U. S.) 433.

⁷⁴ People v. Arnold, 40 Mich. 710.

them of such incidents of his life, not amounting to self-crimination, as would assist them in placing an accurate estimate upon his statements as a witness; and the questions objected to called for nothing more.”⁷⁵ So, on the trial of a bastardy proceeding, the court refused to allow the complaining witness to be asked, on cross-examination, whether she had not, and whether her mother with her had not, stated to various persons named, that the complainant was going to get a prostitute, then in the House of Correction, out of it, and hire her to swear a case against the respondent. Having refused this, the court allowed the complainant’s own counsel to ask her for her version of this conversation. “These rulings,” said Campbell, J., “were erroneous and injurious to the respondent. Such questions were admissible on two grounds. They were directly important in bearing on the character and veracity of the witness, and they bear also on her disposition to resort to criminal practices to injure him. And it is very clear that it was improper to allow her to give her own version without cross-examination, and shut out cross-examination.”⁷⁶ The defendant in a murder trial insisted that he was acting in self-defense. The only witness who was present at the shooting was the wife of the deceased, and her testimony was in direct opposition to that of the defendant. On her cross-examination, the defense offered to prove by her that she had previously been married to one man, from whom she had never been divorced; that she then lived with another, who, by reason of her conduct, became jealous, and shot her, afterwards killing himself; that she and the deceased lived together as man and wife until the previous fall, and that they were married by reason of the regulations governing the military reservation on which they lived. This offer was rejected. It was held that this was error; the rejected questions were proper cross-examination, for the purpose of impeaching her testimony.⁷⁷

§ 466. [Continued.] **Contrary and Confusing Views.**—Contrary and confusing views are sometimes met with upon this question. In one jurisdiction it is not competent, on cross-examination, to ask the witness whether he has not *committed certain acts*, although the commission of such acts, if admitted, would have a tendency to dis-

⁷⁵ Leland v. Kauth, 47 Mich. 508,
11 N. W. 292.

⁷⁷ U. S. v. Wood, 4 Dak. 455, 33
N. W. 59. Francis, J. dissented.

⁷⁶ People v. White, 53 Mich. 537,
539, 19 N. W. 174.

credit his testimony, by showing that he is a man of bad character. He cannot, for instance, be asked if he has not been concerned in a particular transaction which involved an attempt to cheat and swindle.⁷⁸ In another State, in an action by a father for the seduction of his daughter, her character for chastity being involved in the question of damages, evidence of her particular acts of sexual immorality has been held admissible; and yet it has been held that in such a case the principal female witness cannot, over objections by her counsel, be asked, on cross-examination, whether she had not been previously criminally intimate with other men. The reasoning was, that in her character as witness she stood as any other witness in the case,⁷⁹ and that in that character she could be impeached only in the usual mode, through general questions.⁸⁰ But the same court has held, in a later case, that, in an action by a female for her own seduction, or in a case of bastardy, it is competent to ask the prosecuting witness, on cross-examination, whether she had sexual intercourse with any person other than the defendant about the time the child was begotten, as this would be a proper fact to be considered in estimating the damages.⁸¹ Another court, which has vacillated with reference to the rule of the preceding section, seems to have taken the view in one case that evidence that a witness made statements in other cases, or generally, of his being *open to bribery*, does not come within any recognized rule of impeachment, unless such facts have created for him a reputation for untruth, and then it is only the reputation which is admissible, and not its cause.⁸² A witness had testified, on her examination in chief, in a criminal case, as to what took place at two interviews between her and the accused, and, on cross-examination, stated

⁷⁸ *Madden v. Koester*, 52 Iowa, 692, 3 N. W. 790; *Richardson v. St.*, 103 Md. 112, 63 Atl. 317.

⁷⁹ *Shattuck v. Myers*, 13 Ind. 146.

⁸⁰ *Long v. Morrison*, 14 Ind. 595. Compare *Wilson v. St.*, 16 Ind. 392; *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132; *Farmer v. Com.*, 28 Ky. Law Rep. 1168, 91 S. W. 682; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016; *St. v. Clark*, 117 La. 920, 42 South. 425. Asking a witness whether he has been "arrested and convicted" etc. is not objectionable as embrac-

ing two facts, one of which is immaterial. *Koch v. St.*, 126 Wis. 470, 106 N. W. 531. This case also holds, that statute providing for question as to conviction of a criminal offense does not include conviction of a municipal ordinance. In Missouri the statute was held to include conviction in another state. *St. v. Hensack*, 189 Mo. 295, 88 S. W. 21.

⁸¹ *Smith v. Yarvan*, 69 Ind. 445, 35 Am. Rep. 232.

⁸² *Hamilton v. People*, 29 Mich. 175, 183.

that there had been several interviews between the two interviews which she had spoken of. It was held that the witness would not be required to state generally what took place at these interviews, but only so much, if anything, as bore upon the issue.⁸³ The defendant in a criminal prosecution proved, by two of the State's witnesses, upon their cross-examination, that they had expressed to L. their willingness, for a *bribe*, to leave the State, so as not to appear as witnesses against the prisoner. Upon a *subsequent examination* of L., on behalf of the prisoner, touching his negotiations with those witnesses in regard to the matter of the bribery, it was held that the motive and purpose of L. in the transaction were not admissible.⁸⁴

§ 467. **Arrested, Indicted, Convicted.**—There is a confusion in the authorities as to whether a witness may be asked, on cross-examination whether he has been arrested, indicted or convicted upon a criminal charge. One of the difficulties grows out of the question whether such a matter can be proved by *secondary evidence*—even by the admission of the witness, who must of all men be certain of the fact if it existed. The strain about secondary evidence in such a case is a mere quibble, totally destitute of common sense. It has been held that a party seeking to impeach a witness may, on cross-examination, ask him whether he has been convicted of a felony, and if so, what sentence was imposed upon him.⁸⁵ Also it has been held that it is competent to ask a witness on cross-examination whether he has been arrested for vagrancy,—the objection that the question calls for secondary evidence not being tenable, since the fact of an arrest does not necessarily imply any record showing it.⁸⁶ Another court has held that a witness cannot be asked on cross-examination whether he has been indicted for a crime,—as, for instance, perjury. Assuming that the question whether a witness has been indicted merely for a crime, instead of asking him whether he has been convicted of a crime, is competent at all, it has been held in some jurisdictions that such a fact cannot be proved by the admission of the witness upon cross-examination, but can only be proved by the record.⁸⁷ In another

⁸³ Mitchell v. Com., 75 Va. 856.

⁸⁴ Chelton v. St., 45 Md. 565.

⁸⁵ People v. Rodrigo, 69 Cal. 601,
8 Crim. Law Mag. 503.

⁸⁶ People v. Manning, 48 Cal. 335.

⁸⁷ Peck v. Yorks, 47 Barb. (N. Y.)

131, 134; Newcomb v. Griswold, 24
N. Y. 298; Houston etc. R. Co. v.
Bulger, 35 Tex. Civ. App. 478, 80 S.
W. 557. In Illinois, for the same

case in the same State a prisoner, testifying as a witness in his own behalf, was asked on cross-examination by the State's attorney: "How many times have you been arrested?" This was objected to by the prisoner's counsel as incompetent, irrelevant, tending to degrade the witness, etc. The objection was overruled and the prisoner's counsel excepted. The witness answered: "Five times, I believe." It was held that the evidence was inadmissible as an impeachment of the prisoner's character, either generally or in respect of truth and veracity.⁸⁸

§ 468. **Questions creating Prejudice, but not affecting Credibility.**—Within the rule of the preceding text,⁸⁹ questions which might excite prejudice against the witness, but the answers to which would not properly affect his credibility, are not allowed to be put on cross-examination. Thus, it has been held, but it is conceived on a doubtful view of the proper application of this principle, that, in an action to set aside a mortgage as *usurious*, where a witness for the defendant, who had acted for him in the negotiation of the mortgage, was questioned as to whether he had not, on other loans of defendant to other parties, taken notes from them in excess of legal interest paid to defendant,—the question was inadmissible for the purpose of affecting the credit of the witness.⁹⁰

reason, inquiry as to conviction has been held inadmissible. *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693. See also *O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639.

⁸⁸ *Brown v. People*, 8 Hun (N. Y.), 562. The court cité: *Jackson v. Osborn*, 2 Wend. (N. Y.) 555; *People v. Gay*, 7 N. Y. 378; *Lipe v. Eisenlerd*, 32 N. Y. 229, 238; and distinguish *Brandon v. People*, 42 N. Y. 265; *St. v. Barrett*, 117 La. 1086, 42 South. 513. The Indian Territory court held, that an accused might be asked how many larceny cases there had been in the court against him and whether one of them was not "a cotton stealing case." *McCoy v. U. S.*, 6 Ind. T. 415, 98 S. W. 144.

⁸⁹ *Ante*, § 458.

⁹⁰ *Pooler v. Curtiss*, 3 Thomp. & C. (N. Y.) 228; denying the *dictum*

of *Peckham, J.*, in *Ross v. Ackerman* 46 N. Y. 210. See *Stanley v. Ins. Co.*, 70 Ark. 107, 66 S. W. 432, where plaintiff was cross-examined as to former burning of an insured house; *People v. Wells*, 100 Cal. 459, 34 Pac. 1078; as to marital improprieties, *Dore v. Babcock*, 74 Conn. 425, 50 Atl. 1016; as to being tarred and feathered and run out of county, *St. v. Mann*, 39 Wash. 144, 81 Pac. 561; *St. v. Hogan*, 115 Iowa, 455, 88 N. W. 1074, as to witness having been in a reform school; *People v. Kahler*, 93 Mich. 625, 53 N. W. 826, question as to habit of drinking; *People v. Dorothy*, 156 N. Y. 237, 50 N. E. 800, as to witness being expelled from church. Many of the courts hold to exclusion of questions about arrest, accusation, indictment etc. *People*

§ 469. **Cross-examination on Collateral Matters for the Purpose of Contradiction.**—All courts agree that a witness cannot be cross-examined as to any matters which are purely collateral to the issues on trial, with the view of impeaching him by contradiction.⁹¹ The rule is somewhat *differently stated* and applied by different authorities. It is thus stated by Mr. Starkie: "It is here to be observed, that a witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him."⁹² "The rule does not, of course, exclude the contradiction of a witness as to any facts immediately connected with the subject of the inquiry, which in themselves would otherwise be legitimate evidence in the cause."⁹³ It is thus stated by the late Judge Taylor: "In accordance with this general principle, a witness may be cross-examined as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony."⁹⁴ Professor Greenleaf says:

v. Silva, 121 Cal. 668, 54 Pac. 146; Welsh v. Com., 23 Ky. Law Rep. 151, 63 S. W. 984; St. v. Renswick, 85 Minn. 19, 88 N. W. 22; Van Bokkelen v. Berdell, 130 N. Y. 141, 29 N. E. 254; Roop v. St., 58 N. J. L. 479, 34 Atl. 749. Though other cases admit arrests, or confinement in jail, in discretion. St. v. Martin, 124 Mo. 514, 28 S. W. 12; Hill v. St., 42 Neb. 503, 60 N. W. 916; Ryan v. St., 97 Tenn. 206, 36 S. W. 930; Crockett v. St., 40 Tex. Cr. R. 173, 49 S. W. 392.

⁹¹ Clinton v. St., 33 Ohio St. 27, 34; Spenceley v. De Willott, 2 Lewin C. R. 155, n., 7 East. 110; Smith v. St., 5 Neb. 183; Henderson v. St., 1 Tex. App. 432; People v. Devine, 44 Cal. 452, 458; People v. Furtado, 57 Cal. 346; Hester v. Com., 85 Pa. St. 139, 157; Harris v. Wilson, 7 Wend. (N. Y.) 57; Lee v. Chadsey, 2 Keyes (N. Y.), 546; People v. Cox, 21 Hun (N. Y.), 47; Bullock v. St., 65 N. J. L. 557, 47 Atl. 62; People v. Greenwall, 108 N. Y. 300, 15 N. E. 404; Humphrey v. St., 78 Wis. 571, 47 N. W. 386; St. v.

Gatlin, 170 Mo. 354, 70 S. W. 885. Contra, as a matter within discretion. City of Greenville v. Spencer, 77 S. C. 50, 57 S. E. 638. See also Carroll v. St., 32 Tex. Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 786. It may be as truly said that a witness cannot be cross-examined as to any matters purely collateral, whether the cross-examiner have one purpose or another. When a question seeks to elicit what is purely immaterial, it is irrelevant, and what is purely collateral would seem to be immaterial. The real inquiry among courts is to ascertain what facts merely incidentally connected with a cause brought out on cross-examination are subject to contradiction, they being introduced into the case on a test of the accuracy, reliability and credibility of the witness.

⁹² 1 Stark. Ev. 9th Ed. 200.

⁹³ Id. 203.

⁹⁴ Tayl. Ev. (8th ed.), § 1445; People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; Klotz v. James, 96 Iowa, 1, 67 N. W. 648; St. v. John,

"It is a well settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony." Mr. Starkie's statement has been adopted by some courts⁹⁵ and criticised by others.⁹⁶ In Massachusetts it is said: "The rule which excludes all evidence tending to contradict the statements of a witness as to collateral matters does not apply to any facts immediately and properly connected with the main subject of inquiry."⁹⁷ In Indiana it is added: "These decisions, however, do not go to the extent of limiting the right to cross-examine, for the purpose of laying a foundation for an impeachment, to particular matters testified to by the witness on his direct examination; nor do they limit the cross-examination to such matters as bear directly and immediately upon the issue. The effect of proving contradictory statements extend no further than the question of credibility. Such evidence does not tend to establish the truth of the matters embraced in the contradictory statements; it simply goes to the credibility of the witness."⁹⁸ This consideration in itself supplies a strong reason for allowing a *liberal latitude* in cross-examining for the purpose of laying the foundation for impeachment; for a witness who tells a

47 La. Ann. 1225, 17 South. 789; Allin v. Whittemore, 171 Mass. 259, 50 N. E. 618; Columbia Bank v. Rice, 48 Neb. 428, 67 N. W. 165; Mattox v. U. S., 156 U. S. 237; Schloemer v. Transit Co., 204 Mo. 99, 102 S. W. 565.

⁹⁵ Lawrence v. Lanning, 4 Ind. 194; Ware v. Ware, 8 Me. 42.

⁹⁶ Atty.-Gen. v. Hitchcock, 1 Exch. 91; Hildeburn v. Curren, 65 Pa. St. 59.

⁹⁷ Com. v. Hunt, 4 Gray (Mass.), 421.

⁹⁸ Citing Davis v. Hardy, 76 Ind. 272; Docks v. Stone, 13 Minn. 434; Bullock v. St., 65 N. J. L. 557, 47 Atl. 62; People v. Greenwall, 108 N. Y. 300, 15 N. E. 404; Humphrey v. St., 78 Wis. 571, 47 N. W. 386. Contra, as in court's discretion. City of Greenville v. Spencer, 77 S. C. 50, 57 S. E. 638. See also Carroll

v. St., 32 Tex. Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 786. The above as the statement of a rule seems misleading. If the words "purely collateral to the issues on trial" were changed to "purely irrelevant" etc. it would appear singular to refer to any purpose of the cross-examiner. It is certain that courts will not allow a witness' credibility to be knocked about merely in a game of battledore and shuttlecock. But as cross-examination is allowed often to extend to matters foreign to the issue on trial, and solely because a particular witness is being cross-examined, we seem to need some more accurate defining of that, of which the witness can or cannot be contradicted, than such statement presents in the way of a rule.

falsehood concerning a matter incidentally connected with the subject of the action, is as likely to testify untruly as if the falsehood had directly affected the issue. It is difficult to perceive why a material falsehood concerning a matter collaterally related to the main issue, is not as effective against the credibility of the witness, as one immediately bearing upon the question.⁹⁹ The rule was thus stated by Baron Alderson in a leading case: "A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness' testimony, given at the trial of the issue; and if that question is so put to him and answered, the opposite party may then contradict him,—and for this simple reason, that the contradiction qualifies or contradicts the previous part of the witness' testimony, and so removes it."¹ This last extract appears too vague and general to be called a rule on the subject of contradiction of the witness as to a fact not previously testified about. When he is asked as to such a fact, whatever his answer may be, it can have no reference to any "previous part

⁹⁹ *Seller v. Jenkins*, 97 Ind. 430, 435. The Supreme Court of Indiana seems to have settled upon the idea that the rule does not limit the cross-examination to such matters as bear *directly and immediately* upon the issue, although they must be connected with the subject matter of the action. The court say: "We are not to be understood as holding that matters foreign to the subject matter of the action, or wholly irrelevant to the issue, can be used for the purpose of impeachment; but we hold, with the authorities cited, that where the matters properly come up on cross-examination, they may be made use of for the purpose of impeachment, though the specific matter was not explicitly developed in the direct examination." The court then, after proceeding to give the definitions of several text writers as to the meaning of the word "issue" and the word "relevant," proceed to say: "His statements concerning the matter which, as a witness, he declares

to be true, must be relevant to the issue, even using that word in its strict technical sense. If his statements out of court are untrue, then they conduce to the truth of a pertinent hypothesis, namely, the hypothesis that the appellant's statements tending to establish his charge were not true; so that even taking the word 'issue' in its strict technical sense, evidence of statements containing an account of his charge against the appellee are relevant. That the statements given out of court may tend to discredit the statements made in court tending to prove the plea of justification, is evident when it is brought to mind that if, out of court he made one charge, and in court testified to the truth of a different one, there would be a material inconsistency in his testimony." *Seller v. Jenkins*, *supra*, opinion by Elliott, J.

¹ *Atty.-Gen. v. Hitchcock*, 1 Exch. 91, 102.

of that witness' testimony." The prior extracts leave us in the dark as to when a fact is a "distinct collateral fact" or "irrelevant to the issue." The Massachusetts and Indiana cases quoted from come nearer to the statement of a rule, but they also show some lack of certainty. A more definite statement, which appears to have found practical application in judicial decision, would be found in extending what is said by Mr. Starkie as follows: But this does not exclude cross-examination with the view of impeachment by contradiction, as to any particular circumstances and expressions tending to indicate bias or prejudice of the witness,² or his corrupt purpose,³ as to the cause on trial, or to facts showing his opportunity and capacity⁴ for observation at the time in respect of what he testifies or any circumstances tending to show his recollection is at fault.⁵ This qualification relates to matters only immediately or indirectly bearing upon the issue, while the extracts criticised speak of those things which bear upon, or are connected with, the issue, *immediately*. The cases herein cited support this extension or qualification of the rule.

² Purdee v. St., 118 Ga. 798, 45 S. E. 606; Whitney v. St., 154 Ind. 573, 57 N. E. 398; Helwig v. Lascowski, 82 Mich. 623, 46 N. W. 1033; Cathey v. Shoemaker, 119 N. C. 424, 26 S. E. 44; Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879; Livermore etc. Co. v. Union etc. Co., 105 Tenn. 187, 58 S. W. 270; Fenstermaker v. R. Co., 12 Utah, 439, 43 Pac. 112; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755.

³ Powers v. Com., 23 Ky. Law Rep. 146, 63 S. W. 976; Richardson v. St., 90 Md. 109, 44 Atl. 999; Yarbrough v. St., 105 Ala. 43, 16 South. 758.

⁴ Cooper v. Hopkins, 70 N. H. 271, 48 Atl. 100; People v. Webster, 139 N. Y. 73, 34 N. E. 730; St. v. Rollins, 113 N. C. 722, 18 S. E. 394; Ludtke v. Hertzog, 72 Fed. 142, 18 C. C. A. 487; Kuenster v. Woodhouse, 101 Wis. 216, 77 N. W. 165; Tiller v. St., 111 Ga. 840, 36 S. E. 201; Barry v. People, 29 Colo. 395, 68 Pac. 674.

⁵ The most common instances of this are prior inconsistent statements, as to which cases are cited to note 94 (page 471) *supra*, but, if it could be shown, that the witness had acted in a manner, which tended to prove he then remembered the matter differently than he testifies, it would appear to be equally competent to submit proof of such act. The case of Mullin v. Transit Co., 196 Mo. 572, 94 S. W. 288, is a clear illustration of the rule of the text. One of defendant's witnesses, in action for death caused by a street car, testified as to the position of the wagon, in which deceased was, and on cross-examination denied having stated on another occasion, that it was at another place. It was held he could be contradicted, as the statement tended to show a then different recollection. See also Sperbeck v. R. Co., 74 N. J. L. 6, 64 Atl. 1012.

§ 470. Where cross-examined on collateral facts, answer conclusive.—Where the witness is cross-examined as to a matter purely collateral to the issues on trial, or which concerns merely the general credibility of the witness, his answers cannot be contradicted by the cross-examiner.⁶ The like result ensues from statutes providing that no impeachment shall be made by proof of particular wrongful acts,⁷ except that it is generally held that a witness may be impeached by proof of conviction of a felony.⁸ As we have seen, however, this rule does not prevent contradiction of the witness, as to what is material to the issues either directly, or mediately as tending to show, that the witness may be either biased, corrupt, or otherwise unreliable with respect, particularly, to the cause on trial,⁹ except as statutes referred to forbids this.

§ 471. [Continued.] Illustrations.—Under this rule, where, upon the trial of a proceeding in bastardy, the defendant asked the prosecutrix, on cross-examination, if she had ever had sexual intercourse with A., to which she replied that she had not,—it was held that the question was collateral and irrelevant, and the answer of the prosecutrix, conclusive on the defendant, and that the court did not err in excluding the testimony of A. in contradiction thereof.¹⁰ So, where a witness on his cross-examination was asked whether the prosecutor had not paid him for coming from another State to be a witness, and he answered that he had not, it was held incompetent for the defendant to introduce witnesses to prove declarations that he had been so paid.¹¹ In a civil case, the defendant called George Morse, for the purpose of impeaching the plaintiff,

⁶ For examples of rejection of such evidence see *Kellogg v. McCabe*, 92 Tex. 199, 47 S. W. 520; *Lord v. Mobile*, 113 Ala. 360, 21 South. 366; *Hollingsworth v. St.*, 53 Ark. 387, 14 S. W. 41; *Spiro v. Nitkin*, 72 Conn. 202, 44 Atl. 13; *Killian v. R. Co.*, 97 Ga. 727, 25 S. E. 384; *Rippetoe v. People*, 172 Ill. 173, 50 N. E. 166; *Griffith v. St.*, 140 Ind. 163, 39 N. E. 440; *St. v. Johnson*, 40 Kan. 266, 19 Pac. 749; *Jennings v. Machine*, 138 Mass. 594; *Kingston v. R. Co.*, 112 Mich. 40, 70 N. W. 315; *St. v. Yellow Hair*, 22 Mont. 339, 55 Pac. 1026; *St. v. Pancoast*, 5 N. D. 516,

67 N. W. 1052; *Sweet v. Gilmore*, 52 S. C. 530, 30 S. E. 395.

⁷ *Steen v. Santa Clara etc. Co.*, 134 Cal. 355, 66 Pac. 321; *Oxier v. U. S.*, 1 Ind. T. 93, 38 S. W. 331; *Roberts v. Johnson*, 23 Ky. Law Rep. 938, 64 S. W. 526.

⁸ See cases cited in notes to § 467 ante.

⁹ See cases to notes 2 to 6, § 469 ante.

¹⁰ *St. v. Patterson*, 74 N. C. 157.

¹¹ *St. v. Patterson*, 2 Ired. L. (N. C.) 346. See also *Clark v. Clark*, 65 N. C. 655.

Mr. Wilder, as a witness. Morse gave testimony to the effect that the plaintiff's general reputation for truth and veracity was bad. He was then asked by the defendant this question: "Did Mr. Wilder state to you, in a certain conversation, that he regarded it as no wrong to swear falsely against such a man as Albert Morse?" This was objected to, the objection overruled, and an exception taken. The witness answered, "He did," though he could not tell "how long ago it was." It was held that, to allow this question was error, for which the judgment should be reversed.¹² In an action on a policy of insurance against fire, the issues were whether an addition to the building, in which was the property insured, materially increased the risk, and whether the insurer assented to the addition being made. A witness for the defendant, who had the general management of his business, was asked, on cross-examination, whether the plaintiff did not, in an interview with him, show him a letter containing this statement: "All my companies have paid, and I see no reason why the others should not pay." The witness answered in the negative. It was held that this evidence was collateral and irrelevant to the issues of the trial, that the witness could not be contradicted upon this point, and that the admission of a letter written by an agent of other insurance companies, containing such a clause, with evidence that it was shown to the witness, gave the defendant good ground of exception.¹³ A defendant charged with an indecent assault, having been cross-examined as to alleged indecencies in respect of other persons, and having denied them,—evidence in disproof of these imputations on the one side, or in respect of them on the other, is properly rejected under the foregoing rule, as relating to collateral issues. The plaintiff is bound by the defendant's answers as to these collateral matters.¹⁴ So, where the mother of the accused, on a criminal trial, was called by the defense and gave evidence tending to show that the accused was at home at the time a certain letter was delivered, and, having stated on cross-examination that she did not know that the accused wrote a letter on the morning of the day the one in question was delivered, she was subsequently asked on cross-examination whether she did not tell certain persons named that the accused had written a letter on the morning of that day,

¹² *Wilder v. Peabody*, 21 Hun (N. Y.), 376.

¹⁴ *Tolman v. Johnstone*, 2 Fost. & Fin. 66.

¹³ *Kaler v. Builders Mutual Ins. Co.*, 120 Mass. 333.

and she replied that she did not. Subsequently these persons were called and allowed, against the objection of the accused, to testify that the mother had told them that the accused had written a letter on the morning of that day. The mother had made no reference to the writing of the letter in her direct examination. It was held that the prosecution, by attempting to prove by her that the accused had written one on the day in question, had made her, for that purpose, their own witness, and could not thereafter discredit her testimony in regard to it, by showing contradictory statements made to other persons when not under oath.¹⁵

§ 472. [Continued.] **Instances of Convictions Reversed for a violation of this Rule.**—A witness for the defendant, on a criminal trial, on cross-examination, stated that he lived in the City of San Francisco ever since the year 1855, except that he had been out of the city for the space of two years, working on a ranch in Marin county. He also stated that he had testified in this cause, as a witness for the prisoner, at a former trial. He was then asked by the people's counsel, whether he had not testified at the former trial that he had lived in Marin county *four* years, or that he had been in that county *six* or *seven* years since the year 1855, and he answered that he had not so testified. In rebuttal, the people, in order to contradict the witness on this point, were permitted by the court, against the objections of the prisoner, to read to the jury a portion of the evidence given by the witness at the former trial, and by which it was made to appear that he had, in point of fact, testified as claimed by the counsel for the prosecution, and had stated at the former trial that he had been absent from San Francisco and in Marin county some six or seven years since the year 1855. For this trivial departure from the rules of evidence a conviction of felony was reversed and the cause remanded for a new trial.¹⁶ On a trial for murder the defendant was examined as a witness in his own behalf, and, on his cross-examination testified, that the deceased, on the occasion of the quarrel which resulted in his death, called the defendant and his brother "damned sons of

¹⁵ *People v. Cox*, 21 Hun (N. Y.), 47. Compare *Hogan v. Cregan*, 6 Rob. (N. Y.) 138; *Com. v. Bean*, 111 Mass. 438; *Thomas v. David*, 7 Carr. & P. 350. It is said in *People v. Cox*, *supra*, that *Greenfield v. Peo-*

ple, 13 Hun (N. Y.), 244, was not intended to be carried beyond the above authorities, some of which are therein cited.

¹⁶ *People v. McKeller*, 53 Cal. 65.

bitches." The witness further testified: "That is not the first time I ever heard him use that kind of language. Have heard him use it frequently. I do not know as he was a practical swearer." The prosecution called several witnesses in rebuttal, who were permitted to testify, against the objection of the defendant, that they were intimately acquainted with the deceased in his life time, and that he was not a profane swearer, and that they never heard him use profane language. The defendant excepted to the ruling of the court; and, because the prosecution was allowed to go into this collateral and irrelevant matter, which could not possibly affect the merits of the case or prejudice the accused in any way, a conviction was reversed and a new trial ordered.¹⁷ Such decisions are a mere travesty upon the administration of justice.

§ 473. [Continued.] **What if Question answered without Objection.**—Although the witness may be asked such an irrelevant and collateral question and may answer it without objection, evidence cannot be afterwards admitted to contradict his testimony in respect of such collateral matter.¹⁸ But the answers are evidence in the case, and when they tend to affect the credibility of a witness, are to be weighed and considered by the jury.¹⁹

§ 474. **Where the Opposite Party is a Witness.**—It has been suggested, on grounds that are obviously sound, that the fact that the witness is a party to the action, will justify the court, in its discretion, in allowing even a *broader range* of cross-examination than would be allowed where the witness is not a party.²⁰ But at the same time it is held that this is not the *right* of the adverse party, but that the *rules* of cross-examination are the same, whether

¹⁷ People v. Bell, 53 Cal. 119.

¹⁸ Sloan v. Edwards, 61 Md. 90, 105. See also Goodhand v. Benton, 6 Gill & J. (Md.) 481.

¹⁹ Craig v. Rohrer, 63 Ill. 325; Barbee v. St., 50 Tex. Cr. R. 426, 97 S. W. 1058. Nor where the motor-man of a street car company refused to testify at a coroner's inquest, on the ground, that he might incriminate himself, can this be used to contradict his statement on cross-examination, that he did not there

testify, as the privilege being personal no inference prejudicial to his employer should arise. Masterson v. Transit Co., 204 Mo. 507, 98 S. W. 504.

²⁰ Norris v. Cargill, 57 Wis. 251, 255, 15 N. W. 148; Knapp v. Schneider, 24 Wis. 70. The subject of the cross-examination of *accused* persons, who offer themselves as witnesses in *criminal trials*, is reserved for a future chapter. Post, ch. 23.

the witness be a party or not.²¹ Thus, the plaintiff having testified in his own behalf, in a suit against a city for personal injury claimed to have been received from a defective sidewalk, the defendant proposed, by cross-examining him, to show that, three years before, he had combined with others to defraud an insurance company which had taken a risk upon his life. It was held that such cross-examination might, in the discretion of the trial court, be either refused or permitted without error, the witness not claiming his privilege.²² Reasoning from the same premises, it has been held that a defendant who offered himself as a witness in his own behalf, might be asked whether he had not disposed of his property so as to avoid the payment of any recovery in the action then being tried; whether, since such disposal, he had not been engaged in selling the same property; and whether he had not gone to New York to consult a spiritualist in regard to the money which was the subject of the controversy,—and his answers to these questions were held the proper subjects of comment to the jury.²³ But this rule does not extend so far as to render it proper to allow *frivolous and immaterial* questions.²⁴

²¹ *Norris v. Cargill*, supra; *Howland v. Jenks*, 7 Wis. 57.

²² *South Bend v. Hardy*, 98 Ind. 577.

²³ *St. ex rel. v. Phillips*, 70 N. C. 462.

²⁴ Thus, in a civil case in Iowa, the plaintiff was asked on cross-examination: "Who told you to bring this suit against him (defendant)?" also, "Did you tell Mr. Beach or Mr. Hoyt (plaintiff's attorneys), or either of them, how much Mr. Arts owed you when you brought this suit?" It was held that these questions were properly excluded. It was utterly immaterial under whose advice or direction the suit was brought; nor could a communication of facts made to the plaintiff's counsel be introduced in evidence. *Walthelm v. Arts*, 70 Iowa, 609, 31 N. W. 953. In *Georgia* a ruling of the trial court was sustained, in *suppressing* a series of *interrogatories* sued out by the

plaintiff, on the ground that one of the *cross-interrogatories* had not been *fully answered*. The court said: "Where a party to a cause makes himself a witness in his own behalf, he should be held to answer strictly and minutely every interrogatory put to him of which he has knowledge, and if he neglects to answer, or answers evasively, such testimony should be rejected. *Howard v. Chamberlin*, 68 Ga. 684, 696. This was probably ruled in conformity with some statutory requirement; the general rule would be that the failure to answer the cross-interrogatories fully would go merely to the credibility of the witness and be a subject of comment before the jury. Where the plaintiff's witness testified, on cross-examination, to conversations with the defendant, the defendant, called as a witness by the plaintiff, may be examined on the subject of the same conversations. *Homans v.*

§ 475. **Right of Witness to Explain.**—A witness is entitled to explain his declarations, introduced for the purpose of showing an apparent hostility against the defendant.²⁵ Where, on the cross-examination of a witness, collateral facts are called out from him tending to create a distrust in his integrity, fidelity or truth, it is competent for the adverse party to ask, on re-examination an *explanation*, which will tend to support his testimony, although the circumstances thus proved are foreign to the main issue, and would not have been permitted but for the previous cross-examination.²⁶ Thus, if he admits on cross-examination that he has given contrary testimony,—as, for instance, before a committing magistrate in the same case,—he may, on re-examination, be permitted to state that such former testimony was given in consequence of *threats* of personal violence by the opposing witness.²⁷ So, where a witness is interrogated, on cross-examination, as to former inconsistent declarations, and denies that he made them, he may state, in rebuttal, *what he did say* on the particular occasion.²⁸ So, if the plaintiff's testimony is assailed by that given for the defendant, setting up a *new state of facts*, the plaintiff may explain away or modify the facts by re-examination or by rebutting testimony. Thus, where a defendant, on a trial for stabbing, gave in evidence a previous difficulty or quarrel on the same day, to show a conspiracy to do him bodily harm, it was competent for the State to prove other incidents of such previous difficulty, in order that the jury might better understand the real merits of the case.²⁹ A wit-

Corning, 60 N. H. 418. See also Laws of New Hampshire, ch. 228, § 15.

²⁵ St. v. Stewart, 11 Ore. 52, 4 Pac. 128. As to the right of a witness to explain a *mistake* made in his testimony on the trial of another case between the same parties, see McDonald v. McDonald, 55 Mich. 155, 20 N. W. 882; Hoggan v. Caboon, 31 Utah, 172, 87 Pac. 164. But the court may refuse to allow details of the cause of hostility. St. v. Judd, 132 Iowa, 296, 109 N. W. 892.

²⁶ U. S. v. Eighteen Barrels of High Wines, 8 Blatchf. (U. S.), 475, 478; St. v. Bedart, 65 Vt. 278, 26

Atl. 719; Thompson v. St., 35 Tex. Cr. R. 511, 34 S. W. 629.

²⁷ Lewis v. St., 35 Ala. 380; Graham v. Reynolds, 90 Tenn. 673, 18 S. W. 272; People v. Chapleau, 121 N. Y. 266, 24 N. E. 469. Or other influence. People v. Mills, 94 Mich. 630, 54 N. W. 488. Or through fear or embarrassment. Anderson v. St., 104 Ala. 83, 16 South. 108. May also show under what circumstances a letter containing inconsistent statements was given to explain a seeming inconsistency. Douglas v. Douglas, 4 Idaho, 293, 38 Pac. 934; Shreve v. Crosby, 78 N. J. L. 614, 63 Atl. 633.

²⁸ Haley v. St., 63 Ala. 83.

²⁹ McAfee v. St., 31 Ga. 411.

ness having testified to certain facts was asked on cross-examination if he had not made a different statement to A., and he replied that he had not. The adverse party afterwards called A. as a witness, who testified that the former witness had made a different statement to him. The former witness was again recalled and stated what he did say to A., and was going on to give the further conversation between him and A. upon the subject, when, on objection of the adverse party, the court ruled it out. It was held that the party calling the witness was entitled to have the *whole conversation* detailed so far as it related to the same subject.⁸⁰

So where witness was in jail, was released and testified for prosecution and was again put in jail, the state may rebut the inference sought to be drawn by the defense of an inducement to witness to testify. *St. v. Spaugh*, 200 Mo. 571, 98 S. W. 55.

⁸⁰ *Harrison's Appeal*, 48 Conn. 202. So the whole of the testimony

of witness on former trial when part only is used to contradict. *Casey v. St.*, 50 Tex. Cr. R. 392, 97 S. W. 496. See also *Villeneuve v. R. Co.*, 73 N. H. 250, 60 Atl. 748; *St. v. Taylor*, 57 W. Va. 228, 50 S. E. 247; *Turner v. St.*, 131 Ga. 761, 63 S. E. 294. See *Hirschl, Trial Tactics*, ch. Cross-Examination.

CHAPTER XVIII.

OF THE RE-EXAMINATION.

SECTION

- 480. Purpose of.
- 481. Developing New Matter brought out on Cross-examination.
- 482. When not Permitted without Leave of Court.
- 483. Re-examination as to Incompetent and Irrelevant Matters.
- 484. Limits of Re-examination as to Former Statements.
- 485. [Continued.] An Illustration of the Rule.
- 486. Re-examination as to Reasons for Animosity towards Accused.

§ 480. **Purpose of.**—After the witness has been cross-examined, he may often be re-examined by the party originally calling him. The re-examination sustains, in respect of the cross-examination, a relation similar to that which the cross-examination sustains to the direct examination. Its object is to develop, explain, or modify any *new matter* which may have been brought out on the cross-examination.

§ 481. **Developing New Matter brought out on Cross-examination.**—The privilege which is extended to the cross-examining party, of developing and following into detail matter which has been brought out on the direct examination, extends equally to the other party, in respect of new matter which is brought out on cross-examination. When, therefore, a witness has, on cross-examination, detailed a *part of a conversation*, the other party has a right, on re-examination, to have him state the whole of the conversation, so far as it is material to the issues.¹ So, the re-examination of a

¹ *Roberts v. Roberts*, 85 N. C. 9. See *Cabiness v. Martin*, 4 Dev. L. (N. C.) 106; *Gray v. Cooper*, 65 N. C. 183; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846; *Hudson v. St.*, 137 Ala. 60, 34 South. 854; *Roszczyniola v. St.*, 125 Wis. 414, 104 N. W. 113; *Chicago etc. R. Co. v. Lowitz*, 218 Ill. 24, 75 N. E. 755; *Ballew v. U. S.*, 160 U. S. 187, 40 L.

Ed. 388. So also where a part of one's testimony on a former trial is brought out. *Lahue v. St.*, 51 Tex. Cr. R. 159, 101 S. W. 1008. And it is within the discretion of the court, where one conversation has been inquired into, to admit, on redirect examination, evidence of another. *People v. Majoine*, 144 Cal. 303, 77 Pac. 952; *St. v. Botha*, 27 Utah, 289,

witness should be permitted in respect of matters drawn out on the cross-examination, or which furnish circumstances by which a material transaction is impressed on the witness' mind.² It is obviously competent for a party to recall a witness, once sworn and examined in his behalf, for re-examination *in rebuttal*, without express leave of the court.³ Under the American rule,⁴ where the cross-examiner, in developing new matter, thereby makes the witness his own, it follows, in the view of some courts, that the party who originally called the witness may follow up the line of inquiry thus touched upon, by a re-examination, which re-examination is in the nature of a cross-examination of the defendant's witness.⁵

75 Pac. 731. But mere reference to a conversation as a means of fixing a date does not open the door to the giving of the conversation itself. *Uhe v. R. Co.*, 3 S. D. 563, 54 N. W. 601. So, where reference to a writing is merely incidental, its contents may not be inquired about on redirect examination. *Redman v. Piersol*, 59 Mo. App. 173. See also *Avery v. Mattice*, 56 Hun, 639, 9 N. Y. S. 166, affirmed 132 N. Y. 601, 30 N. E. 1152.

² *Farmers etc. Bank v. Young*, 36 Iowa, 44. Witness may also correct his answers given on cross-examination (*People v. Murphy*, 145 Mich. 524, 108 N. W. 1009); or explain the meaning of his answers (*St. v. Lyons*, 113 La. 959, 37 South. 890; *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654; *Marlow v. St.*, 49 Fla. 7, 38 South. 653); and generally all matters brought out for the first time on cross-examination may be inquired about on redirect examination. *Lewes v. John Crane & Sons*, 78 Vt. 216, 62 Atl. 60. Witness may explain any seeming discrepancies between prior oral or written statements made, whether in themselves ambiguous or if better understood in the light of surrounding circumstances. See *Hale Bros. v. Milliken*, 5 Cal. App. 344,

90 Pac. 365; *Strebin v. Lovengood*, 163 Ind. 478, 71 N. E. 494. Or may be asked as to the truth or falsity of an inconsistent statement and make explanation in respect to same. *Grabowski v. St.*, 126 Wis. 447, 105 N. W. 805; *Smith v. St. (Tex. Cr. R.)*, 74 S. W. 556 (not reported in state reports). And generally may testify as to any inference as to new matter shown by cross-examination, giving explanations, reasons and motives surrounding or connected with the doing or omitting to do a particular thing. See *Com. v. Burton*, 183 Mass. 221, 66 N. E. 716; *Glass v. St.*, 147 Ala. 50, 41 South. 727; *Hebert v. Hebert*, 20 S. D. 85, 104 N. W. 911; *Engel v. Conti*, 78 Conn. 351, 62 Atl. 210; *Pelkey v. Hodgdon*, 102 Me. 426, 67 Atl. 218; *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832; *Smith v. Mine etc. Co.*, 32 Utah, 21, 88 Pac. 683; *Hicks v. Hicks (Tex. Civ. App.)*, 26 S. W. 227 (not reported in state reports); *Pullman P. C. Co. v. Hawkins*, 55 Fed. 932, 5 C. C. A. 326; *Spaulding v. R. Co.*, 98 Iowa, 205, 67 N. W. 227.

³ *Osborne v. O'Reilly*, 34 N. J. Eq. 60, 66.

⁴ Ante, § 432.

⁵ *Gray v. Cooper*, 65 N. C. 183; *St. v. Babcock*, 25 R. I. 224, 55 Atl. 685;

But this rule has no application where the matter brought out is not new matter, but is merely matter which was touched upon in the examination in chief. If this matter was not competent, it does not afford a justification to the party who originally stirred it, to go on and develop, in re-examination, a greater mass of incompetent evidence of the same character. Thus, on the examination of a witness for the plaintiff, certain evidence, touching transactions between the plaintiff and his deceased partner, was ruled out under the defendant's objection, the same being clearly incompetent under the statute. On cross-examination, the defendant asked the witness a question touching the evidence so ruled out, which the witness answered. On re-direct examination, the witness was permitted by the court, against the defendant's objection, to enter into a full explanation of the matter. The Supreme Court held that this was error.⁶

§ 482. When not Permitted without leave of Court.—It is an established rule, both of courts of law and of equity, founded, it is believed, upon a sound policy, that a witness cannot, without express leave of court, be re-examined as to matter upon which he has *already been examined* in chief, unless it becomes necessary or

Fouch v. Mishler, 100 Md. 458, 59 Atl. 1009; Boles v. People, 37 Colo. 41, 86 Pac. 1030; Com. v. Carter, 183 Mass. 221, 66 N. E. 716. And the court permits leading questions. Houseman v. City of Bell Plain, 72 Iowa, 469, 100 N. W. 943. In Georgia it is held that, where the cross-examination opens up new matter, the discretion of the court in redirect examination is very wide. Southern R. Co. v. Gentry, 128 Ga. 429, 57 S. E. 429. See also Lewis v. Sumlich, 130 Iowa, 203, 106 N. W. 624. Where the direct examination refers to a book as the basis of knowledge or statement, and the cross-examination is upon that, the redirect examination follows the same rule as the direct. Ball v. Skinner, 134 Iowa, 298, 111 N. W. 1022. Where counsel for an accused makes it necessary for witness of

prosecution to speak of the character of the accused by way of explanation, this opens the door, as to that, on the redirect examination. Craig v. St., 78 Neb. 466, 111 N. W. 143. Where witness is re-examined for explanation, counsel should not be permitted to propound questions of a leading character. Travelers Ins. Co. v. Sheppard, 85 Ga. 75, 12 S. E. 18. If it is desired on redirect examination to refresh witness's memory, leading questions may be permitted. Farrell v. City of Boston, 161 Mass. 106, 36 N. E. 751. And so where a witness may be thought by the court as leaning more favorably to the side of the cross-examiner and has materially modified his testimony in chief. People v. Tubb, 147 Mich. 1, 110 N. W. 132.

⁶ Jackson v. Evans, 73 N. C. 128.

proper in view of his cross-examination.⁷ But where a witness is recalled, and objection is made to this examination, it will not be assignable for error that the court permitted him to be examined, unless the ground of the objection was stated.⁸ Such testimony, in a chancery case, should be excluded on exception.⁹ But the passing of an order allowing the re-examination of a witness in equity, is a matter resting in the *discretion* of the court, which discretion is not subject to review on appeal.¹⁰

§ 483. **Re-examination as to Incompetent and Irrelevant Matters.**—If one side introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other party, then, although it come in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it. The government, in a criminal trial, waives the strict rule to this extent, by its misstep of introducing illegal evidence; but the respondent is not entitled to a *further* relaxation of the common rule, because he could, by his objection, have excluded the illegal or irrelevant evidence.¹¹ This is just and proper, to enable the other party to explain away the prejudicial effect of the evidence, which, in many

⁷ Whart. Ev., § 574; Dan. Ch. Pr. 1104; Osborne v. O'Rielly, 34 N. J. Eq. 60, 66. See also Crawford v. Berthof, 1 N. J. Eq. 458; Delaney v. Noble, 3 N. J. Eq. 441; Hanson v. Presbyterian Church, 11 N. J. Eq. 441; Swartz v. Chickering, 58 Md. 291, 297; Shafer v. Russell, 28 Utah, 444, 79 Pac. 559. The trial court has discretion in allowing questions on redirect examination, which should have been asked in chief but were not. Blake v. Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103; Chesapeake etc. R. Co. v. Lynch, 28 Ky. Law Rep. 467, 89 S. W. 517. Or to ask questions as to matters not touched upon in cross-examination. St. v. Lyons, 113 La. 959, 37 South. 890.

⁸ Osborne v. O'Rielly, 34 N. J. Eq. 60, 66.

⁹ Swartz v. Chickering, 58 Md. 291, 297.

¹⁰ Swartz v. Chickering, 58 Md. 291, 297.

¹¹ St. v. Witham, 72 Me. 531, 536; St. v. Sargent, 32 Me. 431; Williams v. Gilman, 71 Me. 21; Mowry v. Smith, 9 Allen (Mass.), 67; Parker v. Dudley, 118 Mass. 602, 605; Phillips v. Hoyle, 4 Gray (Mass.), 568; Eddy v. Gray, 4 Allen (Mass.), 435; Com. v. Fitzgerald, 2 Allen (Mass.), 297; Brown v. Perkins, 1 Allen (Mass.), 89. Failure, in a civil trial, to move to exclude an incompetent statement, not called for on the cross-examination, does not permit redirect examination thereon. Miller v. R. Co., 89 Iowa, 567, 57 N. W. 418; St. v. Ussery, 118 N. C. 1177, 24 S. E. 414. If the matter is merely immaterial, redirect examination thereon should be refused. Roberts v. City of Boston, 149 Mass. 346, 21 N. E. 668.

cases cannot be cured by an instruction withdrawing it from the attention of the jury. Thus, where, in a criminal trial, the State's attorney was allowed by the court to ask the defendant's witnesses where they came from when they came to the witness stand, to which they answered that they *came from jail*,—it was held error not to allow them to state on what charge they were committed to jail, though they could not regularly be discredited by such testimony.¹² In one jurisdiction, where the rule prevails that a witness for the prosecution in a criminal trial is as much the people's witness when under cross-examination as when being examined in chief,¹³ the conclusion has been drawn that the mere fact that a witness has been permitted, on cross-examination on a subject touched upon in the direct examination, to detail, without objection, evidence which is hearsay merely, will not authorize the calling out of *the rest of the story*, against objection, on the re-direct examination, on the claim that it is a part of the same conversation.¹⁴ Elsewhere it is ruled, on a conception analogous to the doctrine of estoppel, that it is not ground of error that a witness, on his re-examination, is permitted to repeat incompetent evidence which has been brought out on the cross-examination.¹⁵

§ 484. **Limits of Re-examination as to former Statements.**—Professor Greenleaf says: "After a witness has been cross-examined respecting a former statement made by him, the party who called him has a right to re-examine him to the same matter. The counsel has a right, upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or motives of the witness."¹⁶

¹² St. v. Ezell, 41 Tex. 35.

¹³ Wagner v. People, 30 Mich. 384; Wilson v. Wagar, 26 Mich. 458, 459.

¹⁴ Wagner v. People, 30 Mich. 384.

¹⁵ Goodman v. Kennedy, 10 Neb. 270, 4 N. W. 987.

¹⁶ 1 Greenl. Ev., § 467. So held in Schaser v. St., 36 Wis. 429, 432; St. v. Kaiser, 124 Mo. 651, 28 S. W. 182; Baltimore Belt R. Co. v. Satt-

ler, supra; Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833; Loy v. Petty, 3 Ind. App. 241, 29 N. E. 788; Pelkey v. Hodgdon, 102 Me. 426, 67 Atl. 218. The rule of confining the redirect examination strictly to what is drawn out on cross-examination is observed in Maryland. See Struth v. Decker, 100 Md. 368, 59 Atl. 727. And witness may also ex-

§ 485. [Continued.] **An Illustration of the Rule.**—Upon the trial of an indictment for arson a witness for the State, on his direct examination, testified that, in a conversation with him on a certain occasion, the accused said to him, "I suppose you are going to send me up on that buggy scrape." On his cross-examination the witness explained that the words "buggy scrape" referred to a buggy which one L. had caused the accused to be arrested for stealing a few days before, and that the witness had been employed by L. to look it up and had recovered it. On his re-direct examination, the witness was permitted, against objection, to testify "what he knew and what he did in regard to that buggy scrape," and to detail facts having a strong tendency to show that the accused had stolen the buggy. It was held that this was new matter, not admissible within the foregoing rule in respect of re-direct examination, and that its admission was fatal error.¹⁷ The decision is supportable on the ground that the evidence was incompetent, since it was evidence of another and a distinct offense, of a different character

plain motive or purpose of an act admitted, on cross-examination, to have occurred. *Westbrook v. Aultman Miller & Co.*, 3 Ind. App. 83, 28 N. E. 1011. Or may show its conformity with established practice in trade. *Hewes v. Fruit Co.*, 106 Cal. 441, 39 Pac. 853. And also the reasons governing witness in respect to what is elicited on cross-examination. *Chellis v. Chapman*, 52 Hun, 613, 7 N. Y. S. 78, affirmed in 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784. See *Collins v. St.*, 46 Neb. 37, 64 N. W. 432; *St. v. Maher*, 74 Iowa, 82, 37 N. W. 5; *Com. v. Hill*, 156 Mass. 226, 30 N. E. 1016. That this involves evidence corroborative of evidence in chief creates no objection to its admissibility. *Norfolk Nat. Bank v. Job*, 48 Neb. 774, 67 N. W. 781. Where witness answers negatively as to the making a certain statement, he may be asked on redirect what he did say. *Bracken v. St.*, 111 Ala. 68, 20 South. 636, 56 Am. St. Rep. 23; *Com. v. Armstrong*, 158 Mass.

78, 32 N. E. 1032. Mere denials on cross-examination does not open the door for reaffirmation on redirect. *Winslow v. Covert*, 52 Ill. App. 63; *Watson Coal & M. Co. v. James*, 72 Iowa, 184, 33 N. W. 622. Semble, where answer is adverse to cross-examiner. *Ranney v. R. Co.*, 67 Vt. 594, 32 Atl. 810. The motive referred to means that of the witness and not of a third person concerning whose act testimony is elicited on cross-examination. *Levels v. R. Co.*, 196 Mo. 606, 94 S. W. 275. Where the cross-examination probes the witness as to his means of knowledge, this may be further developed on the redirect examination. *Leipird v. Stotler*, 97 Iowa, 169, 66 N. W. 150. If a writing by witness is in apparent conflict its terms may be explained or the circumstances of its being written shown. *Fremont etc. Co. v. Peters*, 45 Neb. 356, 63 N. W. 791. See also *Vaughn v. McCarthy*, 63 Minn. 221, 65 N. W. 249.

¹⁷ *Schaser v. St.*, 36 Wis. 429.

from the one on trial; but the opinion, so far as it holds that it is fatal error, in a criminal or in a civil trial, for the judge to allow new matter to be gone into on re-direct examination, is manifestly unsound. Such a matter, by the best authority and reason, is left to rest within the sound *discretion* of the trial judge.¹⁸

§ 486. Re-examination as to Reasons of Animosity towards Accused.—In Louisiana, it is held that, where a witness for the State, on cross-examination, admits that his feelings to the accused are unfriendly, the counsel of the State cannot, on the re-examination, ask the witness to state the reasons of his animosity. The reason is that, to permit the State's witness thus to detail the causes of his animosity towards the accused, is to suffer him to testify to matters which are wholly irrelevant to the issues on trial, and also to give him an opportunity of poisoning the minds of the jury against the accused, by relating facts and circumstances, and making accusations, wholly disconnected with the charge for which the accused is being tried, without an opportunity of defense or reply being offered to the accused. Such an irregularity has been held good ground for reversing a conviction.¹⁹ The rule, heretofore explained, that such statements are *collateral* to the inquiry, in the sense that the cross-examining party, by interrogating the witness concerning them, makes the witness his own witness, so that he is bound by his answers, does not apply; and it is *error* to reject the contradictory evidence on this ground.²⁰ Thus, it is competent, for the purpose of impeaching the credibility of a witness, to show that there has been a quarrel between him and the party against whom he testifies; and it is not necessary that the cause of the quarrel should be connected with the subject-matter

¹⁸ Ante, § 349.

¹⁹ St. v. Gregory, 33 La. Ann. 737. See also Selph v. St., 22 Fla. 537, and St. v. Frank, 109 La. 131, 33 South. 110. Contra, in discretion. St. v. Warren, 41 Ore. 348, 69 Pac. 679. So also in a civil case, it was held, that a witness could not explain his apparent hostility to defendant railroad company by saying it had refused to settle his claim against it on an equitable basis. Atchison etc. R. Co. v. Briggs, 2 Kan. App. 154, 43 Pac. 289. It was

held in Vermont, in a civil case, that it was discretionary to allow witness to state the nature of the trouble. Hyde v. Town of Swanton, 72 Vt. 242, 47 Atl. 790. And in New York by a decision of four to three, that the defendant might in the court's discretion go into details, where state had brought out the matter on the cross-examination of defendant's witness. People v. Ziguoras, 163 N. Y. 250, 57 N. E. 465.

²⁰ Bosborough v. St., 21 Tex. App. 672, 8 Crim. Law Mag. 751.

of the suit on trial. Where the party against whom a witness testifies asks him, on cross-examination, whether there has not been such a quarrel, he does not thereby make the witness his own witness so as to preclude himself from contradicting him.²¹ The rule which thus requires a foundation to be laid, applies equally to the case of oral statements and to a previous *deposition* given by the witness.²² Accordingly, it has been held that, where the *deposition* of the witness has been read in evidence, and the opposing party produces another and a *conflicting deposition* of the same witness, in another action between the same parties, of a prior date, and offers to introduce the same to impeach the witness, and the court of its own motion excludes the testimony, it is not error.²³ It has even been held that, where the *deposition of a deceased witness* had been by consent read in evidence, another and conflicting deposition of the same witness, at a prior trial, could not be read, in order to impeach the witness, for the reason that the attention of the witness had not been called to the conflict between the two depositions.²⁴ But this last holding does not seem to be supported by reason; since the prior deposition would certainly have some tendency to impair the effect of the latter one, and since the death of the witness has rendered it impossible to examine him respecting the discrepancy between the two.

²¹ Beardsley v. Wildman, 41 Conn. 515.

²² Cropsey v. Averill, 8 Neb. 157.

²³ Greer v. Higgins, 20 Kan. 420, 424.

²⁴ Hubbard v. Briggs, 31 N. Y. 518; Runyan v. Price, 15 Ohio St. 1.

CHAPTER XIX.

OF INDIRECT IMPEACHMENT.

SECTION

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§ 489. Four Modes of Impeaching the Credit of a Witness.—

There are but four modes of impeaching the credit of a witness:

1. By cross-examination.
2. By proving previous contradictory statements or acts.
3. By producing the record of his conviction of some infamous crime.
4. By adducing general evidence tend-

ing to show that he is unworthy of belief on his oath.¹ The *first* has been already considered; ² the *second* will be considered in this, and the *third* and *fourth*, in the succeeding chapter.

§ 490. **Right to Impeach by Proof of Previous Contradictory or Hostile Statements or Acts.**—It is the absolute right of a cross-examining party to lay a foundation for impeaching a witness, by interrogating him as to whether or not he has made contrary declarations on a former occasion, and the exclusion of questions put for this purpose is error for which new trial will be granted;³ and where the proper foundation has been laid, as hereafter explained, it is the right of the party seeking to impeach the witness, to introduce such impeaching evidence, and the exclusion of it will be error.⁴ The *acts* of the witness, relevant to the subject of the action and inconsistent with his testimony, may be shown as affecting his credibility.⁵

§ 491. [Continued.] **Illustrations.**—A witness testified in his direct examination, that he had *no ill feeling* against the accused, when he approached him, just before the difficulty which occasioned the indictment. It was error to exclude his testimony, on

¹ *Rex v. Watson*, 2 Stark. 116, 149; *Spencely v. DeWillott*, 7 East, 108, 3 Smith, 289.

² *Ante*, ch. 17.

³ *Pruitt v. Brockman*, 46 Ind. 56; *McFarlin v. St.*, 41 Tex. 23; *Turney v. St.*, 9 Tex. App. 193; *Rector v. Robins* (Ark.), 102 S. W. 209; *Bowden v. R. Co.*, 107 Va. 10, 57 S. E. 572.

⁴ *Joseph v. Com.* (Ky.), 1 S. W. 4; *St. v. Downs*, 91 Mo. 19, 3 S. W. 219; *Giddens etc. Co. v. Rutledge*, 146 Ala. 232, 40 South. 759; *Miller v. United Ry.*, 144 Mich. 1, 107 N. W. 714; *Grant v. U. S.*, 28 App. D. C. 169; *Myers v. St.*, 56 Tex. Cr. R. 222, 103 S. W. 401; *Ham v. Brown Bros.*, 2 Ga. App. 71, 58 S. E. 316; *St. v. Callahan*, 100 Minn. 63, 110 N. W. 342. Though the impeaching statement includes necessarily some circumstances not independently ad-

missible in evidence, this does not authorize its rejection. *St. v. Mitchell*, 119 La. 374, 44 South. 132.

⁵ *Hyland v. Milner*, 99 Ind. 308; *ante*, § 450; *Com. v. Hargis*, 30 Ky. Law Rep. 510, 99 S. W. 348; *Schloemer v. Transit Co.*, 203 Mo. 702, 102 S. W. 651; *St. v. Huff*, 106 Ga. 432, 32 S. E. 348; *Lewis v. Gas Light Co.*, 165 Mass. 411, 43 N. E. 178; *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272. This is true though the acts are negative in character, if the circumstances are such as according to experience, interest, policy, duty or any reasonable motive, silence or omission would call for explanation. See *People v. Bishop*, 134 Cal. 682, 66 Pac. 976; *St. v. Armstrong*, 118 La. 480, 43 South. 57; *Babcock v. People*, 13 Colo. 519, 22 Pac. 817; *Miller v. St.*, 97 Ga. 653, 25 S. E. 366; *Bonnemort v. Gill*,

cross-examination, regarding his declarations, made just before the difficulty, showing a *different state of feeling*.⁶ A witness had testified, on his direct examination, as to the *unprofitableness* of keeping a certain railroad eating house. It was held competent to ask him, on his cross-examination, whether he had not published the following notice, and to offer the notice in evidence: "For sale. Railroad Eating House, with furniture and good will, on line of Union Pacific R. R. in Nebraska; regular eating house for all trains; large trains and *large profits*; terms, part on cash and part on time. For particulars address," etc.⁷

§ 492. **Previous Declarations not Evidence in Chief.**—What a witness, who is not a party, states out of court, is not evidence in chief, to prove the fact as stated by him; but can only be shown to discredit his testimony at the trial, when his testimony is contradicted by such outside statements.⁸ The effect of proving contradictory statements extends no further than the question of *credibility*; it does not tend to establish the *truth* of the matters embraced in the contradictory statements; it simply goes to the credibility of the witness.⁹

§ 493. **Rule does not extend to Contrary Expressions of Opinion.**—The rule does not extend so far as to introduce previous expressions of opinion made by the witness. Thus, on the trial of an indictment for a criminal offense, the defendant cannot show that a witness, who has testified to circumstances tending to connect him with the crime, had previously expressed the opinion that he, the defendant, was innocent; since the expression of such an opinion would not tend to contradict the facts to which the

165 Mass. 493, 43 N. E. 299; St. v. Morton, 107 N. C. 890, 12 S. E. 112; Barrett v. R. Co., 157 N. Y. 663, 52 N. E. 659.

⁶ McFarlin v. St., supra.

⁷ Markel v. Moudy, 13 Neb. 323, 327, 14 N. W. 409.

⁸ Law v. Fairfield, 46 Vt. 425; Hutchins v. Murphy, 146 Mich. 621, 110 N. W. 52; Giddens & Co. v. Rutledge, 146 Ala. 232, 40 South. 759.

⁹ Seller v. Jenkins, 97 Ind. 430, 435; Davis v. Hardy, 76 Ind. 272;

Hicks v. Stone, 13 Minn. 434; Jones v. St., 145 Ala. 51, 40 South. 947; Perdue v. St., 126 Ga. 112, 54 S. E. 820; Louisville R. Co. v. Williams, (Ky.), 109 S. W. 874; Harriman v. R. Co., 173 Mass. 28, 53 N. E. 156; Eno v. Allen, 113 Mich. 399, 71 N. W. 842; St. v. Baker, 136 Mo. 74, 37 S. W. 810; Texas & P. R. Co. v. Johnson, 90 Tex. 304, 38 S. W. 520; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305.

witness testified.¹⁰ So, where, in an action for damages for an assault and battery, a witness was asked, on cross-examination, whether he had not gone to the plaintiff's store some time after the occurrence, and there stated to the plaintiff that the assault upon him was a great outrage, and that he would be foolish if he did not make the defendant smart for it; and the plaintiff then, for the purpose of contradicting the witness, was allowed to testify, against the objection of the defendant, that the witness had come to his store a week after the occurrence, where, after the plaintiff had explained the occurrence to the witness, the witness had said that it was a great outrage, and that the plaintiff should make the defendant smart for it.¹¹

§ 494. Degree of Contradiction does not determine Competency.—The Supreme Court of Indiana said: "There must be contradiction between the statements alleged to have been made out of court, and those made on the witness stand; but the degree of contradiction does not determine the competency of the impeaching testimony, however much that consideration may affect its potency."¹² The Supreme Court of Minnesota expresses the same

¹⁰ *Com. v. Mooney*, 110 Mass. 99; *Houston etc. R. Co. v. Adams*, 44 Tex. Civ. App. 288, 98 S. W. 222; *St. v. Davison*, 9 S. D. 564, 70 N. W. 879; *Sanders v. R. Co.*, 99 Tenn. 130, 41 S. W. 1031; *Johnson v. Spencer*, 51 Neb. 198, 70 N. W. 982. If the opinion tends to show hostility it may be proven. *St. v. Ellsworth*, 30 Ore., 145, 47 Pac. 199. Contra, it was held that where a witness had testified that there was no obstruction to defendant's view, where plaintiff was suing for negligence causing injury, he was allowed to be contradicted as to statement saying defendant was not to blame. *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5. In *McClelland v. R. Co.*, 105 Mich. 101, 62 N. W. 1025, also an inconsistent opinion as to negligence was allowed to be proven. Where reliance was upon circumstantial evidence, and witness sug-

gested various facts to a certain conclusion, he was allowed to be asked, if he had given expression to a contrary opinion. *Johnson & Son v. R. Co.*, 140 N. C. 574, 53 S. E. 362. So if a non-expert opinion on insanity is received, the expression of an inconsistent opinion may be shown. *St. v. Hogan*, 117 La. 863, 42 South. 352; *Lowe v. St.*, 118 Wis. 641, 96 N. W. 417.

¹¹ *Sloan v. Edwards*, 61 Md. 90, 104.

¹² *Seller v. Jenkins*, 97 Ind. 430, 439, opinion by Elliott, J. The former statement must afford some presumption that the fact was different from his testimony. *Foster v. Worthing*, 146 Mass. 607, 16 N. E. 572. *Semble*, in a case where witness stated that another person than defendant did the shooting, for witness to be asked if he had not stated that he did the shooting—

conclusion thus: "The admissibility of the discrediting testimony does not depend on the degree of variance between it and the subsequent testimony. If it differs in any material particular, it is for the jury to determine what effect such difference in statements shall have on the witness' credit."¹³

§ 495. Not necessary that previous Declarations Intentionally False.—It is not necessary that the previous contradictory statements should be intentionally false. Accordingly, it was held error for the court to give the following cautionary instruction to the jury: "The court instructs for the plaintiff that, before the jury can allow any contradiction of the testimony of any of the witnesses to affect their credibility in this suit, the jury must be satisfied, from the evidence, that such contradiction is not only true, but is upon a matter material to the issue in this case, and also that the testimony so contradicted was intentionally false."¹⁴

§ 496. Necessity of Laying Foundation.—"The rule," said Mr. Chief Justice Waite, "is that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeaching, until the witness has been examined upon the subject, and his attention particularly directed to the circumstances, in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it."¹⁵ Stated

himself and if he had not suggested that the third person claim that he did it as he could get out of punishment. *McIntyre v. St.*, 50 Tex. Cr. R. 83, 94 S. W. 1048. See also *Swift v. Withers*, 63 Minn. 17, 65 N. W. 85.

¹³ *Tinklepaugh v. Rounds*, 24 Minn. 298. It must at least tend in a substantial way to contradiction. *Walker v. Walker (R. I.)*, 67 Atl. 519. Thus it was held in a suit for death from negligence by street railway company, where defendant's motorman denied that he testified at a coroner's inquest, that he could not be contradicted by a transcript showing he was sworn and on being questioned said: "I don't care to testify. I might incriminate

myself," because the testimony was substantially true and defendant ought not to be prejudiced by the claim of privilege which was personal to the witness.

¹⁴ *Craig v. Rohrer*, 63 Ill. 325. In Illinois it was held that the entire duty of the jury, considering the inconsistent statements (if they are inconsistent), is to determine whether or not the witness has willfully sworn falsely as to a material matter at the present trial and unless they so believe the witness has not been impeached. *Chicago etc. R. Co. v. Ryan*, 225 Ill. 287, 80 N. E. 116.

¹⁵ *Steamboat Chas. Morgan*, 115 U. S. 69. So held in *Conrad v.*

in the more usual way, the witness must first be interrogated concerning the supposed contradictory statements, together with the circumstances of *time*, *place* and *person* involved in the supposed contradiction.¹⁶

§ 497. **When Foundation need not be laid.**—The rule which requires the foundation thus to be laid does not apply where the *party himself* is a witness; since his previous self-disserving dec-

Griffey, 16 How. (U. S.) 38, 46; *Seller v. Jenkins*, 97 Ind. 430, 433; *Lea v. Chadsey*, 2 Keyes (N. Y.), 543, 553; *St. v. Wright*, 75 N. C. 439; *The Queen's Case* 2 Brod. & Bing. 284, 313; *Conrad v. Griffey*, 16 How. (U. S.) 28; *Hooper v. More*, 3 Jones L. (N. C.) 428; *Howe Machine Co. v. Clark*, 15 Kan. 492; *Payne v. St.*, 60 Ala. 80, 89; *see cases in 2 Brick. Dig.* 548, §§ 117, 118; *Sprague v. Cadwell*, 12 Barb. (N. Y.) 518; *Booker v. St.*, 4 Tex. App. 564; *Budlong v. Nostrand*, 24 Barb. (N. Y.) 25; *Briggs v. Wheeler*, 16 Hun (N. Y.), 583. In Massachusetts and Maine the rule seems to be that contradictory statements of the witness are allowed, without any previous interrogation of him about them. *Manning, J.*, in *Payne v. St.*, 60 Ala. 80, 89; *Baker v. St.*, 69 Wis. 32, 33 N. W. 52; *St. v. Peterson*, 83 Md. 194, 34 Atl. 834; *Chicago etc. R. Co. v. Jennings*, 217 Ill. 494, 75 N. E. 560; *Coker v. St.*, 144 Ala. 28, 40 South. 516; *People v. Delbos*, 146 Cal. 734, 81 Pac. 131; *Mattox v. U. S.*, 156 U. S. 237; *Columbia Bank v. Rice*, 48 Neb. 428, 67 N. W. 165. In Massachusetts this is not required as a principle but by statute it has been made necessary as to one's own witness. *Allin v. Whittemore*, 171 Mass. 259, 50 N. E. 618. In North Carolina not necessary as to points "pertinent and material to the inquiry, but is as to bias," etc.

Barnett v. R. Co., 120 N. C. 517, 26 S. E. 819. In Pennsylvania the matter rests in discretion. *Cronkrite v. Trexler*, 187 Pa. 100, 41 Atl. 22.

¹⁶ *People v. Devine*, 44 Cal. 452. Upon the cross-examination of a witness for the prosecution in a criminal trial, an affidavit which had been made by the witness was offered by the defendant, for the purpose of impeaching her testimony. It was held that the circumstances under which the affidavit was made, and the conversation had by the witness with the person at whose instance it was made, were admissible as parts of the transaction. *People v. Smallman*, 55 Cal. 185. It is not necessary that the impeaching testimony should be directed to the contradiction of the testimony given by the witness sought to be impeached on his direct examination; it is competent when it contradicts statements made by him to questions propounded to him on his cross-examination. *Seller v. Jenkins*, 97 Ind. 430, 437; *Greenfield v. People*, 13 Hun (N. Y.), 242. In *Seller v. Jenkins*, the following cases were cited by the court as applications of this rule; *Dillon v. Bell*, 9 Ind. 320; *Brown v. St.*, 24 Ind. 113; *Thompson v. St.*, 15 Ind. 473; *Carpenter v. St.*, 62 Ark. 286, 36 S. W. 900 (applying statute), and so the following cases: *People v.*

larations are always admissible against him;¹⁷ but he may, of course, always be asked whether he has not made contrary self-disserving statements respecting the matter in issue.¹⁸ It is scarcely necessary to add that the rule does not extend so far as to preclude the cross-examining party from contradicting the witness as to any *fact* as to which he has testified in chief, without thus interrogating him on cross-examination with the view of laying a foundation. Thus, in an action for assault and battery, the defendant testified as a witness, on his direct examination, that he had no feelings of enmity against the plaintiff at the time of the assault. It was held competent to prove, by another witness, without laying a foundation on the cross-examination of the defendant, that the defendant had, prior to the assault, made declarations showing feelings of enmity against the plaintiff.¹⁹ But, as we shall hereafter see, where the question as to hostile feelings has not been gone into on direct examination, there is a view that the foundation must be laid on cross-examination before evidence of *declarations* tending to show such feelings can be introduced.²⁰

Wade, 118 Cal. 672, 50 Pac. 841; Klotz v. James, 96 Iowa, 1, 64 N. W. 648. In many of the states there are statutes in substantially identical terms.

¹⁷ Collins v. Mack, 31 Ark. 685, 694; Ruemer v. Clark, 112 App. Div. 231, 105 N. Y. S. 657; Coolidge v. Ayers, 77 Vt. 448, 61 Atl. 40. In Nebraska it was held that the rule as to witnesses generally applies to an accused in a criminal case and the foundation must be laid. Had-dix v. St., 76 Neb. 369, 107 N. W. 781.

¹⁸ Thus, in an action to recover damages for injuries from falling into an excavation, the plaintiff may be asked whether he has not stated that he had only been a little hurt, he having testified in chief that he had been severely hurt. Monongahela Water Co. v. Stewartson, 96 Pa. St. 436.

¹⁹ Lucas v. Flinn, 35 Iowa, 9, 14.

²⁰ Post, § 499. Where a continuance is applied for and to avoid

same what is stated in the affidavit is agreed to be admitted as testimony, the courts, where the statute does not provide specifically that the foundation need not be laid, seem divided. That it is not necessary, see St. v. Guy, 107 La. 573, 31 South. 1012. That it must be, see Clay v. Goldstein, 31 Ky. Law Rep. 390, 102 S. W. 319; New York etc. R. Co. v. Flynn, 41 Ind. App. 501, 81 N. E. 741. Missouri Statute obviates the laying of foundation in such a case. Beier v. Transit Co., 197 Mo. 215, 94 S. W. 876. Generally it is held, that where depositions are used, the preliminary question is not dispensed with. People v. Compton, 132 Cal. 484, 64 Pac. 849; Carver v. U. S., 164 U. S. 694; Ryan v. People, 21 Colo. 119, 40 Pac. 777; St. v. Wiggins, 50 La. Ann. 330, 23 South. 334. The fact, that the contradictory matter arose subsequently to the giving of the deposition does not change the rule, the courts leaning to the view that

§ 498. [Continued.] What if no Objection is made.—The grounds on which the foregoing rule, which requires a foundation to be laid by first interrogating the witness on cross-examination, is usually put, is that it is the right of the witness to have the opportunity of explaining. If it is a *privilege* personal to him, it would seem to follow that it can not be *waived* by the party whose witness he is, without his consent; but that if the impeaching testimony is introduced without the foundation first being laid, he has the *right* of subsequent explanation.²¹ We find, however, that it has been held competent for a coroner's clerk to read, for the purpose of contradicting a witness in a criminal trial, his previous deposition, taken before the coroner and subscribed and sworn to by him, without asking him on cross-examination concerning the making of such deposition, where no objection is made to the reading of it on that score.²²

§ 499. Rule applies to Evidence of Previous Threats or Hostile Statements.—According to some opinions, the rule which thus requires a foundation to be laid, applies to evidence of previous threats or hostile declarations, made by the witness against the cross-examining party. Thus, in a criminal trial, the defendant proposed to prove that, since the alleged assault, the prosecuting witness had threatened to poison him. But, as the prosecuting witness, when on the stand, had not been interrogated as to whether he had made such threats, it was held that evidence was properly excluded.²³ It is always competent for the cross-examining party

the impeaching party should take a new deposition himself. See *McCullough v. Dobson*, 133 N. Y. 124, 30 N. E. 641; *Mattox v. U. S.*, 156 U. S. 237. Dying declarations furnish an exception from the very necessity of the case. See *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *Dame v. People*, 172 Ill. 582, 50 N. E. 137; *Green v. St.*, 154 Ind. 655, 57 N. E. 637; *St. v. Shaffer*, 23 Ore. 555, 32 Pac. 545; *Carver v. U. S.*, 164 U. S. 694. In Connecticut, however, the contrary has been held. *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884; see also *St. v. Taylor*, 56 S. C. 360, 34 S. E. 939.

²¹ *Henderson v. St.*, 70 Ala. 29.

²² *Stephens v. People*, 19 N. Y. 549, 573.

²³ *Booker v. St.*, 4 Tex. App. 564. Compare *Briggs v. Wheeler*, 16 Hun (N. Y.), 583; ante, § 540; *Blanchard v. St.*, 191 Ill. 450, 61 N. E. 481; *St. v. Goodbier*, 48 La. Ann. 770, 19 South. 755; *Davis v. St.*, 51 Neb. 301, 70 N. W. 984. Contra, *Brink v. Stratton*, 176 N. Y. 150, 68 N. E. 148; *Lucas v. Flinn*, 35 Iowa, 14; *Titus v. Ash*, 24 N. H. 331. In *Barrett v. R. Co.*, 120 N. C. 517, 26 S. E. 819, it was held that the predicate must be laid, even with a witness who is a party, though that be dis-

to put questions to the witness, tending to show his bias, prejudice or ill-will against such party, and, if the witness denies making such statements, to prove that he did make them.²⁴ It is said by the Supreme Court of California: "No mode of ascertaining the state of feelings of the witness exists, except that disclosed by the declarations or the acts of the witness sought to be impeached by these declarations. The same principle, which assures to him the privilege of explanation when contradictory declarations are offered, applies to assure him the *right of explanation* when declarations of hostility are sought to be introduced. * * * We can see no distinction between admitting declarations of hostility of the witness, by the way of impairing the force of his testimony, and admitting contradictory statements for the same purpose, so far as this rule is concerned; for in either case, an opportunity should be given the witness to explain what he said."²⁵

§ 500. Rule where the Contradictory Declaration is in Writing.—"If," said Mr. Chief Justice Waite, "the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible, and a cross-examination for the purpose of *laying a foundation* for its use as impeachment, would not, except under special circumstances, be allowed, until the paper was produced and shown to the witness while under examination. Circumstances may arise, however, which will excuse its production. All the law requires is, that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can, and desires to do so. Whether this has been done is for the court to determine before impeaching evidence is admitted."²⁶

pensed with where the contradiction is sought as to statements "pertinent and material to" the cause of action directly. In Oregon it is said the requirement is restricted to utterances, not conduct. See *First Nat. Bank v. Com. U. etc. Co.*, 33 Ore. 43, 52 Pac. 1050.

²⁴ *Scott v. St.*, 64 Ind. 400; *Sager v. St.*, 11 Tex. App. 110; ante, § 450; *St. v. Darling*, 202 Mo. 150, 100 S. W. 631; *Morris v. St.*, 146 Ala. 66, 41 South. 274.

²⁵ *Baker v. Joseph*, 16 Cal. 173, 178, quoted and affirmed in *St. v. Stewart*, 11 Ore. 52. See *Davis v. Franke*, 33 Gratt. (Va.) 425; 1 Whart. Ev. § 566.

²⁶ *The Charles Morgan*, 115 U. S. 69, 77. See also *Morrison v. Myers*, 11 Ia. 538; *Samuels v. Griffith*, 13 Iowa, 103; *Stephens v. People*, 19 N. Y. 549; *Honstine v. O'Donnell*, 5 Hun (N. Y.), 472. It has been thought doubtful whether the cross-examining party may rightfully ask

§ 501. [Continued.] **Manner of Interrogating the Witness as to such Writing.**—When the depositions of a witness, on the preliminary examination of the accused, are taken down in writing, read over to the witness, assented to by him as correct, and by him signed,—then, upon plain principles, where the witness is asked whether he made the statement contained in the deposition, and answers in the negative, the deposition is admissible in evidence for the purpose of impeachment.²⁷ It has been held not proper to cross-examine the witness, by first reading what purports to be his previous deposition, and then asking him whether he had so testified. The correct rule is said to be, *first* to prove the deposition to be his, and *then* to read it as evidence, and to cross-examine the witness as to any supposed discrepancies between his testimony in court and the deposition.²⁸ An obvious way of proving the deposition to be that of the witness would be to put it into his hands and ask him whether it was his deposition. But, according to one view, it is not necessary to do this; all that is required is to prove that he is the witness who was sworn and examined by the commissioner taking the deposition and whose answer the commissioner purports to give, without submitting the deposition to him to be read, before he is asked by counsel whether he has not made certain answers therein contained, or before proving that the answers were read over to him before he signed the deposition.²⁹

§ 502. **Particularity in laying the Foundation.**—The question propounded to a witness on cross-examination, for the purpose of laying ground to impeach him by proof of contradictory statements out of court, must clearly state the *time when*, the *place where* and

the witness as to the contents of his *former deposition*, for the purpose of laying a foundation for his impeachment, the deposition itself being presumptively the best evidence of the fact. *St. v. Tickel*, 13 Nev. 502, 508. But there should be no doubt about it. See *The Queen's Case*, 2 Brod. & B. 287; *Newcomb v. Griswold*, 24 N. Y. 298; *Lightfoot v. People*, 16 Mich. 512; *Gaffney v. People*, 50 N. Y. 416.

²⁷ *St. v. Tickel*, 13 Nev. 502, 508.

²⁸ *Cropsey v. Averill*, 8 Neb. 151, 157. In Kentucky a method ap-

proved was for witness to identify the writing as his, then he is cross-examined as to its contents and it is then read to the jury. See *Stinson v. Com.* 29 Ky. Law Rep. 733, 96 S. W. 463. *Semble*, *Lanigan v. Neeley*, 4 Cal. App. 760, 89 Pac. 441.

²⁹ *Ecker v. McAlister*, 45 Md. 291. Where witness repudiates or denies the writing, it cannot then be put into the case, nor can any examination into its contents be had. *Villeneuve v. R. Co.*, 73 N. H. 250, 60 Atl. 748.

the *person to whom* the statements were made.³⁰ General questions whether he has ever said this or that, whether he has always told the same story, and the like, are not competent.³¹ Thus, the question whether a witness has not recently made certain specified statements "to different parties in talking of the matter," is incompetent because not sufficiently definite.³² So, a witness for the State in a criminal trial was asked, on cross-examination: "Have you not said yourself, that you thought the defendant half crazy, and did not know what he was doing at the time?" It was held that there was no error in ruling out this question upon objection.³³ But it is not necessary to put to the witness the *precise question* which it is intended to put to the witness by whom he is to be impeached; the *form* of the question is in the *discretion* of the court.³⁴

§ 503. Contradictory Testimony given on a former Occasion.—

A witness may be impeached by showing that he *testified differently at a former trial*.³⁵ But a witness cannot be impeached by showing that certain circumstances, to which he has testified on the present trial, were *omitted* by him, when testifying concerning the same

³⁰ Hill v. Gust, 45 Ind. 45, 51; Da-Lee v. Blackburn, 11 Kan. 190; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; Roller v. Kling, 150 Ind. 159, 49 N. E. 948; People v. Considine, 105 Mich. 149, 63 N. W. 196; Krup v. Corley, 95 Mo. App. 64, 69 S. W. 609; St. v. Hughes, 8 S. D. 338, 66 N. W. 1076. Where the time was fixed in reference to a conversation as "that morning" and there were two conversations between witness and another on "that morning" about the matter, there was an insufficient laying of the predicate. Laughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854. If witness answers he did testify, etc., strict particularity is obviated. Coffey v. R. Co., 79 Neb. 286, 112 N. W. 589.

³¹ Henderson v. St., 1 Tex. App. 432; Treadway v. St., 1 Tex. App. 668.

³² Standard Oil Co. v. Van Etten, 107 U. S. 325.

³³ St. v. Kinley, 43 Iowa, 294.

³⁴ Sloan v. N. Y. C. R. Co., 45 N. Y. 125; Hotchkiss v. Germania Fire Ins. Co., 5 Hun (N. Y.), 90, 94; Southern R. Co. v. Williams, 113 Ala. 620, 21 South. 328; Brown v. State, 46 Fla. 159, 35 South. 82; St. v. Bartmess, 33 Or. 110, 54 Pac. 167; Gordon v. Funkhouser, 100 Va. 675, 42 S. E. 677; Miller v. St., 106 Wis. 156, 81 N. W. 1020. Rule not iron-clad so as to be reduced to a "petty technicality." St. v. Crook, 133 N. C. 672, 45 S. E. 564. It may not be necessary to cover fully the previous question. Union Square Nat. Bank v. Simmons (N. J. Eq.), 42 Atl. 489 (not reported in state reports). But question must be within the predicate as laid. Williams v. St., 147 Ala. 10, 41 South. 992.

³⁵ St. v. McDonald, 65 Me. 466; Hampton v. St., 45 Tex. 154

occurrence on a former trial of the action, unless at the former trial his attention was particularly called to such circumstances.³⁶ Notwithstanding the policy which the law enforces, in some of the States, by statutes, the secrecy of proceedings before *grand juries*, it has been held competent to ask witnesses on cross-examination for the purpose of impeaching him by contradiction, whether he did not make contradictory statements before the grand jury.³⁷ But it is held in another jurisdiction that the *minutes* of the witness' testimony before the *grand jury*, or the substance of his testimony taken before an examining magistrate, are in no proper sense the *writing* or the *act of the witness*, and consequently that such writings are not admissible in evidence, for the purpose of impeaching the witness by contradicting him, even after a foundation has been laid by his cross-examination.³⁸ It has been ruled not competent to ask

³⁶ Huebner v. Roosevelt, 7 Daly (N. Y.), 111; Com. v. Hawkins, 3 Gray (Mass.), 463. In South Carolina it has been held within discretion for this to be done in cross-examination of another witness on the same side. See Newell v. Taylor, 74 S. C. 8, 54 S. E. 212.

³⁷ Bressler v. People (Ill.), 8 Crim. Law Mag. 466, 117 Ill. 422; Burdik v. Hunt, 43 Ind. 382, 389. The court say. "It has been more than once decided by this court that the oath of grand jurors to keep their proceedings secret, does not prevent the public or an individual, from proving by one of the jurors, what passed before the grand jury." Burnham v. Hatfield, 5 Blackf. (Ind.) 21; Shattuck v. St., 11 Ind. 473. The court also hold that the statute of that State, prescribing, as a part of the grand juror's oath, "that you will not disclose any evidence given or proceedings had before the grand jury" (2 Gav. & Hord. Ind. Stat. 386, form 56) was not intended to change the previously existing rule on this subject. One of the grand jurors may be called to prove the contradictory

statement. Cramer v. Barmon, 126 Mo. App. 54, 103 S. W. 1086.

³⁸ St. v. Hayden, 45 Iowa, 11, 13. in so holding, Mr. Justice Rothrock, in giving the opinion of the court, said: "The witness is in no way connected with the act of taking these minutes of his testimony; they are not required to be read over to him nor to be signed by him. Unlike a deposition or affidavit, they do not purport to give statements of fact in full, but are what the law requires,—'mere minutes.' They are often taken down by persons wholly inexperienced in reducing the language of others to writing. A long experience upon the District Bench has enabled the writer hereof to observe that the evidence taken before grand juries is often of the most indefinite and uncertain character, and if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses, and tend to defeat a proper administration of justice." In St. v. Hull, 26 Iowa, 292, and St. v. Collins, 32 Iowa, 36, the question above decided had been left undetermined. In St. v. Ostran-

a witness as to what he had sworn to on a former occasion, with a view to impeach him, where his testimony on a former occasion was *not admissible* in evidence.³⁹ This holding was erroneously supposed to fall within the rule that a witness cannot be examined upon *collateral matters* with a view to his impeachment.⁴⁰

§ 504. **Former Testimony, how Proved.**—Where the former testimony is in the form of a deposition, subscribed and sworn to by the witness, that is undoubtedly the best evidence.⁴¹ On the trial of an indictment for murder, the *deposition* of a witness, given before the coroner's jury, and certified and returned by the coroner to the trial court, as required by statute, is admissible in evidence, for the purpose of contradicting the statement of a witness, made under oath, on the trial of the person accused of having murdered the deceased.⁴² The testimony of a witness at a former trial may be also proved by any one who heard and recollects it. The fact that there was a legally appointed *stenographer* present at the former trial, who took *notes* of the testimony, and who could give better evidence of it than a witness who heard it could from his recollection, does not exclude the testimony of such other witness. There is no rule of law which makes a stenographer the only competent witness in such a case, and the rule which requires the production of the best evidence is not applicable. Walton, J., said: "Nothing more is intended by that rule than that evidence which is merely *substitutionary* in its nature shall not be received, so long as the original evidence can be had. It does not allow secondary evidence to be substituted for that which is primary. It will not permit the contents of a deed, or other written instrument, to be proved by parol, when the instrument can be produced. It has nothing to do with the *choice of witnesses*. It never excludes a witness upon the ground that another is more credible or reliable."⁴³ It is not error to refuse to allow a transcribed *phonographic report* of the testimony of a witness, given on a former trial, to be read, for the pur-

der, 18 Iowa, 435, it is held that the minutes taken before the grand jury are not admissible as *independent* evidence. Aliter, as held in Iowa, where it was sought to impeach defendant by minute of his testimony before the grand jury. *St. v. Hoffman*, 134 Iowa, 587, 112 N. W. 103.

³⁹ *Mitchum v. St.*, 11 Ga. 615, 616.

⁴⁰ *Ante*, § 469.

⁴¹ Compare *ante*, § 486.

⁴² *People v. Devine*, 44 Cal. 452. 459; *Rex v. Oldroyd*, 1 Russ. & Ry. C. C. 88; *Stephens v. People*, 19 N. Y. 549. Compare *Com. v. Hawkins*, 3 Gray (Mass.), 463; *Falkner v. St.*, 151 Ala. 77, 44 South. 409.

⁴³ *St. v. McDonald*, 65 Me. 466.

pose of contradicting him, unless the legislature has declared that such report shall be evidence. The reason is that such stenographic reports are not seen by the witness, and that they may be fair and truthful reports of the testimony of the witness, and may not. They are merely in the nature of *private memoranda*, taken for the convenience of the parties, and are in no sense a *deposition*, unless made such by statute.⁴⁴ But the rule is different, where the testimony has been taken down by a *commissioner* and duly certified by him, although not read over by the witness before signing.⁴⁵

§ 505. **Proving the Contradictory Statements in other Cases.**—In a case in Connecticut it is said by Pardee, J., in giving the opinion of the court: "The party offering proof concerning these variant statements, is not only permitted, but is bound to give *so much of the conversation*, in connection with which they are said to have been made, as will enable the triers to know both their form and meaning."⁴⁶ The *deposition* of the person with whom the alleged conversation took place is admissible to impeach the witness, notwithstanding it was taken under a commission, at the execution of which the witness sought to be impeached was not examined.⁴⁷ It is said to be a matter of *discretion* with the trial court, whether testimony contradicting the statement which the plaintiff's witness has made on cross-examination, will be brought in *before* the plaintiff rests, or called later, *after* the *plaintiff has rested*.⁴⁸

⁴⁴ Phares v. Barber, 61 Ill. 272, 276. So as to stenographic report. Prewitt v. Telegraph etc. Co. 46 Tex. Civ. App. 123, 101 S. W. 812; St. v. Martin, 47 Ore. 282, 83 Pac. 849. But if stenographer testifies to accuracy of his notes he may read from them. Casey v. St., 50 Tex. Cr. R. 392, 97 S. W. 496.

⁴⁵ Ecker v. McAllister, 45 Md. 291. See also, as to answers in supplementary proceedings on judgment, Fox v. Erbe, 184 N. Y. 542, 76 N. E. 1095.

⁴⁶ Beardsley v. Wildman, 41 Conn. 515.

⁴⁷ Pittsburg etc. R. Co. v. Andrews, 39 Md. 329, 354. Where in an action, for pollution of a water

course, witness for defendant testified water had not been poisoned, and he had testified in a former suit, in which he was one of the parties plaintiff, to enjoin the continuance of the pollution, the petition alleging the poisoning of the water course, was held competent impeaching evidence. See Texas etc. R. Co. v. Moers (Tex. Civ. App.), 97 S. W. 1064 (not reported in state reports).

⁴⁸ Wilder v. Peabody, 21 Hun (N. Y.), 376, 378. In Massachusetts held proper to put in contradictory writing during cross-examination. Pequette v. Ins. Co., 193 Mass. 215, 79 N. E. 250.

§ 506. **Rule where the Witness admits such Statements.**—Where the witness admits the statement which he is alleged to have made out of court, no other proof of his having made it is allowable.⁴⁹

§ 507. **What if Witness says he does not Remember.**—It is competent to impeach a witness, in a criminal case, by proof of contradictory statements, made by him on a previous examination touching the same matter, although, when cross-examined as to such statements for the purpose of laying a predicate for his impeachment, he answers that he “does not remember” whether he made the contradictory statements or not.⁵⁰ A witness cannot, by answering that he has *no recollection* of having made the former statement imputed to him, defeat the right of the impeaching party to prove

⁴⁹ *Lightfoot v. People*, 16 Mich. 507, 512; *St. v. Tickel*, 13 Nev. 502, 508; *Skeen v. St.*, 51 Tex. Cr. R. 39, 100 S. W. 770; *Raines v. St.*, 147 Ala. 961, 40 South. 932; *Swift v. Madden*, 165 Ill. 41, 45 N. E. 979; *St. v. Goodbier*, 48 La. Ann. 770, 19 South. 755. And so generally is the implication from statutes on this subject. But it has been held, that the cross-examiner ought not to be deprived of his preference in bringing this out with more clearness and emphasis. See *Singleton v. St.*, 39 Fla. 520, 22 South. 876; *Fremont B. & E. Co. v. Peters*, 45 Neb. 356, 63 N. W. 791.

⁵⁰ *Payne v. St.*, 60 Ala. 80, 86. It seems that the cases upon this point have not been uniform. It seems from statements made by Phillips in his work on evidence (2 Phil. Ev. (5th Am. ed.) 960), that on one occasion Chief Justice Tindal said that he had “never heard such evidence admitted in contradiction except where the witness had expressly denied the statement,” and rejected the evidence, and that Lord Abinger, C. B., had expressed a similar opinion. But

Baron Parke, in a case before him, held that contradictory statements of the witness could be introduced to impeach his evidence, although, in order to lay a foundation for them and to enable the witness to explain them (and some believe for that purpose only), “the witness must be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he had said it, or some other circumstance sufficient to designate the particular occasion. If the witness * * * admits the conversation imputed to him, there is no necessity to give further evidence of it; but, if he says he does not recollect, that is not an admission and you may give in evidence on the other side to prove that the witness did say what was imputed, always supposing the statements to be relevant to the matter in issue.” In Alabama Mr. Justice Manning said: “We agree with Mr. Phillips that the ruling of Baron Parke is the most sound and fittest to be followed. If the rule were otherwise, it might happen that, under the pretense of *not re-*

that he did make such statement.⁵¹ For like reasons, where the witness *neither admits nor denies*, on his cross-examination, that he has made a certain declaration, or given certain testimony, contrary to that which he has given on the witness stand, the adverse party may, by subsequent testimony, prove the fact.⁵²

§ 508. Answer categorically and explain on Re-examination.—Where, on cross-examination, for the purpose of rebuttal and discrediting a witness, he is asked if he did not give certain different testimony on a former examination, he must answer categorically. If he wishes to explain what he did say, or to explain any other matter touching his former testimony, he may be allowed to do so on re-direct examination.⁵³

§ 509. Impeachment of Married Woman by Evidence of Conspiracy by Husband.—It has been held that, where a married woman testifies as a witness for the prosecution in a criminal case, the defendant cannot, for the purpose of affecting her credibility, introduce testimony tending to prove a conspiracy on the part of her hus-

membering, a witness, who has made a false statement, and knows it to be false, would escape contradiction and exposure." *Payne v. St.*, 60 Ala. 80, 89. See also *Holbrook v. Holbrook*, 30 Vt. 433; *Campos v. St.*, 50 Tex. Cr. R. 289, 97 S. W. 100; *Billings v. St.*, 52 Ark. 303, 12 S. W. 574; *Pringle v. Miller*, 111 Mich. 663, 70 N. W. 345. So if his answer in other respects lacks indefiniteness or is not positive. *Sheldon v. Bigelow*, 118 Iowa, 586, 92 N. W. 701. Or where he refuses to answer. *St. v. Haworth*, 20 Utah, 398, 68 Pac. 155. It has been held that where the question was asked and on objection the answer was forbidden, it was to be considered, that no foundation was laid. *People v. Glaze*, 139 Cal. 154, 72 Pac. 965. If the appellate court deemed the exclusion of the answer error, it would also seem, that, if the trial judge repented of his error, he could not cure it, when if the wit-

ness had either evaded, or was unable to recollect or refused, that would not have been material, as the contradictory matter would have gone in. A more just conclusion would seem to make the objecting party responsible for his objection by allowing the proof.

⁵¹ *Ray v. Bell*, 24 Ill. 444, 451; *Nute v. Nute*, 41 N. H. 60.

⁵² *Bressler v. People* 117 Ill. 422, 8 Crim. Law Mag. 466.

⁵³ *Bressler v. People*, supra. See also *Hirsch & Sons etc. Co. v. Coleman*, 227 Ill. 149, 81 N. E. 21. And the question must be framed so as to call for a categorical answer. *St. L. etc. R. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152. If the witness answers no, he cannot be asked what he did say, until at a later stage of the case, when the contradictory statement has been put in evidence. *Cathcart v. Webb*, 144 Ala. 559, 42 South. 25.

band to obtain his property by falsely prosecuting him. The court, speaking through McKinstry, J., said: "There is nothing in the relation of husband and wife from which it can be inferred that the latter is a party to an offense committed by the former, or which directly tends to prove her a party. Proof of the relationship alone would not make a case to go to the jury against a wife, however strong the case against the husband. The offer of defendant was properly rejected, there being no statement therein of the existence of such evidence of complicity on the part of the witness in the alleged conspiracy, as would have justified a court, if the witness had been on trial for the crime, in submitting the question of guilt to the jury."⁵⁴ The conclusion of the court is more than doubtful. The question is entirely different from the question which would be presented if the married woman were thus on trial for a conspiracy. She would be surrounded with a presumption of innocence, and it would, on the plainest principles, be necessary to make a case against her by proof, not merely by such proof as might raise a remote inference as to her complicity, but by proof overthrowing the presumption of innocence beyond a reasonable doubt. But where a man is prosecuted for a crime—in the particular case, the crime of rape,—and a married woman appears as a witness against him, the fact that her husband has entered into a conspiracy to obtain his property by the coercion of a criminal prosecution, may well be considered as affecting the credibility of the wife; since wives are known to be in constant association with their husbands and under their influence and coercion. Every intelligent juror would give weight to such evidence.

§ 510. Recalling Opponent's Witness to put Impeaching Questions.—Where the defendant on a criminal trial recalled a witness and put to him questions for the purpose of impeaching him, it was held error to exclude the questions on the ground that, by recalling the witness, the defendant had made him his own witness.⁵⁵ On this subject it is said by Prof. Greenleaf: "Whether, when a party is once entitled to cross-examine a witness, this right continues through all the subsequent stages of the cause, so that if the party

⁵⁴ *People v. Parton*, 49 Cal. 632, 637. The wife of an accused may be impeached by contradictory statement to a third person as to his

guilt. *St. v. Sanders*, 75 S. C. 409, 56 S. E. 35.

⁵⁵ *St. v. Jones*, 64 Mo. 391, 396; *Guffy Petroleum Co. v. Hamill*, 48 Tex. Civ. App. 555, 99 S. W. 458.

should afterwards recall the same witness, to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been held. Upon the general ground on which this course of examination is permitted at all, namely, that every witness is supposed to be inclined most favorably towards the party calling him, there would seem to be no impropriety in treating him, throughout the trial, as the witness of the party who first caused him to be summoned and sworn.”⁵⁶

§ 511. **Impeachment of One's Own Witness.**—The general rule on this subject is, that a party cannot impeach a witness whom he has called himself, either by proving that his character for veracity is bad, or by proving that he has made declarations out of court contradictory to those made by him on the witness stand;⁵⁷ but it is always competent, for the purpose of affecting the credibility of a witness, to show that he is more favorable to the opposite party than to the party calling him.⁵⁸ Some of the cases assert the hard ground that a party cannot be allowed to discredit a witness called by him, *in any degree*, even when the witness has been also called by the *opposite party*, and the discrediting testimony relates solely to facts drawn out by him.⁵⁹ The *reason* of the rule is, that the party has given credit to the witness by presenting him to the court, and that he ought not to have the privilege of accepting the testimony if it be for him, and rejecting it if it be against him.⁶⁰ Thus, a party calling a witness cannot show, for the purpose of discrediting him, that he has conspired to extort money from

⁵⁶ 1 Greenl. Ev., § 447.

⁵⁷ *People v. Safford*, 5 Denio (N. Y.) 112; *Thompson v. Blanchard*, 4 N. Y. 303, 311; *Coulter v. American etc. Co.*, 56 N. Y. 585, 589; *Sisson v. Conger*, 1 *Thomp. & C.* (N. Y.) 564, 568; *Chicago, etc. R. Co. v. Gregory*, 221 Ill. 591, 77 N. E. 1112; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310 (statutory). The principle recognized by the federal court is that his general veracity cannot be impugned. *Choctaw etc. R. Co. v. Newton*, 140 Fed. 225.

⁵⁸ *Jones v. People*, 2 Colo. 351,

358; *Batdorf v. Farmers' Bank*, 61 Pa. St. 179; *Swett v. Shumway*, 102 Mass. 365, 369; *Geary v. People*, 22 Mich. 221.

⁵⁹ *Com. v. Hudson*, 11 Gray (Mass.), 64; *Craig v. Grant*, 6 Mich. 447; *Johnston v. Marriage*, 74 Kan. 208, 86 Pac. 461; *Richards v. St.*, 82 Wis. 172, 51 N. W. 652; *Smith v. Assur. Co.*, 65 Fed. 765, 13 C. C. A. 284.

⁶⁰ 1 Greenl. Ev., § 442; *Coulter v. American etc. Co.*, 56 N. Y. 585, 589.

⁶¹ *Sisson v. Conger*, 1 *Thomp. & C.* (N. Y.) 564, 568.

the parties in interest on the side in behalf of which he has been called.⁶¹

§ 512. **Exception where the Party is Surprised or Entrapped by the Witness.**—An exception to this rule has been admitted, where the party calling the witness has been surprised by the testimony of the witness on the stand,—as where the witness, after, taking the stand, testifies differently from the statements which he had made before the trial, concerning the facts, to the party calling him as a witness. In such a case, on grounds of obvious justice, the party is not concluded by the treacherous conduct of his witness, but is allowed to show *contrary declarations* made by the witness.⁶² The party may contradict his own witness by showing that he has made, at other times, *statements inconsistent with his testimony*; but he cannot do this without first calling his attention to the circumstances and occasion of the supposed statements; they can under no circumstances be used as substantive evidence to support the party's case.⁶³ In Alabama a party may ask his own witness whether he has not, on a former occasion, made statements inconsistent with his testimony on the trial.⁶⁴ But "it is not," said McCay, J., in Georgia, "sufficient that he shall have made contradic-

⁶² 1 Greenl. Ev. § 444, note 1; Melhuish v. Collier, 19 L. J. (Q. B.) 493; People v. Jacobs, 49 Cal. 384; distinguishing Com. v. Welsh, 4 Gray (Mass.), 535; St. v. Waldrop, 73 S. C. 60, 52 S. E. 793; St. v. Sederstrom, 99 Minn. 234, 109 N. W. 113; Clancy v. Transit Co., 192 Mo. 615, 91 S. W. 509; St. Clair v. U. S., 154 U. S. 134. The court is to judge in its discretion as to the making out of the predicate of surprise. Beier v. Transit Co., 197 Mo. 215, 94 S. W. 876; Quinn v. St., 51 Tex. Cr. R. 155, 101 S. W. 248. Must first endeavor by calling attention to contradictory statements to refresh recollection. George v. Triplett, 5 N. D. 50, 63 N. W. 891. Carpenter's Appeal, 74 Conn. 431, 51 Atl. 126; Hurley v. St., 46 Ohio St. 320, 21 N. E. 645.

⁶³ Newell v. Homer, 120 Mass. 277,

283; Thiele v. Newman, 116 Cal. 571, 48 Pac. 713; Dukes v. Davis, 30 Ky. Law Rep. 1348, 101 S. W. 390; King v. Phoenix Ins. Co., 101 Mo. App. 163, 76 S. W. 55; Kwong Lee Wai v. Ching Sai, 11 Hawaii, 444. Prosecuting officer should not propound questions in reference to prior inconsistent statements, unless he is prepared to prove them. St. v. Fowler, 131 Idaho, 317, 89 Pac. 757. See also Consol. Coal Co. v. Seniger, 177 Ill. 370, 53 N. E. 733; Statute applied, the court in its discretion to determine question of hostility. Dixon v. St., 86 Ga. 754, 13 S. E. 87; (Semble). Hickory v. U. S., 151 U. S. 303; St. v. Slack, 69 Vt. 486, 38 Atl. 311; Gordon v. Funkhouser, 100 Va. 675, 42 S. E. 877. (Semble).

⁶⁴ Campbell v. St., 23 Ala. 44, 76; Hemingway v. Garth, 51 Ala. 530.

tory statements; such statements must have *deceived* and led the complaining party to introduce him, and thus unwittingly to have been damaged by statements different from what he expected. Under such circumstances, the law permits a party to violate that salutary rule which assumes that one who brings a witness before a court has at least confidence in his truthfulness.”⁶⁵ The strict rule, that a party who brings a witness into court to testify, even as to a single point, vouches for his credibility, and cannot thereafter discredit him, even though he is called by the other party to testify as to other matters, has in many cases worked such injustice that it has been broken into in some jurisdictions by statute.⁶⁶ In one jurisdiction, under a statute,⁶⁷ even direct impeachment is permitted under such circumstances.⁶⁸

§ 513. **Exception in the Case of a Hostile Witness.**—In Colorado, an exception to the rule has been admitted, so as to allow the party calling the witness to prove that he has previously made *statements inconsistent* with his testimony on the witness stand, *delivered at the instance of the opposite party*. In so holding, Mr. Chief Justice Hallett said: “When applied to testimony called out by the party who seeks to discredit the witness, the reason is of great force; but it has little application to testimony drawn from the same witness by the opposite party. By bringing a witness into court, the party vouches for his general character for truth, and for the truth of his statements in regard to the particular matter of which he inquires. Further than this, neither the reason of the rule, nor the policy of the law can be safely extended. Even as to the matter as to which the witness is interrogated, if he declares against the party calling him, it is still open to proof by the testimony of other witnesses. It is obvious that a party may be willing to accept the testimony of a witness on one point, while he would be utterly unwilling to accept his testimony upon another point; and it is equally plain that a witness may testify truly as to one fact, and untruly as to another. If, by calling a witness to prove a single fact, a party shall be held to affirm his truthfulness absolutely and in all things, the rule would appear to be a hard one. It is often necessary for a party to call his adversary, or a witness who is hostile to him, and who is a principal witness for his adversary, to prove a single

⁶⁵ *McDaniel v. St.*, 53 Ga. 253.

⁶⁶ *Mass. Stat.* 1869, ch. 425.

⁶⁷ *Georgia Code*, 1873, § 3869. See *Ga. Code* 1911, Vol. II, § 1050.

⁶⁸ *Skipper v. St.*, 59 Ga. 66.

fact. And if in such case the witness is subsequently called by the opposite party, justice requires that the party first calling him should be permitted to show the interest or hostility of the witness, not for the purpose of showing that the latter is unworthy of belief generally, but that he is more favorable to one party than to the other.”⁶⁹

§ 514. Assailing Credit of Witness called by both Parties.—

When, therefore, a witness had been called in a criminal trial by both parties, it was held competent for the government to ask him whether, in relation to the matters as to which he had testified on behalf of the defendant, he had not given a different account at another time and place. The evidence was regarded as admissible, because it had a tendency to prove that the witness was more favorable to the prisoner than to the government.⁷⁰

§ 515. Contradicting the Statements of One's Own Witness.—

The rule does not extend so far that the party is *estopped* by the statements of his witness. He is not *conclusively* bound by them. While he may not impeach the character of his witness for veracity, or interrogate him as to contradictory statements previously made by him, or interrogate him with a view to affect his credibility, merely, or introduce other evidence for that purpose,—he may, nevertheless, *contradict* him as to a fact material in the case, although the effect of such contradictory evidence may be to discredit him, but he cannot introduce such evidence when it is only material in so far as it bears upon his credibility. In other words, *contradiction* is allowed, though *impeachment*, direct or indirect, is not.⁷¹

⁶⁹ Jones v. People, 2 Colo. 351, 357.

⁷⁰ Jones v. People, 2 Colo. 351, 355.

⁷¹ Skipper v. St., 59 Ga. 63, 66; Mechanics' Bank v. Rawls, 7 Ga. 191, 198, 199; Burkhalter v. Edwards, 16 Ga. 593; 1 Greenl. Ev., §§ 442, 443; Coulter v. American etc. Co., 56 N. Y. 585, 589; Sisson v. Conger, 1 Thomp. & C. (N. Y.) 564, 568;

Chicago etc. R. Co. v. Gregory, 221 Ill. 59, 77 N. E. 1112; Wadsworth v. Dunnam, 117 Ala. 661, 23 South. 669; U. S. Brewing Co. v. Ruddy, 203 Ill. 306, 67 N. E. 799; Schmidt v. Dunham, 50 Minn. 96, 52 N. W. 277; DeMeli v. DeMeli, 120 N. Y. 485, 24 N. E. 996; Hurley v. St., 46 Ohio St. 320; St. v. Mimms, 36 Or. 315, 61 Pac. 888.

CHAPTER XX.

OF DIRECT IMPEACHMENT.

SECTION

- 520. Preliminary.
- 521. Error to Exclude Competent Impeaching Testimony.
- 522. Impeachment by Evidence of Bad Character.
- 523. By Evidence of Bad Character for Veracity.
- 524. Specific Acts not Inquired into.
- 525. Character of Female Witness for Chastity.
- 526. Limitations as to Time and Place.
- 527. Extent of the Reputation.
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- 529. Mode of Examining the Impeaching Witness.
- 530. [Continued.] Of Cross-examination.
- 531. What Interrogatories after Foundation laid.
- 532. Whether Impeaching Witness would Believe the Impeached Witness on Oath.
- 533. Reason of the Rule which Admits this Question.
- 534. Reason of the Opposing Rule.
- 535. Impeaching by Proof of Conviction of a Felony or other Infamous Crime.
- 536. By Evidence that the Witness is of a Defective Mind or Memory.
- 537. Inadmissible Modes of Impeaching.

§ 520. **Preliminary.**—Having concluded the subject of indirect impeachment, that is, of impeachment by proof of contradictory declarations or statements, let us next consider the modes in which a witness may be subjected to what is termed direct impeachment. We find that this may be done in three ways: 1. By proof of bad character for veracity, or in some jurisdictions, of general bad character. 2. By proof that the witness has been convicted of a felony or other infamous crime. 3. By proof that the witness is of defective memory, or is otherwise mentally infirm, in such a sense as to disqualify him as a witness or impair his credibility. It is said in Illinois by Mr. Justice Craig, following a *dictum* of Starkie,¹ that the general rule as to the admissibility of evidence of the *moral character* and conduct of a person in society, confines such proof to three classes, namely: 1. To afford a presumption

that a particular party has, or has not been guilty of a criminal act. 2. To affect the damages in particular cases, where their amount depends upon the character and conduct of any individual. 3. To impeach and confirm the character of a witness.² With the last we have now to deal.

§ 521. Error to Exclude Competent Impeaching Testimony.—Where competent impeaching testimony is seasonably offered, it is *error* to exclude it, for which error a judgment will be reversed;³ though a *new trial* will not be granted merely because the unsuccessful party has discovered new or additional impeaching testimony.⁴

§ 522. Impeachment by Evidence of bad Character.—In some jurisdictions, for the purpose of impeaching a witness, it is competent to prove, by testimony of other witnesses, that his general character or reputation is bad, in the community where he resides or has recently resided.⁵ Where this doctrine prevails, the inquiry

² *Berdell v. Berdell*, 80 Ill. 604, 607.

³ *St. v. Thomas* (Ind.), 10 West. Rep. 808.

⁴ *Porter v. State*, 2 Ind. 435; *St. v. Clark*, 16 Ind. 97; *Jackson v. Sharpe*, 29 Ind. 167. Similarly it has been held proper to refuse a continuance for absence of an impeaching witness. *Powell v. St.*, 49 Tex. Cr. R. 473, 93 S. W. 544.

⁵ *St. v. Shields*, 13 Mo. 236; *Day v. St.*, 13 Mo. 422; *St. v. Hamilton*, 55 Mo. 420; *St. v. Breeden*, 58 Mo. 507; *St. v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506. Upon the question whether the inquiry extends in ordinary cases to the character of the witness for morality, see the opinion of Mr. Justice Clifford in *Tesse v. Huntingdon*, 23 How. (U. S.) 2. By statute in *Indiana*, "In all questions affecting the credibility of a witness, his general moral character may be given in evidence." Crim Code Ind., § 2112; *Morrison v. St.*, 76 Ind. 335. This

rule has been introduced in *Arkansas* by statute. *Gantt Ark. Stat.*, § 2524; *Majors v. St.*, 29 Ark. 112. In many of the states the rule is statutory. Thus in *Arkansas* the inquiry is as regards "his general reputation for truth or immorality." *Hollingsworth v. St.*, 53 Ark. 387, 14 S. W. 41. In *California* it is "general reputation for truth, honesty or integrity." See *People v. Johnson*, 106 Cal. 289, 39 Pac. 622. The *California* statute was re-enacted in *Idaho*. See *Rev. St.* 1887, § 5956, and in *Utah Rev. S.* 1898, § 3412. And in *Montana*, see *C. C. P.* 1895, §§ 3123, 3379. In *Florida* the inquiry is as to "general character." See *Rev. St.* 1892, § 1097, and under this statute, construction puts that state in the class restricting to veracity only. See *Mercer v. St.*, 40 Fla. 216, 24 South. 154. In *Georgia* the statute says "general bad character," *Code* 1895, § 5293. In *Illinois* "his general moral character may be given in evidence." *Rev.*

extends to the general moral character of the witness,⁶ and it is proper to interrogate the impeaching witness thus: "Do you know the defendant's general character in the neighborhood where he lives, for truth and veracity, honesty, chastity and morality?"⁷

§ 523. By Evidence of bad Character for Veracity.—In other jurisdictions the inquiry is confined to the character of the witness for veracity.⁸

§ 524. Specific Acts not Inquired into.—Under either rule, the evidence is confined to the *general* character of the witness, or to his *general* character for veracity. Particular acts cannot be gone

St. 1897, § 1894. In Indiana *Semble*, Rev. St. 1897, § 1894. In Iowa the statute says "general moral character," Code 1897, § 4614. See also *St. v. Seevers*, 108 Iowa, 738, 78 N. W. 705. In Kentucky statute permits "evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief." C. C. P. 1895, § 597. New Mexico statute permits "general evidence of bad moral character not restricted to his reputation for truth and veracity." Comp. L. 1897, § 3026. Oregon statute provides that it may be shown that "his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief," C. C. P. 1892, § 840. Of the states having no controlling statute the following support the above rule: *White v. St.*, 114 Ala. 10, 22 South. 111; *St. v. Guy*, 106 La. 8, 30 South. 268; *St. v. Pollard*, 174 Mo. 607, 74 S. W. 969; *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347; *St. v. Perkins*, 66 N. C. 127; *Merriman v. St.*, 3 Lea, 393.

⁶ *St. v. Breeden*, 58 Mo. 507.

⁷ *St. v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506. In *California* the statutory rule in civil cases is as follows: "A witness may be impeached

by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for *truth, honesty* or *integrity* is bad, but not by evidence of particular wrongful acts, except that it may be shown by the cross-examination of the witness, or the record of the judgment, that he has been convicted of a felony." Cal. Code Civ. Proc., § 2051.

⁸ *Fry v. Bank*, 11 Ill. 373; *Dimick v. Downs*, 82 Ill. 570, 573; *Rud sill v. Slingerland*, 18 Minn. 380. The states following the rule of veracity in reputation and having no governing statute thereon are Maryland, *Hoffman v. St.*, 93 Md. 388, 49 Atl. 658; Michigan, *Calkins v. R. Co.*, 119 Mich. 312, 78 N. W. 129; Mississippi, *Smith v. St.*, 58 Miss. 867; Minnesota, *Moreland v. Lawrence*, 23 Minn. 84; Nevada, *St. v. Ferguson*, 9 Nev. 106; New Hampshire, *St. v. Forschner*, 43 N. H. 89; New Jersey, *Atwood v. Impson*, 20 N. J. Eq. 150; Pennsylvania, *Com. v. Payne*, 205 Pa. 101, 54 Atl. 489; Vermont, *St. v. Fowmier*, 68 Vt. 262, 35 Atl. 178; West Virginia, *St. v. Grove*, 61 W. Va. 697, 57 N. E. 296; Texas, *Belt v. St.*, 47 Tex. Cr. R. 82, 78 S. W. 933.

into; since this would raise a multiplicity of issues which the party calling the witness cannot be expected to be prepared to meet, and which could serve no other purpose than to distract the attention of the jury from the main issue.⁹ Thus, it is not competent to impeach a witness by proving that he has *lied* on other occasions.¹⁰ But when *sustaining testimony* as to general reputation is given by a witness, it seems to be the rule that, on his cross-examination, with the view to lessen the effect of his testimony, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the particular facts,—the witness may be asked whether he has not *heard reports* which tend to contradict the purport and effect of his testimony.¹¹ A person who states that he has no knowledge of the general character of a witness, save only as connected with “some alleged frauds,” is not competent as an impeaching witness.¹²

⁹ *Douglas v. Taussey*, 2 Wend. (N. Y.) 352; *Com. v. Moore*, 3 Pick. (Mass.) 194; *Curtis v. Fay*, 37 Barb. (N. Y.) 69; *Rex v. Rudge*, 2 Peake N. P. Cas. 232; *Jackson v. Lewis*, 13 Johns. (N. Y.) 505; *Rex v. Hemp*, 5 Carr. & P. 468. See also *Harrington v. Lincoln*, 3 Gray (Mass.), 133. *Carpenter v. Blake*, 10 Hun (N. Y.), 358; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110; *Corning v. Corning*, 6 N. Y. 104; *Fox v. Com.* (Ky.), 1 S. W. 396; *Leverich v. Frank*, 6 Ore. 212; 1 Greenl. Ev., § 461; *Wehrkamp v. Willett*, 4 Abb. App. Dec. (N. Y.) 548; *Hensley v. Com.* 31 Ky. Law Rep. 386, 102 S. W. 268; *City of Greenville v. Wallis*, 77 S. C. 50, 57 S. E. 638; *Miller v. Ter.*, 149 Fed. 330, 77 C. C. A. 268; *Bringold v. Bringold*, 40 Wash. 121, 82 Pac. 179; *St. v. Sassaman*, 214 Mo. 695, 114 S. W. 590. Thus if specific acts are alleged against one incidentally connected with a case, e. g. the husband of female in prosecution for rape, such as that he has attempted to blackmail the defendant in respect of the matter charged, this does not put in issue

the husband's reputation for honesty and fair dealing, so as to make evidence thereof admissible in rebuttal. *Smith v. St.*, 51 Tex. Cr. R. 137, 100 S. W. 924.

¹⁰ *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Mount v. Com.*, 27 Ky. Law Rep. 788, 86 S. W. 707; *M. K. & T. R. Co. v. Adams*, 42 Tex. Civ. App. 274, 114 S. W. 453.

¹¹ *Carpenter v. Blake*, 10 Hun (N. Y.), 358; *Leonard v. Allen*, 11 Cush. (Mass.) 241; *Rex v. Martin*, 6 C. & P. 562; *Cook v. St.*, 46 Fla. 20, 35 South. 665. Its extent, however, will be so controlled as not to allow the substance of the inquiry to be forestalled illegitimately. *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

¹² *Sorrelle v. Craig*, 9 Ala. 535. But being unable to state who or how many had discussed the reputation, testified, showing a strong reliance on personal knowledge will not withdraw the impeaching evidence from the jury. *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362.

§ 525. **Character of Female Witness for Chastity.**—An exception to the rule which ignores evidence of immorality for the purpose of impeachment, is made in cases where men are indicted for sexual offenses against women. Thus, in cases of rape, or assault with intent to commit rape, the inquiry as to the reputation of the prosecutrix is not confined to veracity, but extends to her chastity.¹³ Yet the general holding of the courts is that evidence of sexual prostitution is not admissible to impeach a witness, or to affect his or her credit in any other class of cases,¹⁴ though there is some opinion to the contrary.¹⁵

¹³ *Pleasants v. St.*, 15 Ark. 652. But even in this, a particular act of unchastity cannot be stated. *St. v. Stimson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153. Also the evidence as to chastity should approach as closely as possible to the time of the trial. *St. v. Haupt*, 126 Iowa, 152, 101 N. W. 739. It was held in Michigan, in a bastardy case, that it could not refer to the time the child was begotten. *People v. Wilson*, 136 Mich. 298, 99 N. W. 6. Here seems a refinement of distinction, and it must rest in the fact, that in bastardy the unlawful intercourse is asserted while in other cases of sexual intercourse that is what is to be proved. Logically, however, it would seem that the Michigan court, which inquires as to veracity only, should exclude, as a specific trait, all evidence of general unchastity in a bastardy case as impeachment of credibility.

¹⁴ *Dimick v. Downs*, 82 Ill. 570, 573; *Bakeman v. Rose*, 18 Wend. (N. Y.) 148; *Spears v. Forrests*, 15 Vt. 435; *Com. v. Churchill*, 11 Metc. (Mass.) 538; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 363; *People v. Johnson*, 106 Cal. 289, 39 Pac. 622; *People v. O'Hare*, 124 Mich. 515, 83 N. W. 279; *In re Durant*, 80 Conn. 140, 67 Atl. 497. So as to other spe-

cific traits, e. g. honesty. *Calkins v. Ann Arbor R. Co.*, 119 Mich. 312, 78 N. W. 129.

¹⁵ It has been held that a witness testifying in an action for slander, for calling her a thief, could not be impeached by giving in evidence a letter written by her to another person containing language which would indicate that she was unchaste, and such a letter was properly excluded. This was ruled under a statute (Ore. Civ. Code, § 830) which recites that "a witness may be impeached by contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts." *Leverich v. Frank*, 6 Ore. 212. But the conclusion of the court was rested on the ground that the effect of introducing the letter would be to attempt to impeach the character of the witness by evidence of particular acts of immorality. In Missouri the rule as to specific traits being gone into is extended more greatly than in any other state, and the present state of decision shows, that not only is the unchastity of a female permitted to be shown as constituting bad character destructive of veracity, but of

§ 526. **Limitations as to Time and Place.**—The inquiry must in general be restricted to the community in which the witness *resides* or has *recently resided*.¹⁶ But this rule is not imperative; the inquiry may be extended to general reputation at a *former period* and in *another neighborhood*, if it be *not too remote* in point of time.¹⁷ The general effect of the decisions is that the inquiry should relate to a period of time *near* the time of the trial. Unless *some little latitude* is allowed, it has been well said that it would be impossible to impeach the most corrupt, or to sustain the most truthful witness.¹⁸ The obvious reason is that reputation is a thing of slow growth; it is not formed in a day, nor is it suddenly changed in a day. Accordingly, it has been said that it is competent for the parties to give evidence of the character of a witness within a *reasonable time* before the trial.¹⁹ Another court, relapsing into a poetical vein, has suggested that the former character of the witness is relevant only “as it blends with the continuous web of life and tinges its present texture.”²⁰ Again, it has been suggested that the period of time to which the inquiry may be extended is, to some extent, at least, in the *discretion* of the trial court.²¹ In

a male also. See *St. v. Pollard*, 174 Mo. 607, 74 S. W. 969; *York v. City of Everton*, 121 Mo. App. 640, 97 S. W. 604. Specific acts of unchastity are not, however, allowed to be shown. *Wright v. Kansas City*, 187 Mo. 678, 86 S. W. 452.

¹⁶ *Marion v. St.*, 20 Neb. 233, 29 N. W. 911; *Prater v. St.*, 107 Ala. 26, 18 South. 239.

¹⁷ *Brown v. Leuhrs*, 1 Bradw. (Ill.) 74; *Tesse v. Huntingdon*, 23 How. (U. S.) 14; *Holmes v. State*, 17 Ill. 453; *St. v. Lanier*, 79 N. C. 622; *Com. v. Billings*, 97 Mass. 407; *Rathbun v. Ross*, 46 Barb. (N. Y.) 127; *Sleeper v. Van Middlesworth*, 4 Denio (N. Y.), 431; 1 Greenl. Ev., §§ 141, 142. Compare *Willard v. Goodenough*, 30 Vt. 393; *Luther v. Skeen*, 8 Jones L. (N. C.), 356; *St. v. Speight*, 69 N. C. 72; *St. v. Parks*, 3 Ired. L. (N. C.) 296; *St. v. O’Neale*, 4 Ired. L. (N. C.) 88; *Stratton v. St.*, 45 Ind. 468; Nor-

wood & B. Co. v. Andrews, 71 Miss. 641, 16 South. 262; *Yarbrough v. St.*, 105 Ala. 45, 16 South. 758; *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843.

¹⁸ *Stratton v. St.*, 45 Ind. 468, 472; *St. v. Knight*, 118 Wis. 473, 95 N. W. 390; *Brown v. Perez*, 89 Tex. 282, 34 S. W. 725.

¹⁹ *Ibid.* 473. Compare *Aurora v. Cobb*, 21 Ind. 492, 510; *Lake Lighting Co. v. Lewis*, 29 Ind. App. 164, 64 N. E. 35. It is not confined “to the immediate present.” *St. v. Miller*, 156 Mo. 76, 56 S. W. 907.

²⁰ *Willard v. Goodenough*, 30 Vt. 393.

²¹ *Stratton v. St.*, 45 Ind. 468, 473; *St. v. Prins*, 117 Iowa, 505, 91 N. W. 758; *Coates v. Sulan*, 46 Kan. 341, 26 Pac. 720; *Struster v. St.*, 62 N. J. L. 521, 41 Atl. 701. It was held error not to go back two years to a place where witness resided several years. *People v. Mix*, 149 Mich. 260,

a case of bastardy, it was held incompetent to prove the character of the prosecutrix for chastity at a period prior to the begetting of the child.²² In another case the same court held that the inquiry could not be extended back to a period of *five years* before the time of the trial;²³ and where an attempt was made to impeach a witness by evidence of statements made out of court, in conflict with his testimony on the trial, and evidence had been given of the good character of the witness,—it was held not error to admit testimony that his character was also good *two years* before, in a different neighborhood.²⁴ Another court has ruled that evidence of bad reputation for veracity, *four years* previous to the trial, may be admitted to impeach a witness who has no fixed domicile, who has been out of the State over a year of this time, and whose residence at the place of such reputation was as long as at any other place. In such a case it is not improper to allow a larger range of inquiry than would be proper where there has been a more fixed domicile.²⁵ In another jurisdiction it has been held that evidence of the reputation of the witness for truth and veracity at a different place of residence, and at a period of time, *two years*,²⁶ and even *seven years*,²⁷ before the trial, is admissible for the purpose of impeaching him.²⁸ In an important case in Michigan it was laid down by Campbell, J., speaking for the court: "Where an impeached witness has

112 N. W. 907. And that refusal to go back four years was proper. *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277. In Illinois that period was held not a bar to the inquiry. *Kirkham v. People*, 170 Ill. 9, 48 N. E. 405. In Georgia under the facts eight years was thought not too long. *Watkins v. St.*, 82 Ga. 231, 8 S. E. 875. Passing back 22 months over an intermediately established residence was held allowable in Wisconsin. *St. v. Knight*, 118 Wis. 473, 95 N. W. 390.

²² *Walkers v. St.*, 6 Blackf. (Ind.) 1.

²³ *Rucker v. Beaty*, 3 Ind. 70. Compare *King v. Kearsey*, 2 Ind. 402. *Chance v. Indianapolis etc. R. Co.*, 32 Ind. 472.

²⁴ *Stratton v. St.*, 45 Ind. 468.

²⁵ *Keator v. People*, 32 Mich. 484.

Compare *Hamilton v. People*, 29 Mich. 173.

²⁶ *Lawson v. St.*, 32 Ark. 220.

²⁷ *Snow v. Grace*, 29 Ark. 131.

²⁸ In so holding it was reasoned by Williams, Sp. J.: "That the reputation a witness has for truth is a mere circumstance, which the rules of law allow to be considered by the jury, to aid them in determining the degree of credit to be given the witness, and is purely a question of fact. If so, does not reputation at some other time than that of testifying, and some other place than that of the then residence, equally tend to shed light upon the question of credit? The light may be dim and flickering on account of remoteness, but is it not still light? The remoteness of time and place are also circumstances and facts to

changed his domicile, there appears to be no objection to showing his reputation in *both places*, within a reasonable limit of time. But, as the only object is to know whether he is to be believed at the time when he testifies, a witness knowing his reputation *then*, should state that knowledge, although he may also be authorized, in addition, to show what his reputation had been *elsewhere before*.”²⁹

§ 527. **Extent of the Reputation.**—It is not competent to show what *two or three persons* only may say concerning the witness sought to be impeached, but the inquiry should extend to the *general estimation* in which he is held by his neighbors and acquaintances.³⁰ But a witness is competent to speak of the general character of another witness, without being able to say that he knows what a *majority of the neighbors* of such other witness have said about him or thought of him. The reason is, that “it may so happen that a man has a reputation, well established, either good or bad, and yet a majority of his neighbors may never have spoken upon the subject, or expressed their thoughts in any manner whatever.” Again, “there may not have been a majority who have expressed an opinion to the witness; nor may he be able to say with positive knowledge what the majority think; nor may he have heard any one else say what a majority said or thought; and yet he may himself be competent to swear what his general reputation is. A person’s position in the community may be so obscure that very few of his neighbors know anything of him. His general character may be very circumscribed. To hold that he could not prove his

which, ordinarily, under proper instructions, the jury will give due weight. If this sort of testimony is to be admitted at all, it would be difficult to draw the line and say when it—the evidence of reputation—ceases to be fact and becomes a question of law.” At the same time it is admitted that there are cases where the testimony would be so remote as to time that the court, in the exercise of its discretion, might exclude it.

²⁹ *Hamilton v. People*, 29 Mich. 173, 188. In Kentucky it was held that evidence of reputation at the

former place should be aken in connection with that at the latter. *Craft v. Barrow*, 28 Ky. Law Rep. 93, 88 S. W. 1099. In Iowa it was considered that a four years later residence should exclude all evidence of former reputation. *St. v. Potts*, 78 Iowa, 659, 43 N. W. 534.

³⁰ *Matthewson v. Burr*, 6 Neb. 312; *Vickers v. People*, 31 Colo. 491, 73 Pac. 845. The reputation must be general, the number of persons depending largely upon circumstances. *St. v. Turner*, 36 S. C. 534, 15 S. E. 602; *McQuiggan v. Ladd*, 79 Vt. 90, 64 Atl. 503.

general character, except by witnesses who could swear as to what the majority of his neighbors said and thought of him, would be to deprive him of the benefit of this species of testimony.”³¹ But the production of *one witness* only to prove the fact, would not usually be satisfactory, although the law does not fix any required number.³²

§ 528. **Reputation Defined.**—In a case in Iowa, several witnesses were introduced for the purpose of impeaching another witness. The court instructed the impeaching witnesses, before allowing them to testify, that a man’s reputation for truth and veracity is what the persons who deal and associate with him say about him. The Supreme Court did not approve this definition. Adams, J., said: “This definition, we think, is not broad enough. A man’s reputation for veracity is what is said of him in the community in which he lives. Those who deal and associate with him may say nothing about his veracity, while the remainder of the community may regard and speak of him as a notorious liar.”³³

§ 529. **Mode of Examining Impeaching Witnesses.**—It is necessary here, as in many other cases, to *lay a foundation* for the introduction of evidence of the reputation of the witness sought to be impeached, before such evidence can be introduced. Thus, it is necessary for the impeaching witness to show that he has lived in the same community with, or knows the reputation of the witness sought to be impeached, or of the party whose character is in question; and until this is shown, it is not proper to interrogate him on the subject.³⁴ It is competent to ask the impeaching witness what is the *general reputation* of the impeached witness for truth, instead of asking him what is the *general character* of such witness

³¹ Dave v. St., 22 Ala. 23, 38; Robinson v. St., 16 Fl. 835, 839; Pickens v. St., 61 Miss. 567. A numerously signed petition for office has been held incompetent as tending to show reputation. Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119.

³² Wafford v. St., 44 Tex. 439.

³³ Dance v. McBride, 43 Iowa, 624, 629. McSherry, J., said in Jackson v. Jackson, 82 Md. 17, 33 Atl. 317: “A reputation to be a provable rep-

utation at all must be a general reputation. It cannot be intermediate, that is partly good, and partly bad; for that would not be general, and there would be no general reputation either way. Of a general reputation and none other, the law allows evidence to be given.”

³⁴ People v. Rodrigo (Cal.), 8 Crim. Law Mag. 503; Taylor v. St., 121 Ga. 348, 49 S. E. 303; St. v. Rester, 116 La. 985, 41 South. 231.

for truth. "It is true," said Mr. Justice Strong, "that in many cases it has been said that the regular mode of cross-examining is to inquire whether the witness knows the general character of the person whom it is intended to impeach; but in all such cases the word 'character' is used as synonymous with 'reputation.' What is wanted is the *common opinion*, that in which there is general concurrence,—in other words, general reputation or character attributed. That is presumed to be indicative of actual character, and hence it is regarded as of importance when the credibility of a witness is in question."⁸⁵ It is not enough that the impeaching witness professes merely to state *what he has heard others say*; for these others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. *Ordinarily*, the witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries.⁸⁶ Where the impeaching witness was asked whether "he knew the general character of the defendant in his neighborhood, *from rumor*," and answered that he did, and that it was bad, it was held that the question should not have been allowed.⁸⁷

§ 530. [Continued.] **Cross-examining him.**—Where a witness had testified as to the reputation of another for veracity, it was held error to exclude, *on cross-examination*, the questions: "*What makes reputation?*" and "*What is reputation?*" The testimony seems to have been excluded under the idea that it called for a conclusion of law; but the court held that this could not be so, since, if reputation were a conclusion of law, the witness ought not to have been called to prove reputation at all. The court said: "The reputation of a party in his neighborhood is not a conclusion of law, it is a fact; but it is one about which many honest and well meaning witnesses have mistaken or imperfect conceptions. * * * It seems to us that, after the appellee's witness had testified in

⁸⁵ *Knobe v. Williamson*, 17 Wall. (U. S.) 586, 588; *Ross v. St.*, 139 Ala. 144, 36 South. 718.

⁸⁶ *Sorrelle v. Craig*, 9 Ala. 534, 539. Reaffirmed in *Hadjo v. Gooden*, 13 Ala. 718, 721.

⁸⁷ *Haley v. St.*, 63 Ala. 83. Where

witness bases his statement on his business dealings with another, he should not be allowed to testify as to general reputation for veracity. *Carp v. Ins. Co.*, 203 Mo. 295, 101 S. W. 78.

chief that he knew the general reputation of the appellee in his neighborhood, the appellant had the right, clearly and unquestionably, to cross-examine him *as to his means of knowledge*, and, to that end, to inquire of him what constituted reputation. In our opinion the court erred in sustaining the appellee's objection to the questions above set out, propounded by the appellant."³⁸

§ 531. **What Interrogatories after Foundation laid.**—If a witness testifies that he knows the reputation, or reputation for veracity, of the impeached witness in the neighborhood where he lives, this may be followed up with the question whether that reputation is good or bad; and if the witness answers that it is bad, by the question whether, from that reputation, the impeaching witness would believe him under oath.³⁹ The opposite party, then, upon cross-examination, will have the opportunity of ascertaining the extent of the information of the witness and the sources of his knowledge.⁴⁰ The following *form of question* is sanctioned by the authority of Lord Ellenborough: "Have you the means of knowing what the general character of the witness is; and from such knowledge of his general character, would you believe him on his oath?"⁴¹

§ 532. **Whether the Impeaching Witness would believe Impeached Witness on Oath.**—Contrary to the erroneous text of Greenleaf,⁴² the English,⁴³ and prevailing American rule is, that

³⁸ *Hutts v. Hutts*, 62 Ind. 215, 224.

³⁹ *Robinson v. St.*, 16 Fla. 835, 840. Compare *Crabtree v. Hagēnbaugh*, 25 Ill. 233; *Boon v. Weathered*, 23 Tex. 675; *Sorrelle v. Craig*, 9 Ala. 534; *Hadjo v. Gooden*, 13 Ala. 718; 721. See next section. *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320; *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347; *Mayes v. St.*, 33 Tex. Cr. R. 33, 24 S. W. 421; *People v. Corey*, — Cal. App. —, 97 Pac. 907. If the question is not based on personal knowledge of the witness, and, if so framed, the final inquiry on direct examination will be rejected on objection. *Benesch v. Wagner*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254; *St. v. Blackburn* (Iowa), 110 N. W. 275.

⁴⁰ *Robinson v. St.*, *supra*. It has been ruled that, where a witness, called to sustain an impeached witness, states, on his direct examination, that he has heard the character of the witness spoken against,—it is admissible for the party calling him to ask him to give the names of the parties referred to by him. *Bakeman v. Rose*, 18 Wend. (N. Y.) 146.

⁴¹ *Mawson v. Hartsink*, 4 Esp. 102; recommended by Senator Tracy in *Bakeman v. Rose*, 18 Wend. (N. Y.) 146, 151; and by Collier, C. J., in *Sorrelle v. Craig*, 9 Ala. 534, 539.

⁴² 1 Greenl. Ev. § 461.

⁴³ 1 Stark. Ev. 237 et seq. 2 Phil. Ev. (Edward's Edition) 955,

it is competent to ask the impeaching witness whether, from his knowledge of the reputation of the impeached witness, or his knowledge of the reputation of the latter for veracity,⁴⁴ he would believe him on oath.⁴⁵

§ 533. Reason of the Rule which admits this Question.—The existence of this rule is an undisputed branch of legal doctrine, and the reasons upon which it is founded were thus stated at length in an opinion of the Supreme Court of Michigan by Mr. Justice Campbell: “The purpose of any inquiry into the character of a witness is to enable the jury to determine whether he is to be believed on oath. Evidence of his reputation would be irrelevant for any other purpose, and a reputation which would not affect a witness so far as to touch his credibility under oath, could have no proper influence. The English text-books and authorities have always, and without exception, required the testimony to be given directly on this issue. The questions put to the impeaching and supporting witnesses relate, first, to their knowledge of the reputation for truth and veracity of the assailed witness; and, second, whether, from that reputation, they would believe him under oath. The only controversy has been whether or no the grounds of belief must rest upon, and be confined to a knowledge of reputation for veracity only. But as to that the authorities are harmonious. The reason given is that, unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person’s credit, the jury cannot accurately tell what the witness means to express

958; *Reg. v. Brown*, L. R. 1 Cr. Cas. Res. 70.

⁴⁴ According to the rule prevailing in the particular jurisdiction. *Ante*, §§ 522, 523.

⁴⁵ *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166, 170; *People v. Davis*, 21 Wend. (N. Y.) 309; *Hamilton v. People*, 29 Mich. 173; *Keator v. People*, 32 Mich. 484; *Uhl v. Com.*, 6 Gratt. (Va.) 706; *People v. Mather*, 4 Wend. (N. Y.) 299; *People v. Rector*, 19 Wend. (N. Y.) 569; *People v. Davis*, 21 Wend. (N. Y.) 309; *Titus v. Ash*, 24 N. H. 319; *Bogle v. Kretzer*, 46 Pa. St. 465; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Knight*

v. House, 29 Md. 194; *Stevens v. Irwin*, 12 Cal. 306; *People v. Tyler*, 35 Cal. 553; *Eason v. Chapman*, 21 Ill. 33; *Wilson v. St.*, 3 Wis. 798; *Stokes v. St.*, 18 Ga. 17; *Taylor v. St.*, 16 Ga. 7; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *McCutchen v. McCutchen*, 9 Port. (Ala.) 650; *Mobley v. Hamit*, 1 A. K. Marsh. (Ky.) 590; *U. S. v. Van Sickle*, 2 McLean (U. S.), 219; *People v. Ryder*, 151 Mich. 187, 114 N. W. 1021; *St. v. Marks*, 16 Utah, 204, 51 Pac. 1089. The rule announced by Dr. Greenleaf, followed in *Carlson v. Winter-son*, 147 N. Y. 652. *Contra*, *St. v. Coates*, 22 Wash. 601, 61 Pac. 726.

by stating that such reputation is good or bad, and can have no guide in weighing his testimony. And since it has become settled that they are not bound to disregard a witness entirely, even if he falsifies in some matters, it becomes still more important to know the extent to which the opinion in his neighborhood has touched him. It has also been commonly observed that impeaching questions as to character are often misunderstood, and witnesses, in spite of caution, base their answer on bad character generally, which may or may not be of such a nature as to impair confidence in testimony. When the question of credit under oath is distinctly presented, answers will be more cautious.”⁴⁶ “The objection alleged to such an answer by a witness,” continued Campbell, J., “is that it enables the witness to substitute his opinion for that of the jury; but this is a fallacious objection. The jury, if they do not act from personal knowledge, cannot understand the matter at all, without knowing the witness’ opinion, and the ground on which it is based. It is the same sort of difficulty which arises in regard to insanity, to disposition or temper, to distances and velocities, and many other subjects, where a witness is only required to show his means of information, and then state his conclusions or belief based on those means. If six witnesses are merely allowed to state that a man’s reputation is bad, and as many say it is good, without being questioned further, the jury cannot be said to know much about it. Nor would any cross-examination be worth much, unless

⁴⁶ *Hamilton v. People*, 29 Mich. 173, 185, 186. The learned judge criticised the dictum of Prof. Greenleaf (1 Greenl. Ev. § 461), to the effect that the American authorities on this subject disfavored the English rule; and stated that, of the cases cited by the author in support of this doctrine, not one contained a decision upon the question, and only one contained more than a passing dictum, not in any way called for. The decision referred to was *Phillips v. Kingfield*, 19 Me. 375. The learned judge pointed out that the authorities referred to in that case contained no such decision and that the Maine court, after reasoning out the matter somewhat carefully, declared that the question was not presented

by the record for decision. He also calls attention to the fact that the American editors of *Phillips* and *Starkie* do not appear to have discovered any such conflict, and do not allude to it; whereas they do, as many decisions do, refer to the *kind of reputation* which should be shown, whether for veracity merely or for other moral qualities also. He also pointed out that in *Webber v. Hanke*, 4 Mich. 198, no question arose on the record except as to the species of reputation, and the neighborhood and time of its existence, saying that what was said further was not in the case, and could not dispose of the matter. *Hamilton v. People*, *supra*. Approved *People v. Ryder*, 151 Mich. 187, 114 N. W. 1021.

it aided them in finding out just how far each witness regarded it as tainted.”⁴⁷ The learned judge concluded with this statement: “Mr. Greenleaf himself intimates that it might be a proper inquiry on cross-examination. We think the inquiry proper, when properly confined and guarded, and not left to depend on any basis but the reputation for truth and veracity. And we also think that the cross-examination of impeaching or sustaining testimony should be allowed to be full and searching.”⁴⁸

§ 534. [Continued.] **Reasons for the Opposing Rule.**—In a case in Texas where the subject is extensively examined, it was said by Bell, J.: “Where the impeaching witness is asked, ‘Whether or not he could believe the other under oath,’ he is more likely to give an answer suggested by his personal knowledge, or prompted by his personal feelings, or his individual opinion, than he is when asked whether or not he is acquainted with the general reputation of the impeached witness for truth, and whether it is good or bad. If the impeaching witness states that he is acquainted with the general reputation of the former witness for truth in the community where he lives, he may then be properly asked whether that general reputation is such as to entitle the witness to credit on oath, or any other form of words may be used which do not involve a violation of the cardinal principles that the inquiry must be restricted to the general reputation of the impeached witness for truth in the community where he lives, or is best known; and that the impeaching witness must speak from general reputation or report, and not from his own private opinion.”⁴⁹ Following this ruling, it has been held proper, where an impeaching witness has stated that he knows the witness’ character for truth and veracity in the neighborhood in which he has lived and that it is bad, to exclude the further question, “from that reputation would you believe him on oath?”⁵⁰

§ 535. **Impeachment by Proof of Conviction of Felony or other Infamous Crime.**—It is competent, for the purpose of impeaching a witness, to put in evidence the record of a conviction of felony

⁴⁷ *Hamilton v. People*, 29 Mich. 173, 186.

⁴⁸ *Ibid.* 187, 188.

⁴⁹ *Boon v. Wethered*, 23 Tex. 675, 686; *Chandler v. St.* (Tex. Cr. R.), 131 S. W. 598. For analysis of

rule see *Douglass v. St.* (Tex. Cr. R.), 98 S. W. 840; *Benitt v. St.*, 12 Tex. App. 39, 41 Am. Rep. 666; *Mayo v. St.*, 33 Tex. Cr. R. 33, 24 S. W. 421.

⁵⁰ *Marshall v. St.*, 5 Tex. App. 274, 293.

or other infamous crime.⁵¹ But under this rule, a witness cannot be impeached by proving that he has been convicted of a simple misdemeanor, such as assault and battery,⁵² or the violation of a city ordinance.⁵³ For stronger reasons, the record of a mere *complaint* or *indictment*, charging a crime, is not admissible, for this does not impeach the witness;⁵⁴ since, "until convicted, the law presumes the person indicted to be innocent of the charge."⁵⁵ The *record* is the only competent evidence of the fact of such a conviction;⁵⁶

⁵¹ *Carpenter v. Nixon*, 5 Hill (N. Y.), 260; *Newcomb v. Griswold*, 24 N. Y. 300; *People v. DeCamp*, 146 Mich. 533, 109 N. W. 1047; *Pioneer F. P. Co. v. Clifford*, 125 Ill. App. 352; *Gordon v. St.*, 140 Ala. 29, 36 South. 1009; *Clifford v. Pioneer Fire-Proofing Co.*, 232 Ill. 150, 83 N. E. 448. In Georgia, if the offense involves moral turpitude. *Powell v. St.*, 122 Ga. 571, 50 S. E. 369. In Missouri (applying statute) any criminal offense. *St. v. Hensack*, 189 Mo. 295, 88 S. W. 21.

⁵² By statute in Indiana, a witness might be impeached by proving by the record that he had been convicted of an infamous crime; but it was held that this cannot be done by showing that, on an indictment for assault and battery with intent to commit a rape, he had been convicted of a simple assault and battery; since this was not an infamous crime. *Glenn v. Clore*, 42 Ind. 60. As to what is an infamous crime see *Pruitt v. Miller*, 3 Ind. 16; *Missouri etc. R. Co. v. Dumas* (Tex. Civ. App.), 93 S. W. 493 (not reported in state reports).

⁵³ The Statute of Ohio provides that, "No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; but such interest or conviction may be

shown for the purpose of affecting his credibility." Gen. Code Ohio, 1910, § 13659. It is held that the conviction referred to in this section, which may be shown for the purpose of affecting the credibility of the witness, is such, and such only, as, before the enactment of the section, would have disqualified the person from testifying as a witness. Convictions for violations of city ordinances never disqualified a person from testifying in any cause; and therefore such convictions cannot be shown, under this section, for the purpose of affecting the credibility of the witness. *Coble v. St.*, 31 Ohio St. 100; *Goode v. St.*, 32 Tex. Cr. R. 505, 24 S. W. 102.

⁵⁴ *People v. Gay*, 7 N. Y. 378; *Lipe v. Eisenlerd*, 32 N. Y. 238; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555; *West v. Lynch*, 7 Daly (N. Y.), 245; *Glover v. U. S.*, 147 Fed. 426, 77 C. C. A. 450; *Wells v. Com.*, 30 Ky. Law Rep. 504, 99 S. W. 218; *Ross v. St.*, 139 Ala. 144, 36 South. 718.

⁵⁵ *West v. Lynch*, *supra*. Thus, it has been held that the fact that the witness has been *indicted* for *forgery* or *perjury* is inadmissible as affecting his character without proof of conviction under the indictments. *Jackson v. Osborn*, *supra*.

⁵⁶ In *Georgia*, the rule of law concerning secondary evidence has

though, as elsewhere seen,⁵⁷ the rules of practice in some jurisdictions allow such a question to be put by the witness *on cross-examination*, but he cannot be contradicted by the record if he denies the fact.

§ 536. By Evidence that the Witness is of Defective Mind or Memory.—A person entirely without memory is incompetent as a witness, and if his memory is naturally weak, or has been impaired by disease or age, his testimony will naturally have less weight with a jury than if his memory is sound and unimpaired. It is therefore competent to give evidence that the memory of a witness is weak, for the purpose of affecting his testimony.⁵⁸ It is not necessary that such testimony should be given by an *expert*.⁵⁹

been carried to the extent of holding that it is not competent to show, on the cross-examination of a witness, for the purpose of impairing his testimony, that he had, during the term of court then in session, pleaded guilty to a criminal offense; the record of the plea of guilty was held the only proper evidence. *Johnson v. St.*, 48 Ga. 116; *O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287. Where the name in the judgment is the same as that of the witness, there is a presumption of identity subject to rebuttal. *Boyd v. St.*, 150 Ala. 101, 43 South. 204. In one court it has been held a foreign judgment could not be used for this purpose. *Kennerly v. Lee*, 147 Cal. 596, 82 Pac. 257. But in a federal Circuit Court of Appeals it was said the objection of extraterritorial force beyond the limits of a state did not apply—at least to a judgment rendered in a federal court in one state and being offered in another. *Ball v. U. S.* 147 Fed. 32, 78 C. C. A. 128. It has been ruled, that while a pardon does not destroy the judgment as impeaching evidence, it is proper to admit the pardon as sustaining credibility. *O'Donnell v. People*,

110 Ill. App. 250. See also *Douglass v. St.*, 35 Tex. Cr. R. 202, 33 S. W. 228.

⁵⁷ Ante, §§ 464, 465, 467.

⁵⁸ *Isler v. Dewey*, 75 N. C. 466. Thus also it may be shown that witness is addicted to the use of opium and the effect of such a habit on the mind and memory. *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *Eldridge v. St.*, 27 Fla. 162, 9 South. 448. As tending to show lack of power to observe, or observe with accuracy, that, of which the witness testifies, it may be shown witness was intoxicated. *St. v. Rollins*, 113 N. C. 722, 18 S. E. 394; *Kuenster v. Woodhouse*, 101 Wis. 216, 77 N. W. 165. In the case of *Ludtke v. Herzog*, 72 Fed. 142, 18 C. C. A. 487, the court allowed gross error in a date otherwise immaterial to be shown, where dates were in controversy as to what was material, the witness being an aged person. The admissibility of this kind of evidence rests largely in the discretion of the trial court, though the right of cross-examination is very broad.

⁵⁹ *Ibid.*; *Clary v. Clary*, 2 Ired. L. (N. C.) 78; *Bailey v. Pool*, 13 Ired. L. (N. C.) 404,

§ 537. **Inadmissible Modes of Impeaching.**—It is not admissible, for the purpose of impeaching a witness, to prove that he is a *chronic witness* for particular cases. Thus, in a criminal case in Mississippi, in an indictment for gaming, the defendant offered to prove that a certain witness for the State had already made, in the form of witness fees, about \$20 that week, by testifying for the State in several cases. It was held that the court correctly excluded this evidence. “Such evidence,” said Cooper, C. J., “would not prove or tend to prove that he ought not to be believed.”⁶⁰ Nor can evidence be introduced to affect the credibility of a witness, by showing that he testified on a former trial and was not *believed* by the jury.⁶¹

⁶⁰ *Rebecca Lea v. St.*, 64 Miss. 294, 1 South. 244.

⁶¹ *Schenck v. Griffin*, 38, N. J. L. 463, 471.

CHAPTER XXI.

CORROBORATING AND SUSTAINING WITNESSES.

SECTION

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§ 541. **Right to Introduce Corroborating Testimony.**—Where a witness is contradicted, the party calling him has the obvious right to introduce competent testimony corroborating him, and no exception lies to the hearing of such testimony.¹

§ 542. **Witness' own evidence as to Corroborating Facts.**—But a party cannot support his own positive testimony of facts, stated upon his own knowledge, by testifying himself to other consistent or corroborative facts, which are immaterial in themselves, and which, like the facts sought to be corroborated, rest entirely upon his own oath. "Such evidence," said Cooley, C. J., "coming from other persons, might have had some such tendency; but when the question is whether one fact to which a witness testifies is correct, it can receive no support whatever from his swearing to another which, though consistent with the first, must, like that, rest entirely upon his own statement."²

§ 543. **Additional Evidence of the Facts testified to by the Impeached Witness.**—Where the character of a witness is impeached,

¹ Green v. Gould, 3 Allen (Mass.), 465. See also Holbert v. St., 9 Tex. App. 219. In an action to recover real estate, it was held no error to allow a deed for *other lands* than that in controversy to be put in evi-

dence for the purpose of corroborating the statements of witnesses. Buie v. Carver, 75 N. C. 559.

² Anderson v. Russell, 34 Mich. 109, 111.

it is competent for the party calling him to introduce *further testimony* in support of the facts to which the discredited witness has testified. So held in a criminal trial, where one of the State's witnesses was impeached by evidence of bad character, in which case it was held that the plaintiff had the right to introduce another witness to the same fact, and that it was not a good objection that the testimony of this witness was *not in rebuttal*.³ In 1853 the practice was said to be in North Carolina, and, as the Supreme Court thought, sustained by good sense, for a party to offer as many witnesses as he might deem necessary to establish his allegation. If the other party should choose, he might rest the case upon it, or he might call witnesses in his turn; and then the first party might call witnesses in reply, and for the purpose of adding to the strength of the evidence, upon which he first rested his case. That is to say, the party sustaining the burden of the proof might call as many witnesses as he might think necessary to make out a *prima facie* case, and then, after hearing the opposing testimony, if he should think it necessary, he might call other witnesses whose testimony would simply corroborate that of his first witnesses. In support of this view, a remark attributed to Lord Kenyon was quoted that "it is not worth while to jump until you get to the fence,"—"that is," said Pearson, J., "there is no use of meeting objections until they are presented, or in piling up proof until it is made necessary by what is done on the other side."⁴ Thus, on an issue of *devisavit vel non*, the caveator produced and examined *thirteen* witnesses, who testified to the disputed signature, after which the proponent introduced *six* witnesses, who swore to the contrary. It was held proper for the caveator then to call his *other witnesses* in support of those who had first testified.⁵

§ 544. Where Witnesses are Assailed in Rebuttal.—Where the plaintiff, in rebuttal, introduces evidence in contradiction of the witnesses of the defendant, which the defendant could not reasonably have anticipated, which evidence is offered for no other purpose than to impeach their credibility, the defendant is entitled, after the plaintiff has rested, to support their credibility by additional testimony.⁶

³ John v. St., 16 Ga. 200.

⁵ Ibid.

⁴ Outlaw v. Hurdle, 1 Jones L.

⁶ Wade v. Thayer, 40 Cal. 573.

(N. C.) 150.

§ 545. **In Cases where testimony of Single Witness is Insufficient.**—In certain cases the testimony of a single witness is insufficient to establish the fact in issue, and therefore corroboration is necessary, and unless there be corroboration, the court will direct a verdict against the party sustaining the burden of proof.⁷ This happens in cases of *treason*, *perjury*, and in some others, to enter upon which is not within the plan of this work.

§ 546. **Corroboration of Accomplice Testimony.**—A slight deviation may, however, be made for the purpose of merely noticing a subject of great interest and of much conflict of opinion, namely, the question of the necessity of corroboration in the case of the testimony of accomplices. There is a *conflict of opinion* as to whether a conviction of crime can be had upon the uncorroborated testimony of an accomplice. The old English⁸ and some of the American⁹ opinion is to the effect that it can be; but there are contrary holdings in England,¹⁰ and the later American holdings,

⁷ Thus, under the civil code of Louisiana, 1900, art. 2277, the testimony of a single witness is not sufficient to establish a contract guaranteeing the payments of the price of goods purchased for an amount exceeding \$500. *Dickson v. Sharretts*, 7 La. Ann. 54.

⁸ *Rex v. Atwood*, 2 Leach C. C. 521; *Jordaine v. Lashbrooke*, 7 T. R. 601, 609; *Rex v. Jones*, 2 Camp. 131; *Rex v. Sheehan*, *Jebb Cr. Cas.* 54.

⁹ *St. v. Wolcott*, 21 Conn. 272; *St. v. Stebbins*, 29 Conn. 463, 468; *St. v. Williamson*, 42 Conn. 261. Almost ever state holds that this is a rule of caution but not a rule of evidence. In the following states it is so held and other states have statutes, making corroboration necessary. *Jurelich v. People*, 223 Ill. 484, 79 N. E. 181; *Caldwell v. St.*, 50 Fla. 4, 39 South. 188; *St. v. Wigger*, 196 Mo. 90, 93 S. W. 390; *Johnson v. St.*, 65 Ind. 269; *St. v. McDonald*, 57 Ind. 537, 46 Pac. 967; *St. v. DeHart*, 109 La. 570; *St. v.*

Litchfield, 58 Me. 267; *Com. v. Clune*, 162 Mass. 206, 38 N. E. 435; *Hamilton v. People*, 29 Mich. 173; *White v. St.*, 52 Miss. 216, 227; *Lamb v. St.*, 40 Neb. 312, 58 N. W. 963; *St. v. Rachman*, 68 N. J. L. 120, 53 Atl. 1046; *St. v. Holland*, 83 N. C. 624; *Allen v. St.*, 10 Ohio St. 287, 305; *Cox v. Com.*, 125 Pa. 94, 101 (except bribery statute); *St. v. Green*, 48 S. C. 136, 26 S. E. 234; *St. v. Potter*, 42 Vt. 495, 560; *Brown v. Com.*, 2 Leigh (Va.), 769, 777; *St. v. Concannon*, 25 Wash. 327, 65 Pac. 534 (corroboration usually to be required; *St. v. Hill*, 43 W. Va. 132, 35 S. E. 831; *Means v. St.*, 125 Wis. 650, 104 N. W. 815.

¹⁰ *Rex v. Noakes*, 5 Carr. & P. 326; *Reg. v. Magill*, *Ir. Circ. Cas.* 418. There is a *modified view* that the testimony of accomplices is admissible without corroboration, where they have been *kept separate* since their arrest, and have no opportunity to communicate with each other. *Reg. v. Aylmer*, 1 *Crawf. & D.* 116. *Re Meunier*, 2 Q. B. 415, de-

founded largely upon statutes, are also to the contrary.¹¹ But where the modern and more humane rule prevails, it is conceded that evidence necessary in order to corroborate the testimony of an accomplice, so as to authorize a conviction thereon, need not be of a *conclusive* character.¹² A statutory rule which requires the testimony of an accomplice to be corroborated, does not apply to the

cided in 1894, says the warning to the jury about accepting the testimony of an accomplice with great caution is customary, but there is no right to withdraw the case because of the want of corroboration. See also *R. v. Mullins*, 3 Cox Cr. 326 in 1848; *R. v. Stubbs*, 7 Cox Cr. R. 48 in 1852; *Magee v. Magee* 11 Ir. C. L. 449 in 1860 and *R. v. Boyds*, 1 B. & S. 311 in 1868, say, all uniting, that "it is not a rule of law that an accomplice must be confirmed." Similarly is the rule in Canada. See *R. v. Andrews*, 12 Ont. 184.

¹¹ Rap. Wit., § 226; citing *Marler v. St.*, 67 Ala. 55; *Lumpkin v. St.*, 68 Ala. 56; *People v. Ames*, 39 Cal. 403; *People v. Melvane*, 39 Cal. 614; *People v. Cloonan*, 50 Cal. 449; *Johnson v. St.*, 4 Greene (Iowa), 65; *Upton v. St.*, 5 Iowa, 465; *Bowling v. Commonwealth*, 79 Ky. 604; *Craft v. Commonwealth*, 80 Ky. 349; *People v. Courtney*, 28 Hun (N. Y.), 589; *People v. Ryland*, 28 Hun (N. Y.), 568; *Lopez v. St.*, 34 Tex. 133; *Wright v. St.*, 43 Tex. 170; *Nourse v. St.*, 2 Tex. App. 304; *Davis v. St.*, 2 Tex. App. 588; *Roach v. St.*, 4 Tex. App. 46; *Miller v. St.*, 4 Tex. App. 251; *Powell v. St.*, 15 Tex. App. 441; *Dunn v. St.*, 15 Tex. App. 560; *St. v. Howard*, 32 Vt. 380; *Wright v. St.*, 43 Tex. 170. See statutes on this subject.

¹² Best on Ev., § 171; *People v. Melvane*, 39 Cal. 614; *St. v. Schlaegel*, 19 Iowa, 169; *Nolan v. St.*, 19 Ohio, 131. By § 1111 of the California Penal Code, the evidence

which is necessary to corroborate the testimony of an accomplice need not be evidence tending to establish the precise facts testified to by the accomplice, but it is sufficient if it tends to connect the defendant with the commission of the offense. *People v. Cloonan*, 50 Cal. 449; *Cook v. St.*, 80 Ark. 495, 97 S. W. 683; *Chapman v. St.*, 109 Ga. 157, 34 S. E. 369; *St. v. Hicks*, 6 S. D. 325; *St. v. Collett*, 20 Utah, 290, 58 Pac. 684; *St. v. Thompson*, 87 Iowa, 670, 673, 54 N. W. 1077. It is ruled in some jurisdictions, that the corroboration must be of some material fact in accomplice's testimony. *St. v. Jones*, 115 Iowa, 113, 88 N. W. 196; *Cox v. Com.*, 125 Pa. 94, 102, 17 Atl. 227. It has been held also that this is too indefinite a description for an instruction. The jury should be told it should be corroboration tending to connect accused etc. *Com. v. Chase*, 147 Mass. 567, 18 N. E. 565. It must do more than show that accused was where he could have participated in the crime or that he knew something about its being or having been committed. *Simpson v. Com.*, 31 Ky. Law Rep. 769, 103 S. W. 332. See also *St. v. Scott*, 28 Or. 331, 42 Pac. 1. The evidence must create more than a suspicion, but need not be absolutely convincing nor extend to every fact stated by the accomplice. It must as standing alone tend to connect accused with the crime. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364; *St. v. Knudtson*, 11 Idaho, 524.

testimony of a *feigned accomplice*,¹³ and, of course the same holding would apply in respect of the same common-law rule, of which the statute is merely declaratory.

§ 547. [Continued.] **Parties to an Incestuous Intercourse.**—It has been ruled that if the female, with whom an incestuous intercourse is alleged to have been had, is shown to have knowingly, voluntarily and with the same intent which actuated the accused, united with him in the commission of the offense, she is an accomplice in the crime, and her uncorroborated testimony is insufficient to support a conviction of the accused. On the other hand, if the evidence shows that, in the commission of the incestuous act, she was the victim of force, threats, fraud or undue influence, so that she did not act voluntarily, and did not join in the commission of the act with the same intent that actuated the accused, then she is not an accomplice, and a conviction might stand even upon her uncorroborated testimony.¹⁴

83 Pac. 226; *St. v. Gordon*, 105 Minn. 217, 117 N. W. 483; *Moxie v. St.*, (Tex. Civ. R.), 114 S. W. 375.

¹³ *People v. Bollinger*, 71 Cal. 17, 11 Pac. 799; *Com. v. Hollister*, 157 Pa. 13, 16, 27 Atl. 386; *St. v. Brownlee*, 84 Iowa, 473, 476, 51 N. W. 25; *St. v. Baden*, 37 Minn. 212, 34 N. W. 24; *St. v. Douglas* 26 Nev. 196, 65 Pac. 802.

¹⁴ *Mercer v. St.*, 17 Tex. App. 452, 465. See also *Freeman v. St.*, 11 Tex. App. 92; *Watson v. St.*, 9 Tex. App. 237; *Whart. Crim. Ev.*, § 440; *Porath v. St.*, 90 Wis. 527, 538, 63 N. W. 1061; *Whitaker v. Com.*, 95 Ky. 632, 27 S. W. 83; *People v. Patterson*, 102 Cal. 239, 244, 36 Pac. 436; *St. v. Keller*, 8 N. D. 563, 80 N. W. 476. In Texas it is said, that, if the female is under the age of consent, she is not an accomplice. *Wallace v. St.*, 48 Tex. Cr. R. 548; 89 S. W. 827. In Iowa where the statute requires corroboration, it has been held not to apply to the female in incest. See *St. v. Perry*, 129 Iowa, 277, 105

N. W. 507. In Missouri no corroboration is required because there is no rule of law requiring corroboration of accomplices. *St. v. Dilts*, 191 Mo. 665, 90 S. W. 782. The rule at common law was that in the trial of crimes against the chastity of women no corroboration of the prosecutrix was necessary for a conviction. For state decisions recognizing this principle see *Curby v. Terr*, 4 Ariz. 371, 42 Pac. 953; *People v. Fleming*, 94 Cal. 308, 310, 29 Pac. 647; *Doyle v. Com.*, 39 Fla. 155, 22 South. 272; *St. v. Marcks*, 140 Mo. 656, 41 S. W. 973. But in many states statutes have required that there be corroboration, and decision turns greatly on statutory terms. Where the charge is seduction under promise of marriage, it is held that the corroboration required is to be of the promise and of the seduction, each independently. *St. v. Waterman*, 75 Kan. 253, 88 Pac. 1074. See *Rucker v. St.*, 77 Ark. 23, 90 S. W. 151; *Russell v. St.*, 77 Neb. 519, 110 N.

§ 548. [Continued.] By what Evidence Corroborated.—But it is nevertheless a rule that it makes no difference as to the number of accomplices who testify without confirmation, since accomplices *cannot corroborate each other*. Although their testimony is given to the same fact, it must be corroborated by evidence coming from an unpolluted source, before it will justify conviction.¹⁵ But a *writing* delivered by one accomplice to another, in furtherance of the scheme of crime concocted between them, may be used as corroborating evidence.¹⁶ And where an accomplice testified that he had paid a bribe to the defendant (on trial for bribery) by giving to the defendant a *check* upon a certain bank, payable to cash or bearer, which had afterwards been returned by said bank to the witness, it was competent for the State, in corroboration, to show, by the *books and business memoranda* of the *bank*, a credit to the defendant for a like amount, deposited by check two days after the alleged bribery.¹⁷

§ 549. By Evidence of Previous Consistent Declarations.—It has been reasoned that, where the witness is an accomplice, this fact alone is an attack upon his credibility, and authorizes the public prosecutor to prove that the witness, when first arrested, had given the same relation of the facts which he gave on the witness stand.¹⁸ So, it has been ruled that, where a witness is called, who, in the commencement of his testimony, states himself to be an accomplice of the accused, it is regular, before the witness is attacked, to call on another witness to prove that the first witness had related the facts disclosed in his evidence, immediately after they happened.¹⁹

W. 380. In Missouri where statute requires as to the promise that "the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury," viz: two witnesses, that proof of defendant's admission of the promise is corroborative. *St. v. Sublette*, 191 Mo. 163, 90 S. W. 374. In Arkansas where testimony as to promise must be corroborated, it was held that letters offered in corroboration must be identified independently of the testimony of the prose-

cutrix. *Carrens v. St.*, 77 Ark. 16, 91 S. W. 30.

¹⁵ *Rex v. Noakes*, 5 Carr. & P. 326; *Reg. v. Magill*, Ir. Circ. Cas. 418.

¹⁶ *St. v. Kellerman*, 14 Kan. 135, 138.

¹⁷ *St. v. Smalls*, 11 S. C. 263, 286.

¹⁸ *People v. Vane*, 12 Wend. (N. Y.) 78.

¹⁹ *St. v. Twitty*, 2 Hawks (N. C.), 449. Such evidence was to be considered as given substantially in reply. *Id.*

Though, it is conceded that, after the evidence of the confessed accomplice had been freed from suspicion, such confirmatory evidence would be useless, and therefore inadmissible.²⁰ These holdings are based on a view which, as we shall hereafter see,²¹ had a better foothold in our earlier, than in our later jurisprudence, and are therefore stated by the writer with reserve. In Massachusetts, where, on the more general question of sustaining impeached witnesses by evidence of their previous consistent declarations; the holdings are opposed to those in North Carolina,²² the following ruling on this question is found:—

The defendant in a criminal case, for the purpose of impeaching the testimony of an accomplice, introduced a letter from him, admitting that his testimony in regard to the transaction in controversy, given on a former occasion, was false; and the attorney for the commonwealth, in order to show that the letter had been obtained unfairly, asked the accomplice certain questions, in answer to which he testified that the letter was part of a correspondence which had been carried on in jail, and stated the means by which the correspondence had been carried on, the relative position of the several rooms, and the arrangement of the prisoners therein. It was held that it was not competent to call witnesses to prove that the position of the rooms and the arrangement of the prisoners therein corresponded with the account given by the accomplice, in order to support his general credit. The court could not perceive how the circumstance that the witness told the truth about these public and common objects, concerning which he knew the proof was at hand, had any tendency to confirm the material parts of his testimony, involving the guilt of the defendant.²³

§ 550. [General Rule.] Supporting Testimony not Admissible in Chief.—The general rule is that sustaining testimony is not admissible until the credit of the witness is in some way impeached, either upon cross-examination, or by testimony of other witnesses, and that *mere contradiction* among witnesses furnishes no basis for admitting such evidence.²⁴ This rule has its aptest illustration in

²⁰ Ibid.

²¹ Post, § 572.

²² Post, § 573.

²³ Com. v. Bosworth, 22 Pick. (Mass.) 397, 400.

²⁴ Annesley v. Anglesea, 17 How. St. Tr. 1348; Fitzgerald v. Goff, 99 Ind. 28, 34; Johnson v. St., 21 Ind. 329; Presser v. St., 77 Ind. 274; Brann v. Campbell, 86 Ind.

cases where it is sought to sustain the testimony of witnesses by evidence of their *good character*; ²⁵ but it equally applies where it is attempted to corroborate a witness by evidence of his having made *previous statements*, similar to those delivered on the witness-stand, under a rule hereafter considered. The general rule, therefore, is that the evidence which is usually heard to sustain a witness whose credibility has been in some way impeached, other than by mere contradiction of his testimony, cannot be given in chief.²⁶ Upon this subject it has been well said: "If, in the multiplicity of contradictions daily occurring, each witness was permitted to bring other witnesses to sustain his general character, and they, contradicting each other, should be permitted to bring others,—the whole time of our courts would be taken up in hearing these side questions, until the matters originally in litigation would be almost lost sight of, to the great detriment of suitors." ²⁷

§ 551. **Right to Sustain by Proof of Good Character.**—But where the *direct impeachment* of a witness is attempted, it is al-

516; *Braddee v. Brownfield*, 9 Watts (Pa.), 124; *Pruitt v. Cox*, 21 Ind. 15. This is the rule under the Kentucky Code, §§ 661-663 (*Bullitt's Codes*, 591-599). *Vance v. Vance*, 2 Metc. (Ky.) 581; *Jacobs v. St.*, 42 Tex. Cr. R. 353, 59 S. W. 1111; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697; *Spurr v. U. S.*, 87 Fed. 701, 31 C. C. A. 202. Contra, where direct conflict exists. *St. v. DesForges*, 48 La. Ann. 73, 18 South. 912.

²⁵ *People v. Gay*, 7 N. Y. 380; *Wildor v. Peabody*, 21 Hun (N. Y.), 376, 379; *St. v. Ward*, 49 Conn. 429, 442; *People v. Rector*, 19 Wend. (N. Y.) 569; *Anderson v. R. Co.*, 107 Ga. 500, 33 S. E. 644; *Louisville etc. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 494; *Texas & P. R. Co. v. Raney*, 86 Tex. 363, 25 S. W. 11; *St. v. Nelson*, 13 Wash. 523, 43 Pac. 637.

²⁶ *Jackson v. Etz*, 5 Cow. (N. Y.) 314, 320; *People v. Vance*, 12 Wend.

(N. Y.) 78, 79, per Savage, C. J.

²⁷ *Pruitt v. Cox*, 21 Ind. 15, 16, opinion by Hanna, J.; reaffirmed in *Brann v. Campbell*, 86 Ind. 516. For similar expression of view see *Tedens v. Schumers*, 112 Ill. 263, 266. The reason given by Holmes, J., in *Gertz v. R. Co.*, 137 Mass. 77, is: "That the purpose and only direct effect of the (impeaching) evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or for any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general character for truth, as well as for the other virtues, and until the character of a witness is assailed, it cannot be fortified by evidence."

ways competent for the party, whose witness he is, to call other witnesses to prove that his character is good.²⁸ It has even been held that this may be done where the impeaching witness testifies that the character of the witness assailed is good,—the view being that the mere fact that his character is *questioned* by the opposite party, entitles the party, whose witness he is, to sustain it.²⁹ Where the plaintiff introduced evidence tending to prove declarations of the defendant unfavorable to the character of one of his own witnesses as to veracity, this was regarded as an impeachment of the witness' character, such as authorized the defendant to testify that his character was good.³⁰ In an action on a policy of insurance, where the defendant's evidence tended to show that the plaintiff burned his own building and committed perjury in his proof of loss, it was held that evidence of his good character was admissible.³¹

§ 552. **View that any Species of Assault lets in Evidence of Good Character.**—Some American courts hold that, whenever the character of a witness for truth is attacked *in any way*, it is competent for the party calling him to give general evidence of his good character for truth; and that it is immaterial whether his character is attacked by showing that he has given accounts of the matter out of court different from that given by him in court, or by cross-examination, or by general evidence of his character for truth.³² This latter rule has been applied where the motives of the witness were assailed on a *severe cross-examination*;³³ where

²⁸ Clackner v. St., 33 Ind. 412; People v. Rector, 19 Wend. (N. Y.) 569.

²⁹ Com. v. Ingraham, 7 Gray (Mass.), 46. Where defendant said as to a witness for the state, that he had discharged him from employment for dishonesty, it was held proper to allow evidence of good character for honesty, though such statement was immaterial as evidence. St. v. Speritus, 191 Mo. 24, 90 S. W. 459.

³⁰ Prentiss v. Roberts, 49 Me. 127.

³¹ Mosley v. Vermont Mutual Fire Ins. Co., 55 Vt. 142.

³² Paine v. Tilden, 20 Vt. 554; St.

v. Roe, 12 Vt. 93; Sweet v. Sherman, 21 Vt. 24; Isler v. Dewey, 71 N. C. 14; George v. Pilcher, 28 Gratt. (Va.) 300, 315. So held under statutes. Glaze v. Whitley, 5 Ore. 164; Richmond v. Richmond, 10 Yerg. (Tenn.) 343; Hadjo v. Gooden, 13 Ala. 718 (impeachment by evidence of previous inconsistent statements).

³³ Richmond v. Richmond, 10 Yerg. (Tenn.) 343; contra, Kessebrung v. Hummer, 130 Iowa, 145, 106 N. W. 501. See Missouri etc. R. Co. v. Dumas (Tex. Civ. App.), 93 S. W. 493 (not reported in state reports). And where answers do not involve misconduct. St. v. Owens,

evidence had been admitted to *contradict* the witness on an *immaterial point*; ³⁴ and even where an attempt was made to discredit the witness by *disproving material facts* testified to by him.³⁵ Where one party introduces evidence that the witness of the other party has been *suborned* and *paid* for his testimony, the party whose witness is thus assailed may, in rebuttal, introduce testimony tending to show the good character of the witness for veracity.³⁶ Another American court holds that, where a witness testifies to a material fact, and the opposite party calls a witness who contradicts the former witness as to such fact, and thereupon the former witness is allowed to be sustained by evidence of good character, the contradicting witness may be so sustained.³⁷

§ 553. [Continued.] Reasons for the Foregoing View.—In a case in New York, Duer, J., while conceding the rule in that State is not as last above stated, said that, if the question were an open one, he would not hesitate to hold that evidence of the good character of a witness ought to be admitted, in every case in which the veracity of the witness, and not merely the truth of his testimony, is denied by the adverse party. He also said: “An attack upon the moral character of a witness is permitted, because, when successful, it creates a probability that he has sworn falsely in the testimony that he has given; and it cannot be denied that an opposite probability is created, when the character of the witness, a man of integrity and truth, is fully established. It therefore seems to me that the evidence is, in its nature, corroborative, and

109 Iowa, 1, 79 N. W. 462. Where questioned as to former prosecution, proof of good character admitted. *St. v. Fruge*, 44 La. Ann. 165, 10 South. 621. Cross-examination as to conviction for crime, same result. *Wick v. Baldwin*, 51 Ohio St. 51, 36 N. E. 671. If cross-examination affects veracity, proof admissible. *Warfield v. R. Co.*, 104 Tenn. 74, 55 S. W. 304. Or character, *Stevenson v. Gunning's Estate*, 64 Vt. 601, 609, 25 Atl. 697; *Minton v. La Follette etc. Co.*, 117 Tenn. 415, 101 S. W. 178, 11 L. R. A. (N. S.) 478. In Alabama evidence of complainant's character in a bastardy

proceeding was allowed to be shown upon her admission, that she kept company with other men. *Lusk v. St.*, 129 Ala. 1, 30 South. 33.

³⁴ *Newton v. Jackson*, 23 Ala. 335. It was ruled in Illinois, that proof of good reputation was not admissible, where witness was contradicted as to testimony which should not have been allowed, though no motion was made to strike out. *Clark v. People*, 224 Ill. 554, 79 N. E. 941.

³⁵ *Davis v. St.*, 38 Md. 15. See also *St. v. Cherry*, 63 N. C. 493.

³⁶ *People v. Ah Fat*, 48 Cal. 61, 64.

³⁷ *Davis v. St.*, 38 Md. 15, 49.

as such, ought to be admitted in every case in which intentional falsehood, no matter upon what ground, is imputed to a witness. There is a fallacy in the assertion that, when the general character of a witness has not been impeached by the adverse party, it is admitted to be good. All that is admitted is, that his character can not be shown to be positively bad; but this is no reason for excluding evidence to show that it is positively good. Nor is it difficult to see that, in many cases, the exclusion of such evidence may be a source of error and injustice. The relation given by a witness may be very improbable in itself, yet perfectly true; for experience attests the justness of the observation that 'truth is not unfrequently stranger than fiction.' But it is obvious that the improbability of the relation may lead a jury to discredit a witness who, if it was clearly proved to them that he was a man distinguished for his probity and strict adherence to truth, they would not hesitate to believe. It is obvious that the probability that he has sworn truly, arising from the moral excellence of his character, might very reasonably outweigh, in the minds of the jury, the opposite probability, arising from the nature of the facts to which he has testified. In judging of the credit to be given to the narrative, where the facts are remarkable and unusual, we are all of us governed by the knowledge we have, or the estimate we have formed, of the moral character of the person from whom the narrative proceeds; and it is not easy to understand why the evidence that determines the judgment of every reasoning person, in the ordinary transactions of life, should be withheld from the consideration of a jury."³⁸

§ 554. Witness Impeached by Contradiction Sustained by good Character.—Some American courts hold that witnesses, who have been impeached by evidence of previous contradictory statements made by them,³⁹ may be sustained by evidence that they are of good character for veracity.⁴⁰ But where the impeaching party

³⁸ *Leonori v. Bishop*, 4 Duer (N. Y.), 420, 422.

³⁹ *Ante*, § 490.

⁴⁰ *Clark v. Bond*, 29 Ind. 555; *Haley v. St.*, 63 Ala. 83; *Isler v. Dewey*, 71 N. C. 14; *Burrell v. St.*, 18 Tex. 713; *Paine v. Tilden*, 20 Vt. 554. Compare *Harris v. St.*, 30 Ind. 131; *Stratton v. St.*, 45 Ind. 468; *St.*

v. Roe, 12 Vt. 93; *Sweet v. Sherman*, 21 Vt. 23; *Towns v. St.*, 111 Ala. 1, 20 South. 598; *Clark v. St.*, 117 Ga. 254, 43 S. E. 853 (statute applied); *Board v. O'Conner*, 137 Ind. 622, 35 N. E. 1006; *St. v. Boyd*, 38 La. Ann. 374; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697.

has merely laid the foundation for introducing evidence of the supposed contradictory statements, but has not introduced such evidence, the party calling the witness will have no right to introduce evidence of good character to sustain him; for until he is impeached, such evidence is premature.⁴¹

§ 555. [Continued.] **Contrary View.**—Many other American courts hold that evidence of the good character of the witness for veracity is admissible only when his general character, or his character for truth, has been assailed by direct evidence, or by proof on cross-examination of extrinsic facts going to his general character; and that it cannot be received where the only foundation is inconsistencies in the statements of the witness on cross-examination, or between statements made by him on the witness stand and statements made by him out of court, or upon proof being given by other witnesses of material facts irreconcilable with the facts proved by the particular witness; although the necessary consequence of the proof of such facts may be to impute fraud or falsehood to the witness.⁴²

§ 556. **Where the Witness has committed an Offense which affects his Character.**—Where, on cross-examination, a witness ad-

⁴¹ *St. v. Cooper*, 71 Mo. 436, 442. *Contra*, *Harris v. St.*, 49 Tex. Cr. R. 338, 94 S. W. 227.

⁴² *People v. Hulse*, 3 Hill (N. Y.), 300; *People v. Gay*, 7 N. Y. 378; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Rogers v. Moore*, 10 Conn. 13; *Brown v. Mooers*, 6 Gray (Mass.), 451; *Heywood v. Reed*, 4 Gray (Mass.), 574; *Atwood v. Dearborn*, 1 Allen (Mass.), 483; *Boardman v. Woodman*, 47 N. H. 120; *Braddee v. Brownfield*, 9 Watts (Pa.), 124; *Wertz v. May*, 21 Pa. St. 274; *Webb v. St.*, 29 Ohio St. 351; *Vance v. Vance*, 2 Metc. (Ky.) 571; *Frost v. McCargar*, 29 Barb. (N. Y.) 617; *Chapman v. Cooley*, 12 Rich. L. (S. C.) 654; *Starks v. People*, 5 Denio (N. Y.), 106. The statement to the contrary by Dr. Greenleaf (1 Greenl. Ev., § 469) is in the language of a

statement by Mr. Phillips to which Mr. Phillips cites no authority. Dr. Greenleaf cites in support of his statement the case of *Rex v. Clarke*, 2 Starkie, 241. This does not bear out the doctrine. There the prosecutrix in an indictment for an assault with intent to commit rape, having admitted, on cross-examination, that she had been sent to the House of Correction upon charges of having stolen money, and that she had been admitted into the Refuge for the Destitute and had remained there nearly two years,—it was held competent to show that her conduct, *since* being so admitted into the Refuge for the Destitute, had been good. The ruling did not relate at all to previous contradictory statements made by the prosecutrix. *St. v. Hoffman*, 134 Iowa,

mits, or where it is otherwise proved, that he has been *convicted of a crime*, or has *committed an offense* which affects his character, the person who calls him is permitted to prove that his general character, *since* being convicted of the offense, has been good.⁴³ Where a witness is impeached by producing the record of his conviction of a felony or infamous crime, it is not a new thing to allow his character to be sustained by witnesses who testify that his subsequent character has been good. This was allowed by Lord Holt on the trial of Henry Harrison for murder, in 1692. The record of the indictment and conviction of a witness for extortion, was produced to impeach him. Afterwards another witness, Captain Cannon, was called, who was asked by Lord Holt to tell the court of what reputation the witness was at the present time; and Captain Cannon said: "My lord, he is now of none of the clearest reputation."⁴⁴ And so, where an attempt was made to show that a certain witness had *himself committed the crime* of which the de-

387, 112 N. W. 103; First Nat. Bank v. Com. U. Assn., 33 Ore. 43, 52 Pac. 1050.

⁴³ Rex v. Clarke, 2 Stark. 241; Com. v. Green, 17 Mass. 515, 541; Webb v. St., 29 Ohio St. 351; Gertz v. Fitchburg etc. R. Co., 137 Mass. 77 (distinguishing Harrington v. Lincoln, 4 Gray (Mass.) 563, 568). See also Com. v. Ingraham, 7 Gray (Mass.), 46. In Russell v. Coffin, 8 Pick. (Mass.) 143, 154, the court referred to this principle, with the observation that they did not object to it. It was also cited with approval in Braddee v. Brownfield, 9 Watts (Pa.), 94. It is competent to give such evidence under the *California* statute. People v. Amnacus, 50 Cal. 233. In Harrington v. Lincoln, *supra*, it was held that evidence introduced for the purpose of impeaching a witness to the effect that he has been tried for a crime in another State does not authorize the party calling the witness to sustain his testimony by evidence of his good character for truth and integrity. The question is not well

reasoned, and the conclusion seems to be wrong in principle; since such evidence may fairly be supposed prejudicial to the witness in the minds of the jury. Wick v. Baldwin, 51 Ohio St. 51, 36 N. E. 671; Luttrell v. St., 40 Tex. Cr. R. 651, 51 S. W. 930; Central R. & B. Co. v. Dodd, 83 Ga. 507, 10 S. E. 206. Where the admission is by a party and it is against interest, its force cannot be impaired by proof of general reputation, but such proof becomes inadmissible. So held where it was shown that plaintiff attempted to suborn witnesses. Fulkerson v. Murdock, 53 Mo. App. 151. Vide also Gaar Scott & Co. v. Shaffer, 139 Ind. 91, 38 N. E. 811.

⁴⁴ Harrison's Case, 12 How. St. Tr. 861, 862. See Tennessee etc. R. Co. v. Haley, 85 Fed. 534, 29 C. C. A. 328, where evidence that an ex-convict had been made a "Trusty" was admitted. Also on re-examination witness' statement as to leading an orderly life may be admitted. Conley v. Meeker, 85 N. Y. 618.

fendant stood charged, and that he had by false testimony, by his management of the case, and by improperly interfering with defendant's witnesses, attempted to *exculpate himself* by convicting an innocent man,—it was held that evidence of his good character for veracity was admissible. The court reasoned: "While it is true evidence cannot be given to prove an infamous crime against a witness, of which he has not been convicted, for the purpose of impeaching his credit, yet where the question as to whether the witness is guilty of such a crime becomes the legitimate subject of inquiry on the trial, we think his reputation for truth may be proved to rebut any imputation against his credit which the evidence of guilt makes against him."⁴⁵ But in such a case, the character of the witness may not be sustained by showing that he was *in fact innocent*, for the *record* of the conviction is *conclusive*.⁴⁶

§ 557. [Continued.] **Contrary and Confusing Views.**—It is to be regretted that authority is not uniform on the question what species of assaults upon the character of a witness will authorize evidence of good character to sustain him. In a criminal case in the Supreme Court of New York, it was held that the fact that the witness admits, on his cross-examination, that he has been prosecuted and bound over, on a charge of perjury, will not authorize the party calling the witness to give evidence of his general good character,—the court reasoning that a party can only give such evidence when impeaching witnesses have been called on the other side, and that, by impeaching witnesses is meant only such witnesses as have spoken to general character for truth.⁴⁷ The court went

⁴⁵ *Webb v. St.*, 29 Ohio St. 351, 358. It has also been ruled, that a witness might explain the circumstances of his arrest and conviction. *South Covington etc. R. Co. v. Beatty* (Ky.), 50 S. W. 239 (not reported in state reports). Or explain why he had been in jail. *St. v. McClellan*, 23 Mont. 532, 59 Pac. 924. *Holmes, J.*, in *Lamoureux v. R. Co.*, 169 Mass. 338, 47 N. E. 1009, argues and holds that "the conviction must be left unexplained" and it must not be allowed "to go behind the sentence to determine the

degree of guilt," all of this being "impracticable" as going into "a long investigation of a wholly collateral matter." In Illinois it has been held that the punishment, term of sentence or fact of pardon is immaterial and incompetent. *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842. The conviction going to credibility and not disqualification.

⁴⁶ *Gertz v. Fitchburg etc. R. Co.*, 137 Mass. 77; *Com. v. Gallagher*, 126 Mass. 54.

⁴⁷ *People v. Gay*, 1 Park. Cr. (N. Y.) 308, affirmed, 7 N. Y. 378 (Rug-

into a great deal of learning to reason itself into a conclusion which is obviously unsound in principle. To call out, on cross-examination of a witness, the fact that he has been prosecuted, though unsuccessfully, for perjury, would ordinarily prejudice his character and testimony in the minds of the jury, and clearly the party calling him ought to be allowed thereafter to sustain his testimony by evidence tending to show his good character. Evidence tending to contradict a witness, and also to show that he has *conspired* with the party calling him, *to cheat and defraud* the opposite party, does not, it has been held on equally doubtful grounds, authorize the party calling him to introduce evidence of his character for honesty, integrity and moral worth, as well as for truth and veracity.⁴⁸

§ 558. [Continued.] Where Third Parties have Accused the Witness of Swearing Falsely.—Equally untenable seems another holding of the Supreme Court of New York. A witness' character for veracity was attacked by asking him, on cross-examination, whether third persons had not accused him of swearing falsely. He answered in the affirmative. It was held that this did not operate to let in evidence showing that his character for truth and integrity had always been good.⁴⁹ The court reasoned that because the impeaching evidence was not competent, that is, because the question put on cross-examination was not competent,—and ought not to have been put and answered, the party whose witness he was, was thereby cut off from removing the disparaging effect of the answer,—and this, although the question put on cross-examination was objected to by the party calling the witness who was thus assailed.

§ 559. Exception in the Case of a Subscribing Witness who is Dead.—An exception to this rule has been admitted by the English

gles C. J., and Willes, J., dissenting).

⁴⁸ Heywood v. Reed, 4 Gray (Mass.), 574. See also McCarty v. Leary, 118 Mass. 510, where cross-examination of plaintiff, witness, referred to intoxication at other times, proof of character for sobriety was excluded because "it would not have removed the imputation which resulted from his testimony." For a somewhat similar reason good char-

acter has been excluded as to cross-examination as to specific acts. See Hitchcock v. Moore, 70 Mich. 112, 114. In Texas it is said that the only instance in which such proof is admissible, as following upon cross-examination attacking credibility, is that the witness is a stranger. Warren v. St., 51 Tex. Cr. R. 598, 103 S. W. 888.

⁴⁹ Hannah v. McKellop, 49 Barb. (N. Y.) 342.

judges, in the case where the subscribing witnesses to a will, or one of them, is dead, and the will is impeached on the ground of fraud,—in which case they have admitted evidence to support the characters of such deceased subscribing witnesses.⁵⁰ In so holding Lord Kenyon said: “In the great case of Jolliffe’s Will, Lord Dudley and Ward, and other persons, were examined as to the character of the person by whom the will was prepared; and the legality of admitting such evidence was not doubted.⁵¹ But Lord Ellenborough justly held that the rule has no application where the subscribing witness is not dead, and no shade is cast upon his character by the evidence.⁵²

§ 560. [Continued.] Illustration.—The validity of a will was impeached on the ground of total incapacity in the testatrix to make any will at the time when it was supposed to have been made. The names of three witnesses were regularly subscribed, as attesting its execution. These were a Mr. Gale, an attorney by whom it was prepared; one Reynolds, his clerk; and one Cooperson. The two former witnesses were dead. Evidence was given tending to show that, when the will was signed, the testatrix was in a state of stupor, and that the pen was guided in her hand, without her seeming to know what she did. Lord Kenyon allowed several witnesses, particularly of the legal profession, to be called and asked as to the general character of Gale and Reynolds, and whether they were persons of good reputation and likely to be guilty of such conduct as was imputed to them.⁵³ In another such case, imputations having been cast upon the character of the deceased attorney by whom the will was prepared, and who was one of the attesting witnesses, the evidence charging him with fraud in the execution of the will, it was held that the devisee might call witnesses to show his general good character. In so holding, Best, C. J., said: “Courts of law lay down principles according to the necessity of the case before them. Here, the character of the deceased attorney, when attacked, could only

⁵⁰ Stephenson v. Walker, 4 Esp. 50; Provis v. Reed, 3 Moore & P. 4.

⁵¹ Stephenson v. Walker, *supra*; Ward v. Brown, 53 W. Va. 227, 44 S. E. 488, where the question was undue influence, and the attorney

preparing the will was dead. His good character was shown.

⁵² Bishop of Durham v. Beaumont, 1 Camp. 207.

⁵³ Stephenson v. Walker, 4 Esp. 50.

be protected by calling witnesses to show that he was not capable of the fraudulent conduct imputed to him."⁵⁴

§ 561. **Exception Where the Witness is a Stranger.**—In Connecticut, while the general rule is conceded that a witness cannot be supported by evidence of his general character for truth, until after a general impeachment of it,—yet an exception to the rule has been adopted in the case where the witness is in the situation of a stranger. There, they allow him to be supported by evidence of his general good character for veracity, although it has not been impeached.⁵⁵ But it is held, in applying this exception, that evidence of his good character in other respects than veracity, is not admissible for the purpose of sustaining him.⁵⁶

§ 562. [Continued.] **Sustaining a Deaf and Dumb Prosecutrix.**—Where the prosecutrix, who was also the principal witness for the State, on the trial of an indictment for an assault with intent to ravish her, was a deaf and dumb person, it was held that the public prosecutor was entitled to support her testimony by evidence that her general character for truth was good, although no impeachment of her character had been attempted;⁵⁷ for one who could neither hear nor speak might well be regarded as a *stranger* in the community in which she lived.

§ 563. **Laying Foundation.**—But here, as in the case of the examination of impeaching witnesses, before the sustaining witness can properly testify, a foundation should be laid, by asking him if he knows the general character of the witness who is assailed (in those jurisdictions where the inquiry is as to general character,) or his general character for truth and veracity (in those jurisdictions where the inquiry is thus limited), in the community where he resides or has recently resided. Until this is done, he cannot be heard;⁵⁸ after it is done, he may be allowed to say whether or not, from that reputation, he would *believe the impeached witness on*

⁵⁴ *Provis v. Reed*, 3 Moore & P. 4, 9.

⁵⁵ *Merriam v. Hartford etc. R. Co.*, 20 Conn. 354, 364. Compare *Rogers v. Moore*, 10 Conn. 12.

⁵⁶ *Merriam v. Hartford etc. R. Co.*, *supra*.

⁵⁷ *St. v. De Wolf*, 8 Conn. 93, 100.

⁵⁸ *Cook v. Hunt*, 24 Ill. 536, 550; *Clay v. Robinson*, 7 W. Va. 350, 363; *Wolff v. Telegraph Co.*, 42 Tex. Civ. App. 30, 94 S. W. 1062; *Gifford v. People*, 148 Ill. 173, 35 N. E. 754.

oath;⁵⁹ but without this foundation, he cannot so testify.⁶⁰ But where, without the asking of this specific question, a witness, whose deposition was taken, stated that the general character of the impeached witness was good and that he was entitled to full credit on oath, this was deemed sufficient.⁶¹

§ 564. **Negative Evidence of Character.**—Negative evidence of character, by which is meant that the witness has long been acquainted with the person whose character is in issue and has never heard it questioned,—is competent, and it has been held error to exclude it.⁶² The reason is that the fact that a person's character is not questioned is, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good.⁶³

§ 565. [Continued.] **Reasons and Illustrations.**—"A very sensible and commendable instance of the relaxation of the old and strict rule, is the reception of negative evidence of good character,—as for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear

⁵⁹ *Clay v. Robinson*, supra; ante, § 532.

⁶⁰ *Lyman v. Philadelphia*, 56 Pa. St. 488, 502; ante, § 529.

⁶¹ *McCutchen v. McCutchen*, 9 Port. (Ala.) 650; *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23.

⁶² *St. v. Lee*, 22 Minn. 407; *Lemons v. St.*, 4 W. Va. 755; *St. v. Nelson*, 58 Iowa, 208, 12 N. W. 253; *Bucklin v. St.*, 20 Ohio, 18; *Taylor v. Smith*, 16 Ga. 7, 10; *People v. Davis*, 21 Wend. (N. Y.) 309, 315; *Morss v. Palmer*, 15 Pa. St. 51, 57; *Davis v. Franke*, 33 Gratt. (Va.) 414; *Powell v. St.*, 101 Ga. 9, 29 S. E. 309; *St. v. Keenan*, 111 Iowa, 286, 82 N. W. 792; *Day v. Ross*, 154 Mass. 14, 27 N. E. 676; *Milliken v. Long*, 188 Pa. 411, 41 Atl. 540.

⁶³ *St. v. Lee*, supra, opinion by Berry, J. A similar reason was

given by *Berkshire, J.*, in *Lemons v. St.*, supra. See the following authorities, as showing the extent to which the old rule in this regard has been relaxed. *Reg. v. Rowton*, 2 Benn. & H. Cr. Cas. 333 and note; *Gandolfo v. St.*, 11 Ohio St. 114; 1 Tayl. Ev. (8th ed.), § 350; 1 Bish. Cr. Proc., § 489. But under the provisions of the Georgia Code (Ga. Code 1895, §§ 5293, 5294), it is held that "if the sustaining witness is not able to say that the general character of the impeached witness is not bad, he should at least be required to state that it is not such as to render him unworthy of credit on his oath, before he can give his own declaration that, from his character, he would not believe him under oath." *Artope v. Goodall*, 53 Ga. 318, 324.

what was said about him, and has never heard any remark about his character; the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good." ⁶⁴ In like manner, it was ruled in Pennsylvania, that it is competent evidence in support of character, that a witness, acquainted with the witness assailed and living in his neighborhood, never heard his character for truth spoken against or questioned. The court, speaking through Rogers, J., said: "It is certainly some proof that a person against whom the tongue of slander has never been heard to wag, is not so destitute of truth and sincerity as that he ought not to be believed on his oath. The evidence is not easily reconcilable with the charge that he is totally unworthy of credit. The presumption is, if the charge be true, it must have been heard by those who live near, and were in daily intercourse with him." ⁶⁵ In like manner, in a case in New York where the sustaining witness testified that he had never heard the character of the impeached witness for truth and veracity spoken of, but who also testified that he knew the witness and the persons with whom he associated,—it was held that he might properly be asked whether he would believe the impeached witness on oath. Nelson, C. J., said: "If such a question might not be permitted, the most respectable man in the community might fail in being supported, if his character for truth should happen to be attacked. Living all his life above suspicion, his truth would rarely be the subject of remark. A neighbor might be obliged to admit, as in this case, that he had never heard it spoken of, and yet undoubtedly be competent to sustain him." ⁶⁶ The same view has been taken by the Supreme Court of Georgia, in an opinion in which it is said: "Certainly, the sort of silent respect and consideration with which one is treated and received by those who know him, is some index of what they think of him as a man of veracity. And, indeed, if he is a person whom they think very highly of, that is about the only index. The character for truth of such person is never discussed—questioned—spoken of. To discuss, question, or even perhaps to speak of one's reputation for truth, is to admit that two opinions are possible on the point. Suppose the question were, what was the

⁶⁴ *St. v. Lee*, 22 Minn. 407, 409, opinion by Berry, J. To the same doctrine see *Gandolfo v. St.*, 11 Ohio St. 114, 117.

⁶⁵ *Morss v. Palmer*, 15 Pa. St. 51, 57.

⁶⁶ *People v. Davis*, 21 Wend. (N. Y.) 309, 315.

character of Washington among his neighbors for truth, could the answer be anything but this: 'I never heard it questioned—discussed—spoken of; and yet I know it to have been excellent.' ”⁶⁷ It was therefore held that the testimony of witnesses to the effect that they were acquainted with the character of the impeached witness for truth in their neighborhood, and that from their acquaintance, thence derived, they would believe him on his oath, although they had never heard his character spoken of, was proper to be considered by the jury.⁶⁸ So, in a civil case in Virginia, a witness was asked whether he knew the general character of the plaintiff for truth and veracity. He replied that he had known the plaintiff six or seven years, and knew his general character for truth and veracity as well as any other man's character against whom he had never heard anything alleged, and that he had never heard his character called in question. It was likewise held that this was proper evidence to go to the jury.⁶⁹

§ 566. **Distance of Time and Place.**—It has been ruled that evidence in support of the character of an assailed witness need not be confined to the same neighborhood, or to the same time spoken of by the assailing witness, but that the party attempting to sustain the witness may prove his character for veracity years previously, and in a different county, in which he has resided. The reasons in support of this conclusion were thus stated by Rogers, J.: "It is contended that the testimony in support of character must take no wider range, but must be confined to the same neighborhood and the same time. It must be observed that witnesses have rights, as well as parties. It is too often the case that they are set up as marks to be shot at, and sometimes are compelled to defend themselves against sudden ruthless assaults, of which they had no previous notice. However, a correct and proper rule has been adopted, that greater latitude is allowed in support, than in attacking character."⁷⁰ * * * If the party making the assault is allowed to choose his own neighborhood and his own time, it may be difficult, in many cases, to parry the attack. It allows him an unjustifiable advantage, of which the witness, who is most interested, would have great right to complain. The not coming from what is termed

⁶⁷ Taylor v. Smith, 16 Ga. 7, 10,
opinion by Benning, J.

⁶⁸ Ibid.

⁶⁹ Davis v. Franke, 33 Gratt. (Va.)
414.

⁷⁰ Citing Chess v. Chess, 1 Penn.
41.

his immediate neighborhood may lessen its weight, but certainly does not destroy the competency of the evidence. The same may be said, with equal force, as to time. It is sometimes convenient for a party to rid himself of a troublesome witness, deposing to facts on which the cause turns; it is sometimes easy to excite prejudice against him, in the town, village, or neighborhood where he resides. To confine him, in vindication, to the same place where the atmosphere has been polluted by sinister arts, no man's character would be safe."⁷¹

§ 567. **Right to Impeach an Impeaching Witness.**—The rule is that the general character, or general character for veracity, of *every witness* who testifies in a case, may be impeached by the opposite party. It hence follows that a witness called to impeach the character of another witness, may himself be impeached by the same method.⁷² It is said by the late Judge Taylor, in speaking of a witness whose general character for veracity has been impeached: "The party calling him may re-establish his credit by attacking the general character of the impeaching witnesses. How far this plan of *recrimination* may be carried at common law is not yet determined, though in courts of equity the practice is in conformity with the rule of the civil law."⁷³ The rule of the civil law, here alluded to, permitted the discrediting witness himself to be discredited by other witnesses, but allowed the recrimination to extend no farther.

§ 568. **Cross-Examination of Sustaining Witness.**—Where a witness deposes to good character of an assailed witness, he may be asked, on cross-examination, whether the impeached witness has been reputed to have been arrested for felony,⁷⁴ and whether he has

⁷¹ *Morss v. Palmer*, 15 Pa. St. 51, 56.

⁷² *Starks v. People*, 5 Denio (N. Y.), 106; *St. v. Cherry*, 63 N. C. 493; *Dunn v. Com.*, 27 Ky. Law Rep. 113, 84 S. W. 321. And it may be shown that the impeaching witness is hostile. *Brink v. Stratton*, 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182.

⁷³ 2 Tayl. Ev. (8th ed.), § 1473.

⁷⁴ *Wachstetter v. St.*, 99 Ind. 290, 50 Am. Rep. 94. The same court in a previous case held it incompetent

to ask a sustaining witness on cross-examination if he had heard his neighbors say that the sheriff had come to arrest him for larceny. *Oliver v. Pate*, 43 Ind. 132. But this case was "distinguished" in the subsequent case of *McDonel v. St.*, 90 Ind. 320. Compare *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595. *Semble, Basye v. St.*, 45 Neb. 261, 63 N. W. 811; *Cook v. St.*, 46 Fla. 20, 35 South. 665; *St. v. Ogden*, 39 Ore. 195, 65 Pac. 445.

not heard neighbors of such party testify, in a previous action against the party, that his reputation was bad.⁷⁵ A prisoner on trial for highway robbery called a witness who deposed that he had known the prisoner for years, during which time the prisoner had borne a good character. On cross-examination, it was proposed to ask the witness whether he had not heard that the prisoner was suspected of having committed a robbery, which had taken place in the neighborhood some years before. This was objected to as raising a collateral issue, but Mr. Baron Parke overruled the objection, saying: "The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it."⁷⁶ So, in a prosecution for murder, a witness swore that he knew the general character of the prisoner for peace and quietude in the neighborhood, and that it was good. On cross-examination, he was asked whether he had not heard that defendant had killed a man in the State of Georgia. He was allowed, against objection, to answer this question. It was held that in this the court committed no error. Stone, J., in giving the opinion of the court, said: "In estimating character the shadings, as well as the brighter hues, should be considered. They all go to make up character—reputation—the estimation in which the person is held. But it is only character, and not the particulars or details of independent acts which can be inquired into."⁷⁷

§ 569. **Re-examination.**—If sustaining witnesses admit, on cross-examination, that there are reports in the neighborhood unfavorable to the character of the witness assailed, it is competent, on re-examination, to interrogate them concerning the nature of those reports, *e. g.*, to ask them whether they are not in respect of drinking and horse-trading. This is necessary, in order that the jury may judge in what respect the reports affect the character of the witness, and whether they are of such a nature as to impair his credibility.⁷⁸

⁷⁵ *Hutts v. Hutts*, 62 Ind. 240.

⁷⁶ *Rex v. Wood*, 5 Jur. 225; cited in *Best Ev.*, § 261. Cross-examination is largely in the discretion of the trial court. *Shears v. St.*, 147 Ind. 51, 46 N. E. 331; *St. v. Lee*, 95 Iowa, 427, 64 N. W. 284; *St. v. Boyd*, 178 Mo 2, 72 S. W. 650.

⁷⁷ *Ingram v. St.*, 67 Ala. 67, 72. Witness may be asked about what he has heard, but not about what he knows of specific acts. *Pulliam v. Cantrell*, 77 Ga. 563, 565, 3 S. E. 280; *Kearney v. St.*, 68 Miss. 233, 236, 8 South. 292.

⁷⁸ *Stape v. People*, 85 N. Y. 390.

§ 570. [Georgia.] What Sustaining Witness must swear to.—

Under the Code of Georgia, to impeach a witness by proof of general bad character, the impeaching witness should be first asked as to his knowledge of the general character of the witness; next, as to what that character is; and lastly, whether, from that character, he would believe him on his oath.⁷⁹ By another section, "the witness may be sustained by similar proof of character."⁸⁰ It would seem that these provisions are merely declaratory of the common law. Construing them, the Supreme Court of that State has said: "If the sustaining witness is not able to say that the general character of the impeached witness is not bad, he should, at least, be required to state that it is not such as to render him unworthy of credit on his oath, before he can give his own declaration, that, from this character, he would believe the other on his oath."⁸¹

§ 571. [General Rule.] Declaration out of Court not admissible

to Sustain Declaration in Court.—The general rule is that the previous declaration of a witness out of court is not admissible to sustain his evidence given in court.⁸² Thus, it has been ruled that a party who, in the progress of a trial, makes use of a deposition, may not be allowed to strengthen it by a so-called *disclosure* of the same witness, made at the time of taking the poor debtor's oath, before two justices of the peace and quorum.⁸³ So, as a general rule, what a party *swore to on a former occasion*, cannot be given in evidence in his favor, though it may be against him.⁸⁴ Where a witness—a deaf-mute—was discredited by evidence tending to show that she had no knowledge of a Supreme Being or of the obligations of an oath, and the party whose witness she was, tendered evidence to the

⁷⁹ Georgia Code 1873, § 3873.

⁸⁰ Georgia Code 1895, § 5293.

⁸¹ *Artope v. Goodall*, 53 Ga. 319, 325.

⁸² *Riney v. Vanlandingham*, 9 Mo. 816; *People v. Finnegan*, 1 Park. Cr. (N. Y.) 147; *Nichols v. Stewart*, 20 Ala. 358; *Stolp v. Blair*, 68 Ill. 541; *St. v. Thomas*, 3 Strobb. L. (S. C.) 269; *Bailey v. St.*, 9 Tex. App. 98; *People v. Hulse*, 3 Hill (N. Y.), 309 (Cowen, J., dissenting); *Corpus v. St.*, 51 Tex. Cr. R. 315, 102 S. W. 1152; *Inman Bros. v. Lumber Co.*, 146 Fed. 449, 76 C. C. A. 659; *Ten-*

ney v. Rapid City, 17 S. D. 283, 96 N. W. 96. Thus prior consistent declarations are inadmissible to support a dying declaration. *St. v. Hendricks*, 172 Mo. 654, 73 S. W. 194. Where a railway mail clerk told a newspaper correspondent about an accident, what he said not competent corroborating evidence. *Southern Pac. Co. v. Schuyler*, 135 Fed. 1015, 68 C. C. A. 409.

⁸³ *Smith v. Morgan*, 38 Me. 463.

⁸⁴ *Robertson v. Caw*, 3 Barb. (N. Y.) 410; *Loomis v. R. Co.*, 159 Mass. 39, 34 N. E. 82.

effect that she had related the same transaction to which she testified, in a similar manner, to a friend of hers,—it was held that evidence of these statements was rightly rejected, as being no more than hearsay evidence; “and because, in the case of a witness already laboring under suspicion, they are rarely calculated to increase, in any degree, the confidence due to his testimony.”⁸⁵ It has been well said that: “To extend the doctrine to witnesses who are not impeached, would result in making a witness’ credibility depend more upon the number of times he had repeated the same story, than upon the truth of the story itself, and tend to render the proceedings on each trial interminable.”⁸⁶

§ 572. **Old Rule that Former Consistent Declarations may be shown in Corroboration.**—It was early held in Pennsylvania that, where a witness is impeached by evidence as to his character for veracity, and is also contradicted, it is competent to give evidence of what he swore to on a former trial, for the purpose of corroborating his testimony.⁸⁷ An early case in Maryland supported the same view. The action was ejectment, and the question became material, whether a certain child had been born alive or dead. The deposition of a doctor of medicine was read, to the effect that he assisted at the accouchment, and that the child was born alive. To overthrow this, testimony was given to the effect that the deponent was not present at the accouchment at all. The party offering the deposition then offered to prove, for the purpose of corroborating the testimony of the deponent, that he had, two or three days after the birth of the child and before the date of the deposition, declared the same facts to which he had deposed. It was held that this evidence should have been admitted,—the court saying: “Where the credibility of the witness is attacked by the opposite party, his prior declarations may be given in evidence to show his consistency.”⁸⁸ One decision is found which goes to the wild length of holding that, where evidence is adduced which *contradicts* a witness upon an *immaterial point*, the party calling him may introduce witnesses to sustain his general character, although the opposite party disclaims

⁸⁵ Munson v. Hastings, 12 Vt. 346.

⁸⁶ Bailey v. St., 9 Tex. App. 98, 100, opinion by White, P. J.

⁸⁷ Henderson v. Jones, 10 Serg. & R. (Pa.) 322. See also Wallace v. Grizzard, 114 N. C. 488, 19 S. E.

760; Glass v. Bennett, 89 Tenn. (5 Pickle) 478, 14 S. W. 1085; St. v. Taylor, 134 Mo. 109, 35 S. W. 92.

⁸⁸ Cooke v. Curtis, 6 Harr. & J. (Md.) 93. See also Mallonee v. Duff, 72 Md. 283, 19 Atl. 708.

any intention of discrediting him.⁸⁹ These conceptions take root in some early English authority, which will now be explained. In an old case, William Maynard, a witness, was, as appeared by his own evidence, guilty of a felony, to wit, robbery, together with others, which robbery was the subject of the action, which was an action of trespass. He had not been joined with the other defendants, in order that he might be a witness for the plaintiff. He was allowed to testify, and afterwards several witnesses were received and allowed to prove that William Maynard did, at several times, discuss and declare the same things, and to the like purpose, that he testified now; and my Lord Chief Baron said: "Though a hearsay ought not to be allowed as direct evidence, yet it might be made so to this purpose, viz., to prove that William Maynard was consistent to himself, whereby his testimony was corroborated."⁹⁰ Mr. Justice Buller, in his work called *Nisi Prius*, citing the last named case, said: "But, though hearsay be not allowed as direct evidence, yet it has been admitted in corroboration of a witness' testimony, to show that he affirmed the same thing before, on other occasions, and that he is still consistent to himself,"⁹¹—without offering any opinion as to the propriety of the rule. In like manner, it was said by Mr. Serjeant Hawkins: "What a witness hath been heard to say at another time may be given in evidence, in order, either to invalidate or confirm the testimony which he gives in court."⁹² Chief Baron Gilbert, in his work on evidence, in treating of hearsay evidence, says: "But although hearsay is not allowed as direct evidence, yet it may, in corroboration of a witness' testimony, to show that he affirmed the same thing on other occasions, and that the witness is still consistent with himself; for such evidence is only in support of the witness that gives his testimony upon oath."⁹³ So, on the trial of Sir John Friend for treason, Lord Chief Justice Holt allowed Bertham, a witness, to testify that Captain Blair had told him for two years past, that Sir John Friend was to have a regiment of horse which was to be raised and lie posted about the town, that Captain Blair was to be lieutenant-colonel of the regiment, and that the witness was to be lieutenant to Captain Blair in his troop. Lord Holt said: "That is not evidence against Sir John Friend. He [the witness] is only called to confirm the testi-

⁸⁹ *Newton v. Jackson*, 23 Ala. 335.

⁹⁰ *Lutterell v. Reynell*, 1 Mod. 282.

⁹¹ *Bull N. P.* 294b.

⁹² *Hawk. P. C.*, bk., 2, ch. 46, § 14.

⁹³ *Gilb. Ev.* 890.

mony of Captain Blair,—that Blair spoke of it long ago before he gave his evidence, and so it is not a new thing invented by him.”⁹⁴ In another case, such confirmatory evidence was offered and admitted in chief, which would not now be allowed.⁹⁵ For, notwithstanding these decisions and *dicta*, it is well settled that such evidence is not receivable to confirm the testimony of a witness, until it has been assailed by evidence of previous inconsistent statements made by him; since, to receive it would involve the solecism of attempting to support testimony given upon oath, by statements made not on oath, which are mere hearsay.⁹⁶

§ 573. Witness Impeached by Previous Inconsistent Statements not Sustained by Previous Consistent Statements.—By the weight of authority, where the testimony of a witness is discredited by evidence that he has made statements out of court inconsistent with his sworn testimony, it is not competent, for the purpose of sustaining him, to prove that, at other times, he has made, out of court, statements which are consistent with his sworn testimony.⁹⁷ A *fortiori*, such testimony is not admissible to confirm the testimony of another witness testifying to the same fact.⁹⁸ Thus, where the prisoner was on trial for the crime of robbery committed upon the person of one Terhune, it was held that the statements which Terhune had made to a witness, immediately after the alleged robbery, consistent with his statements made as a witness, were not admissible for the purpose of corroborating his statements as a witness.⁹⁹ But in one jurisdiction, the case of a woman swearing to a rape committed upon her¹ has been held to form no exception to the foregoing

⁹⁴ Friend's Case, 13 How St. Tr. 32, 33.

⁹⁵ Harrison's Case, 12 How. St. Tr. 861.

⁹⁶ This was distinctly ruled in *Rex v. Parker*, 3 Dougl. 242, where the doctrine of *Lutterell v. Reynell*, *supra*, was declared not to be the law.

⁹⁷ *Nichols v. Stewart*, 20 Ala. 358; *Com. v. Jenkins*, 10 Gray (Mass.), 485, 489; *Ware v. Ware*, 8 Me. 42; *St. v. Vincent*, 24 Iowa, 570, 575; *Ellicott v. Pearl*, 1 McLean (U. S.), 206, 10 Pet. (U. S.) 412; *Butler v. Truslow*, 55 Barb. (N. Y.) 293;

Reed v. Spaulding, 42 N. H. 114; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *U. S. v. Holmes*, 1 Cliff. (U. S.) 98, 105; *People v. Doyell*, 48 Cal. 85; *Dushon v. Merchants' Ins. Co.*, 11 Metc. (Mass.) 199. So held in *Com. v. Wilson*, 1 Gray (Mass.), 337; *Com. v. Jenkins*, 10 Gray (Mass.), 489; *Jones v. St.*, 107 Ala. 93, 18 South. 237; *Cincinnati Traction Co. v. Stephens*, 75 Ohio St. 171, 79 N. E. 235.

⁹⁸ *St. v. Parish*, 79 N. C. 610.

⁹⁹ *People v. Finnegan*, 1 Park. Cr. (N. Y.) 147.

rule. On the trial of an indictment for such an offense, alleged to have been committed on board a vessel, the prisoner attempted to discredit the testimony of the prosecutrix,—1. By showing, on her cross-examination, that her story was improbable in itself. 2. By disproving some of the facts to which she testified. 3. By evidence that her conduct, while on board the vessel and afterwards, was inconsistent with the idea of the offense having been committed. 4. By calling witnesses to show that the account which she had given of the matter out of court, did not correspond with her statements under oath. It was held, that this was not an attack upon the complainant's general character, and therefore, that evidence of her good character was not admissible in reply. Cowen, J., dissented, holding that evidence of the complainant's contradictory statements out of court affected her general character, and consequently that evidence of her good character became admissible.²

§ 574. **Recognized Exceptions to the Rule.**—There are certain recognized exceptions to the foregoing rule, as to which all the authorities agree. Thus, where the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement from that which he actually made.³ Accordingly a *confession* by an

¹ Post, § 577.

² *People v. Hulse*, 3 Hill (N. Y.), 309.

³ *Gates v. People*, 14 Ill. 433, 438; *Stolp v. Blair*, 68 Ill. 541, 544; *Hayes v. Cheatham*, 6 Lea (Tenn.), 2; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun (N. Y.), 90; *St. v. Petty*, 21 Kan. 54, 60. See also *People v. Moore*, 15 Wend. (N. Y.) 419; *St. v. De Wolf*, 8 Conn. 93; *Wright v. De Klyne*, 1 Pet. C. C. (U. S.) 199; *Henderson v. Jones*, 10 Serg. & R. (Pa.) 332; *Packer v. Gonsalus*, 1 Serg. & R. (Pa.) 526; *People v. Vane*, 12 Wend. (N. Y.) 419; *Clapp v. Wilson*, 5 Den. (N. Y.) 286. This rule was thus stated in an opinion

drawn up by Miller, J., in the Court of Appeals of New York, but not reported, because not concurred in fully by all members of the court: "As a general rule, such evidence is inadmissible, as the witness cannot be allowed to corroborate his statements in court by what was said by him out of court. There are, however, exceptions to this rule. In case an attempt is made to discredit the witness on the ground that his testimony was given under the influence of some motive prompting him to make a false or colored statement, then, he may be allowed to show in reply, that he has made similar declarations, at a time when

accomplice, given before he had received a promise of personal exemption if he would become a State's witness, may well be received, as corroborating the testimony given by him on the witness stand.⁴

§ 575. [Continued.] **Change of Relation Necessary to 'Admit such Evidence.**—In such a case, denying the general right to admit such evidence, it has been said: "To make the former statements of the witness competent in his own favor, it should ordinarily be made to appear that, at the time he made the statements, he stood in some different relation to the cause or party from what he now occupies, and that the change in his position has been such that, though his present statement is in favor of his interest, yet that the former one, at the time it was made, must have been, or at least must have appeared to be, directly against his interests. And any such statements by a witness, made at any time, and offered as evidence in his own favor, after he has been impeached, should be received with great caution."⁵

§ 576. [Another Exception.] **Fabrication of Recent Date.**—So, in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account, before its effect and operation could be foreseen.⁶ Thus, where it was proved, with a view to discredit a witness, that he had given, on other occasions, a week or ten days after the time of the transaction of which he testified, a very different account from what he had given on the stand,—it was held admissible to support him, by showing that, immediately

the motive imputed to him did not exist." *Railway Co. v. Warner* (memorandum in 62 N. Y. 651); quoted and followed in *Herrick v. Smith*, 13 Hun (N. Y.), 446, 448; *Hewitt v. Corey*, 150 Mass. 445, 23 N. E. 223; *Howard v. Com.*, 81 Va. 458.

⁴ See the reasoning of *Bronson, J.*, in *Robb v. Hackley*, 23 Wend. (N. Y.) 50.

⁵ *Reed v. Spaulding*, 42 N. H. 114, 123, opinion by *Sargent, J.*; *St. v. Flint*, 60 Vt. 304, 14 Atl. 178.

⁶ *Gates v. People*, 14 Ill. 433, 438, per *Treat, C. J.*; *Stolp v. Blair*, 68 Ill. 541, 544, per *Sheldon, J.*; *St. v. Petty*, 21 Kan. 54; *Bronson, J.*, in *Robb v. Hackley*, 23 Wend. (N. Y.) 50, 54; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412, 439, per *Story, J.*; *Hester v. Com.*, 85 Pa. St. 140, 158; *Henderson v. Jones*, 10 Serg. & R. (Pa.) 323. See also *St. v. Hendricks*, 32 Kan. 559; *English v. St.*, 34 Tex. Cr. R. 190, 30 S. W. 233; *St. v. Sharp*, 183 Mo. 715, 82 S. W. 134.

after the transaction, he had given the same account which he had given upon the stand.⁷

§ 577. [Another Exception.] **Statements made immediately after the Occurrence.**—A modified rule has been thus laid down in a decision in Kansas: "If a witness be impeached by proof of his having previously made statements out of court, inconsistent with his testimony in court, he may then be corroborated by evidence of other statements made by him out of court, in harmony with his testimony, if made *immediately after the occurrence* of which he has testified took place, and made before he has had any reason or ground for fabricating an untrue or false statement; and such corroborating evidence is not limited to those statements made by him before the time when his statements, given in evidence to impeach him, were made, but may be extended to other statements made by him afterwards."⁸ Thus, in an action by husband and wife for a personal injury upon the wife, Lord Holt admitted evidence of what the wife had said, immediately upon receiving the hurt, and before she had time to devise or contrive anything for her own advantage.⁹ So, on a trial for *rape*, where the testimony of the prosecutrix was impeached by proof of inconsistent statements made by her on the preliminary trial before a justice of the peace, it was competent for the prosecution, in corroboration to prove the declarations of such witness on the day following the commission of the crime.¹⁰ The reader will here recall the doctrine of *immediate outcry* applicable to such prosecutions. "Upon accusations for rape, where the forbearance to mention the circumstance within a reasonable time is in itself a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact, upon first opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection."¹¹ It has been held, on doubtful grounds, in a case in

⁷ French v. Merrill, 6 N. H. 465 (with which compare Spaulding v. Reed, 42 N. H. 114); St. v. Exum, 138 N. C. 599, 50 S. E. 283. If made at an "unsuspicious time" it has been held admissible. St. v. Dudousatt, 47 La. Ann. 977, 17 South. 685.

⁸ St. v. Hendricks, 32 Kan. 559, 563, 4 Pac. 1050.

⁹ Thompson v. Trevanion, Skin. 402.

¹⁰ St. v. Laxton, 78 N. C. 564, 570; Logansport etc. Co. v. Heil, 118 Ind. 135, 20 N. E. 703; Mallonee v. Duff, 72 Md. 283, 287, 19 Atl. 708.

¹¹ Sir W. D. Evans in his notes to Pothier on Obligations, vol. 2, p. 251.

admiralty, that the protest of the captain and crew of the vessel, made the morning after the collision, may be considered as evidence corroborative of the testimony of the witnesses in court, when, as to *all* material facts, they correspond.¹²

§ 578. [Continued.] **Not Admissible when made subsequently to the Inconsistent Statements.**—It has been ruled that, while evidence of previous inconsistent declarations may, in such a case, be admissible, when made *prior* to the date of the inconsistent ones, yet the rule is otherwise where they are made *subsequently*,—the reason, as stated by Mr. Justice Woodbury, being, “that they must be made at least under circumstances when no moral influences existed to color or misrepresent them.” “But,” continued he, “when they are made subsequent to other statements of a different character, as here, it is possible, if not probable, that the inducement to make them is for the very purpose of counteracting those first uttered. This impairs their force and credibility, when, if made before the others, they might tend to sustain the subsequent evidence corresponding with them.”¹³ The reason was thus stated by McKinney, J.: “To allow consistent statements, for the purpose of giving support to the credit of the witness, made after the contradictory representations by which it is sought to impeach him, would be to put it in the power of every unprincipled witness to bolster his credit, and, perhaps, escape the just consequences of his own falsehood and tergiversation.”¹⁴

¹² The Pacific, 1 Newb. (U. S.) 9. The New York rule seems to be that, in order to let in evidence of good character for the purpose of sustaining a witness, his general character must have been assailed, either by impeaching witnesses or by proof of extrinsic facts of a disparaging nature. Leonori v. Bishop, 4 Drue (N. Y.), 420; People v. Hulse, 3 Hill (N. Y.), 309; People v. Gay, 7 N. Y. 378; Starks v. People, 5 Denio (N. Y.), 106; Reynolds v. St., 147 Ind. 3, 46 N. E. 31; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085; Crooks v. Bunn, 136 Pa. 368, 30 Atl. 529. In Washington this may be done where the contradictory statement was made

under duress. St. v. Coates, 22 Wash. 601, 61 Pac. 726.

¹³ Conrad v. Griffey, 11 How. (U. S.) 480, 491; Queener v. Morrow, 1 Coldw. (Tenn.) 124, 135; St. v. Petty, 21 Kan. 54. See also Ellicott v. Pearl, 10 Pet. (U. S.) 412, 438, where it was held generally that such evidence was inadmissible; but the court found an additional reason for supporting the decision of the trial court in excluding it, in the fact that the conversations, testified to by the sustaining witnesses, were *subsequent* to those testified to by the impeaching witnesses. Contra, Brookbank v. St., 55 Ind. 169.

¹⁴ Queener v. Morrow, 1 Coldw. (Tenn.) 124, 135.

§ 579. [Contra.] **Impeached by Contradictory Statements, confirmed by Consistent Statements.**—In the view of other American courts, where a witness has been assailed by evidence of having made previous statements, inconsistent with his testimony on the stand, he may be confirmed by evidence of having made previous statements consistent with such testimony.¹⁵ This rule is *differently stated* in different jurisdictions. In one it is laid down that when the credibility of a witness is attacked from the *nature of his evidence*, from his *situation*, on the ground of *bad character*, by proof of *previous inconsistent statements*, or by *imputations* directed against him on *cross-examination*, the party who has introduced him may prove other consistent statements, for the purpose of corroborating him.¹⁶ In another, it is stated in a much modified form, by saying that statements made by a witness corroborating his evidence upon the trial, made soon after the transaction to which it relates, or when he was not under the influence of any motive to relate the transaction untruthfully, are competent, where it is shown that he had given a different relation of the occurrence, or that he testified under the influence of a motive calculated to induce him to testify falsely.¹⁷ According to one view, evidence of such statements made, in harmony with the testimony given by the witness in court, is not limited to such declarations as were made *prior* to the time when his conflicting declarations, given in the impeaching evidence, are claimed to have been made.¹⁸

§ 580. [Illustration.] **Where the Witness on a Previous Occasion Testified Less Positively.**—A novel illustration of this principle is furnished in a case in Vermont, where, on the trial of an indictment for crime, the respondent, to weaken the force of the evidence

¹⁵ Hoke v. Fleming, 10 Ired. L. (N. C.) 263; St. v. George, 8 Ired. L. (N. C.) 324; Johnson v. Patterson, 2 Hawks (N. C.), 183; March v. Harrell, 1 Jones L. (N. C.) 329; Brookbank v. St., 55 Ind. 169; Dailey v. St., 28 Ind. 285; Coffin v. Anderson, 4 Blackf. (Ind.) 395; Hayes v. Cheatham, 6 Lea (Tenn.), 2, 10; Third Nat. Bk. v. Hall, 1 Baxt. (Tenn.) 479; Perkins v. St., 4 Ind. 222; Dodd v. Moore, 92 Ind. 397; Coffin v. Anderson, 4 Blackf. (Ind.)

395; Beauchamp v. St., 6 Blackf. (Ind.) 299; Dailey v. St., 28 Ind. 285; Dossett v. Miller, 3 Sneed (Tenn.), 72; Lyles v. Lyles, 1 Hill Ch. (S. C.) 76.

¹⁶ March v. Harrell, 1 Jones L. (N. C.) 329; Isler v. Dewey, 71 N. C. 14.

¹⁷ Hotchkiss v. Germania Fire Ins. Co., 5 Hun (N. Y.), 90, 95; Robb v. Hackley, 23 Wend. (N. Y.) 50.

¹⁸ Brookbank v. St., 55 Ind. 169.

of certain witnesses as to his identity with the criminal, introduced evidence tending to show that, at a preliminary examination of the respondent, they testified less positively on that point; but it also appeared that the same witnesses, directly after the commission of the offense, asserted positively the identity of the respondent with the person whom they saw commit the crime, and at the same time caused his arrest. It was held that such statements and such action on the part of the witnesses, so near the time of the commission of the offense, tended to corroborate their testimony as to identity, and that the judge committed no error in making this suggestion to the jury.¹⁹

§ 581. Distinction between the Case where the Previous Inconsistent Declarations are established, and where they are left in Dispute.—A distinction has been taken between a case where the witness concedes, or where other testimony conclusively establishes, the fact of his having made prior statements inconsistent with his testimony on the witness stand, and the case where the fact of his having made such prior statements is left by the testimony in doubt or in dispute. In the former case, the Supreme Court of Michigan concede that evidence of his prior consistent declarations would not be admissible in corroboration, while in the latter case such evidence would be admissible.²⁰ In the opinion of the court, given by Mr. Justice Cooley, the following language occurs: "If it were an established fact that the witness had made the contradictory statements, we should say that the supporting evidence here offered was not admissible. If a witness has given different accounts of an affair on several different occasions, the fact that he has repeated one of these accounts oftener than the opposite one, can scarcely be said to entitle it to any additional credence. A man untruthful out of court is not likely to be truthful in court; and where the contradictory statements are proved, a jury is generally justified in rejecting the testimony of the witness altogether. But in these cases, the evidence of contradictory statements is not received until the witness has denied making them, so that an issue is always made between the witness sought to be impeached and the witness impeaching him. The jury, therefore, before they can determine how much the contradictory statements ought to shake the credit of the witness.

¹⁹ St. v. Dennin, 32 Vt. 158.

(Campbell, C. J., dissenting on both

²⁰ Stewart v. People, 23 Mich. 63 points).

are required first, to find, from conflicting evidence, whether he made them or not; and the question we now are to decide is whether, upon an issue of this character, evidence like that received by the circuit judge was admissible. The proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to effect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness. Now, there are many cases in which, if evidence is given of statements made by a witness in conflict with those he has sworn to, his previous statements should not only be received in support of his credit, but would tend very strongly in that direction. If, for instance, the witness is himself the prosecutor, and has already made sworn complaint, there can be no doubt, we suppose, that the pendency of this complaint, its contents, and the relation of the witness to it, might be put in evidence, and that they would raise a strong probability that the testimony to conflicting accounts as having been given about the same time, was either mistaken or corrupt. Suppose a man to be testifying in a case in which he had spent a considerable period of time and a large sum of money in pursuing an alleged criminal to conviction, and he is confronted with evidence of his own conflicting statements; the rule would be exceedingly unjust, as well as unphilosophical, which should preclude his showing, at least by his own evidence, such circumstances of his connection with the case as would make the impeaching evidence appear to be at war with all the probabilities. And other cases may readily be supposed in which, under the peculiar circumstances, the fact that the witness has always previously given a consistent account of the transaction in question, might well be accepted by the jury as almost conclusive that he had not varied from it in the single instance testified to, for the purposes of impeachment. It is impossible to lay down any arbitrary rule which could be properly applied to every case in which this question could arise; but we think there are some cases in which the peculiar circumstances would render this species of evidence important and forcible. The tender age of the principal witness might sometimes be an important consideration, and the fact that the previous statement was put in writing,—as it was in this instance,—at a time when it would be reasonably free from suspicion, might very well be a controlling circumstance. We think the circuit judge ought to be allowed a reasonable discretion in such cases, and that, though such evidence would not generally be received, yet that

his discretion in receiving it ought not to be set aside, except in a clear case of abuse." ²¹

§ 582. General Character not Supported by Previous Declarations.—It has been ruled in Vermont that, where a witness has been discredited by evidence of his having given a different relation, even when this evidence appeared from his own cross-examination, he might be sustained by evidence of general good character.²² But the same court holds that the converse of this proposition, that when his general character is impeached, he may be sustained by proof of prior statements consistent with his testimony,—is not the law.²³ Where a party testifies in his own behalf, evidence of previous inconsistent declarations are admissible against him, without laying any foundation for the introduction of the same by cross-examining him; merely because they are declarations against his interest, and such declarations are always original evidence against a party.²⁴ The mere fact that evidence of such declarations has been given, does not, it has been held, authorize the party to introduce witnesses in support of his general character.²⁵

²¹ *Stewart v. People*, 23 Mich. 63, 74.

²² *St. v. Roe*, 12 Vt. 110; ante, § 552. In North Carolina it has been held, that such statements are admissible "whenever the witness is impeached and in whatever manner," see *St. v. Freeman*, 100 N. C. 429, 5 S. E. 921. This case is preceeded by those which have specifically referred to impeachment from "bad

character" and by cross-examination. Among succeeding cases see *Wallace v. Grizzard*, 114 N. C. 488. In Texas prior statements have been admitted after impeachment by conviction of crime. See *Scott v. St.*, 39 Tex. Cr. R. 547, 47 S. W. 531.

²³ *Gibbs v. Linsley*, 13 Vt. 208.

²⁴ *Blossom v. Barrett*, 37 N. Y. 434, 438.

²⁵ *Owens v. White*, 28 Ala. 413.

CHAPTER XXII.

OF THE EXAMINATION OF EXPERTS.

ARTICLE I.—DIRECT EXAMINATION.

ARTICLE II.—CROSS-EXAMINATION.

ARTICLE I.—DIRECT EXAMINATION.

SECTION

587. Expert Witnesses, how Examined.
588. Laying the Foundation.
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§ 587. **Expert Witnesses, how Examined.**—Expert witnesses are generally examined upon *hypothetical questions*, assuming the existence of facts which there is substantial evidence tending to prove.¹ They are sometimes allowed to give their opinions upon evidence which they have heard detailed by witnesses.² They often give their opinion based upon their own *knowledge* of the facts of a particular case.³ *Medical experts* are sometimes permitted to give an opinion based upon facts *communicated* to them *by their patient*, and by them communicated to the jury.⁴ Experts are sometimes, though rarely, allowed to make *experiments* in the presence of the jury.⁵

§ 588. **Laying the Foundation.**—A witness cannot be permitted to give his opinion as an expert, until it appears, by a preliminary examination, that he is a person of skill in the particular department of science or special matter in which his opinion is desired. So, too, where he is called upon to testify from his own knowledge, it must appear that he has trustworthy information or knowledge of the facts involved, and upon which his opinion is to be founded, before he can testify as an expert.⁶ Questions which are directed to him for the purpose of laying this *foundation*, present a preliminary

¹ Post, § 594.

² Post, § 599.

³ Post, § 589.

⁴ Post, § 590.

⁵ Post, § 620.

⁶ *Heald v. Thing*, 45 Me. 392. Accordingly, where it was not shown that an attorney at law called as a witness on the question of the value of another attorney's services had any personal knowledge of the case in which the services were claimed to have been rendered, or of the amount and character of such services, the party calling him had no right to ask him, e. g. "from what you know of this case, what do you think would be a fair amount for Todd's services?" *Williams v. Brown*, 28 Ohio St. 547; *Dolan v. Safe Co.*, 105 App. Div. 366, 94 N. Y. S. 241; *Gilmore v. Stamping Co.*, 79 Conn. 498, 66 Atl. 4; *Hamilton v. U. S.*, 26 App. D. C. 382; *Campbell v. St. L. & Sub. R. Co.*, 175 Mo. 161, 75 S. W. 86; *Hupper v. Distilling Co.*, 127 Wis. 306, 106 N. W. 831; *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N. E. 327. Whether a witness establishes his competency on preliminary examination is largely in the discretion of the court. *Griffin v. Home Ass'n*, 151 Ala. 597, 44 South. 605; *Multnomah County v. Towing Co.*, 49 Or. 204, 89 Pac. 389.

question of fact for the decision of the judge.⁷ In questioning a medical expert with this end in view, it is obviously proper to ask him *what experience* he has had with the particular disease or physical injury which is the subject of the investigation; and where he has been afflicted with the disease himself, it has been held that he may state that fact to the jury; since the fact would render it more probable that he had made the disease the subject of a special study and investigation.⁸

§ 589. Opinions based on the Personal Knowledge of the Expert.—Expert witnesses are allowed to give opinions based upon their personal knowledge.⁹ This is seen every day in our trial courts in actions for damages for *physical injuries*, where the physician who has attended upon the plaintiff is allowed to give his opinion as to the duration and probable extent of the injuries complained of. The opinion of a physician, who has personal knowledge of the conduct

⁷ Ante, § 323; *Carscallen v. Transfer Co.*, 15 Idaho, 444, 98 Pac. 622.

⁸ Thus, in a late case in Illinois, an expert witness, a physician of thirty years' standing, introduced by the plaintiff in an action for physical injury, was allowed to testify "I am paralyzed on the left side,—my arm and leg. Have no practical use of them, but I can move the leg along." The court refused the defendant's motion to strike out this evidence. It was a controverted question whether or not the plaintiff was paralyzed in her left leg and arm by the injury which she had received. It was held that no error was committed in the ruling. Mr. Justice Sheldon, in giving the opinion of the court, said: "It is true that the witness' paralysis was not within the issue; and yet it was not a wholly unimportant fact. It tended to add strength to the witness' testimony as an expert in being calculated to excite in him a peculiar interest, and lead him to give special study to that subject of injury. We see no just ground of complaint on defend-

ant's part in not excluding this evidence." *Chicago etc. R. Co. v. Lambert*, 119 Ill. 256, 10 N. E. 219; *Hildebrand v. United Artisans*, 50 Or. 159, 91 Pac. 542. It was ruled in Missouri, that it is not necessary for a physician to understand the theory or principle or practice of magnetic healing by means of power possessed by a certain individual to be qualified to testify whether a person treated thereby received proper treatment, and whether that administered was negligently and carelessly done. *Longan v. Weltmer*, 180 Mo. 322, 79 S. W. 655.

⁹ *Pelamourges v. Clark*, 9 Iowa, 1; *St. v. Stickley*, 41 Iowa, 232; 1 Redf. Wills, 137; *Louisville etc. R. Co. v. Falvey*, 104 Ind. 409, 418, 3 N. E. 389; *Burns v. Barenfield*, 84 Ind. 43; *Lawson Exp. & Op. Ev.* 144; *Boardman v. Woodman*, 47 N. H. 120, 135; *City of Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23; *Galveston etc. R. Co. v. Alberti*, 47 Tex. Civ. App. 32, 103 S. W. 699; *Casey v. Chicago City Ry. Co.*, 237 Ill. 140, 86 N. E. 606.

and habits of a person, is competent evidence as to the *sanity* of such person; ¹⁰ so, in fact, is the opinion of a non-expert. On an issue of sanity, physicians may be asked whether, from the circumstances of the patient and the symptoms which they observed, they are capable of forming an opinion of the soundness of his mind; and if so, whether they can thence conclude that his mind is sound or unsound; and in either case, they are properly required to state the circumstances or symptoms from which they draw their conclusions, to the end that the jury may the better judge of the value of the same.¹¹

§ 590. **Medical Opinion based on Statements of Patient.**—The opinion of a medical expert may rest in part on statements made to him by his patient, and by him communicated to the jury. Upon this subject the authorities are in harmony, though there is some difference of opinion as to whether statements of past symptoms may be taken into consideration.¹²

¹⁰ *People v. Lake*, 12 N. Y. 358.

¹¹ *Hathorn v. King*, 8 Mass. 371. *Semble*, *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 346; *St. v. Simonis*, 39 Or. 111, 65 Pac. 595. But in insanity, as in other cases, where the opinion is based on personal knowledge, the hypothetical question and the relation of the circumstances may in the discretion of the court be dispensed with, as many courts decide, and all of this may be gone into on cross-examination. See *McCarthy v. Boston Duck Co.*, 165 Mass. 165, 42 N. E. 460; *Wells v. Davis*, 22 Utah, 322, 62 Pac. 322, 62 Pac. 3; *St. v. Foote*, 58 S. C. 218, 36 S. E. 351. And where opinion from observation and statements as to undisputed things is desired, the physician may state what it was, as formed at the time of the observation and statements made. *Houston etc. R. Co. v. Rutland*, 45 Tex. Civ. App. 621, 101 S. W. 529. The general rule is that the opinion must be

either on facts previously stated by the witness, or on facts testified to by others, or on facts agreed to or assumed as true hypothetically, and it cannot be on what is personally known to the witness but not in the record. *Pyke v. City of Jamestown*, 15 N. D. 157, 107 N. W. 359. The true distinction seems to be, that hypothesis as a part of the question need not be used, where the opinion is sought, as based on personal knowledge, and testimony already in need not always be repeated. See also *Hanley v. R. Co.*, 59 W. Va. 419, 53 S. E. 625.

¹² *Louisville etc. R. Co. v. Falvey*, 104 Ind. 409, 419, 3 N. E. 389; *Carthage Turnp. Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364; *Elkhart v. Ritter*, 66 Ind. 136; *Barber v. Merriam*, 11 Allen (Mass.), 322; *Thompson v. Trevanion*, Skinner, 402; *Aveson v. Kinnaird*, 6 East, 188; *Bacon v. Charlton*, 7 Cush. (Mass.) 581; *Denton v. Bate*, 1 Swan (Tenn.), 279; *Illinois etc. R. Co. v. Sutton*, 42 Ill. 438; *St. v. Gedicke*, 43 N. J. L. 86;

§ 591. **Medical Opinion upon Symptoms stated by other Unsworn Persons.**—On an issue of insanity a physician who has visited the person whose sanity is in question, in consultation with his attending physician, is not permitted to give in evidence the declarations made to him at the time, either by the defendant's wife, physician, or other attendant, as to his previous symptoms or condition. Such statements are properly excluded as hearsay.¹³ Nor will such a witness be permitted to give his opinion of the mental condition of the person in question, based upon the representations thus made to him, in connection with the symptoms which he discovered by personal observation and examination. His opinion should be formed entirely from his own observation and examination of his patient's symptoms and condition.¹⁴ The reason of the rule which excludes the declarations as incompetent, excludes also an opinion, based in whole or in part thereon.¹⁵

§ 592. **Facts and Opinion Mingled.**—On an issue of sanity or insanity, a witness, who has had opportunities of knowing and observing the person in question, may not only depose to the facts which he knows, but he may also give his opinion or belief as to his sanity or insanity.¹⁶

Eckles v. Bates, 26 Ala. 655; Quaife v. Chicago etc. R. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; Brown v. N. Y. etc. R. Co., 32 N. Y. 597; Towle v. Blake, 48 N. H. 2. As to present symptoms and opinion, admissible. See Western & A. R. Co. v. Stafford, 99 Ga. 187, 25 S. E. 656; Ohio & M. R. Co. v. Heaton, 137 Ind. 1, 35 N. E. 687; Johnson v. R. Co., 47 Minn. 430, 50 N. W. 473; St. v. Chiles, 44 S. C. 338, 22 S. E. 340; Union P. R. Co. v. Novak, 61 Fed. 573, 9 C. C. A. 629. Contra, Van Winkle v. R. Co., 95 Iowa, 509, 61 N. W. 529; Davison v. Cornell, 132 N. Y. 236, 30 N. E. 573. Where the opinion rests partly on examination and detailed history of the case, whether detailed by patient or another, it is not competent evidence. Federal Betterment Co. v. Reeves, 73 Kan. 107, 84 Pac. 560. Statement by patient of cause cannot help out

opinion. Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89. The statements whether of past or present symptoms must be given to the jury. Van Winkle v. R. Co., 93 Iowa, 509, 61 N. W. 929. The personal confidence of the physician is of no concern. Austin etc. R. Co. v. McElmurry (Tex. Civ. App.), 33 S. W. 249 (not reported in state reports).

¹³ Heald v. Thing, 45 Me. 392; Kelly v. Kelly, 103 Md. 548, 63 Atl. 1082; St. v. Peel, 23 Mont. 358, 59 Pac. 169; People v. Strait, 148 N. Y. 566, 42 N. E. 1045; Miller v. R. Co., 62 Minn. 216, 64 N. W. 554. Contra, Southern K. R. Co. v. Michaels, 57 Kan. 474, 46 Pac. 938.

¹⁴ Heald v. Thing, 45 Me. 392; St. v. Banner, 149 N. C. 519, 63 S. E. 84; Thompson v. U. S., 30 App. D. C. 352,

¹⁵ Ibid.

¹⁶ Clary v. Clary, 2 Ired. L. (N. C.) 78; ante, § 589.

§ 593. **Witness not to decide Disputed Questions of Fact.**—Expert witnesses cannot be called upon to decide disputed questions of fact, thereby assuming the office of the jury.¹⁷

§ 594. **But Examined on Hypothetical Facts.**—The proper mode of examination is upon facts hypothetically stated;¹⁸ or, as it is sometimes said, upon a hypothetical case, stated to them and so proved as to resemble, as near as may be, the case under consideration.¹⁹

§ 595. **Not to give Opinions based upon Hearing the Evidence.**—The general rule is that it is not the province of an expert witness *to draw inferences from the evidence* of other witnesses, unless the facts testified to are clear and uncontroverted, or to take into consideration such facts as he can recollect as having been testified to, and thus form an opinion; but he should have full knowledge of the

¹⁷ *Hitchcock v. Burgett*, 38 Mich. 501; *Craig v. Noblesville etc. R. Co.*, 98 Ind. 109; *Burns v. Barenfield*, 84 Ind. 43; *Livingston v. Com.*, 14 Gratt. (Va.) 592; *U. S. v. McGlue*, 1 Curtis C. C. 1. To the like effect see *Heald v. Thing*, 45 Me. 392; 1 Greenl. Ev., § 440; *Redf. Am. Cas. on Law of Wills*, 40; 1 Whart. Ev., § 452. It is, therefore, improper to take down the testimony of the witnesses and read it over to the experts, to enable them to express an opinion as to the sanity or insanity of the accused in a criminal trial. *Choice v. St.*, 31 Ga. 424; *People v. McElvaine*, 121 N. Y. 250, 24 N. E. 465; *Malynak v. St.*, 61 N. J. L. 562, 40 Atl. 752; *Forsyth v. Doolittle*, 120 U. S. 77; *Taylor v. Grand Avenue R. Co.*, 185 Mo. 239, 84 S. W. 273. Any question submitting the credibility of testimony is objectionable. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 32 L. R. A. 668.

¹⁸ *Spear v. Richardson*, 37 N. H. 24; *Woodbury v. Obear*, 7 Gray (Mass.), 467; *U. S. v. McGlue*, 1

Curt. (U. S.) 1; *Gutterman v. Liverpool etc. Steamship Co.*, 83 N. Y. 358; *Davis v. St.*, 35 Ind. 496; *Livingstone v. Com.*, 14 Gratt. (Va.) 592; *Mitchell Square Bale Ginning Co. v. Grant*, 143 Ala. 194, 38 South. 855; *Barker v. Transfer Co.*, 79 Conn. 342, 65 Atl. 143; *Western Union Tel. Co. v. Morris*, 67 Kan. 410, 73 Pac. 108; *Flaherty v. Powers*, 167 Mass. 61, 44 N. E. 1074. If personal knowledge and other basis are combined, the hypothesis sets forth the latter. *Mullin's Estate*, 110 Cal. 252, 42 Pac. 646; *Skelton v. R. Co.*, 88 Minn. 192; 92 N. W. 960; *St. v. Wright*, 134 Mo. 404, 35 S. W. 1145; *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975. If opinion is based solely on personal knowledge, question need not be hypothetical. *St. v. Magorden*, 49 Or. 259, 88 Pac. 306; *Flannagan v. St.*, 106 Ga. 109, 32 S. E. 80.

¹⁹ *Boardman v. Woodman*, 47 N. H. 120, 135; *Seaboard A. L. Ry. Co. v. Bradley*, 125 Ga. 193, 54 S. E. 69.

ascertained or supposed state of facts, on which his opinion is desired.²⁰ It is therefore improper, in most cases, and therefore error, to submit to him the testimony detailed by the witnesses in their hearing, and to ask him his opinion thereon.²¹

§ 596. [Continued.] **Observations on the Above Rule.**—In the celebrated case of *M'Naghten*, the following question was put by the lords to the judges: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any, and what delusion at the time?" To this the judges, speaking through Tindal, C. J., answered: "In answer thereto, we state to your lordships, that we think the medical man, under the circumstances supposed, cannot in strictness, be asked his opinion in the terms above stated; because each of those questions involves the determination of the truth of the facts deposed to, which is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But, where the facts are admitted or not disputed, and the question be-

²⁰ *Guttermann v. Liverpool etc. Steamship Co.*, 83 N. Y. 358; *Elgin A. & S. Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436; *Foster v. F. & C. Co.*, 99 Wis. 447, 75 N. W. 69; *Porter v. St.*, 135 Ala. 51, 33 South. 694; *Mfrs. Acc. Indem. Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; *Davis v. St. (Tex. Civ. R.)*, 114 S. W. 366.

²¹ *Woodbury v. Obear*, 7 Gray (Mass.), 467; *Jameson v. Drinkald*, 12 Moore, 148; *The Clement*, 2 Curt. (U. S.) 363, 369; *McMechen v. McMechen*, 17 W. Va. 684, 694; *Reg. v. Frances*, 4 Cox Cr. Cas. 57; *People v. McElvaine*, 121 N. Y. 250, 24 N. E. 465; *Re Snelling's Will*, 136 N. Y. 515, 32 N. E. 1006. But the court's discretion often permits testimony to be referred to as the laying of the

hypothesis. As or not this is deemed a fair method of presenting a good basis for opinion see, as permitting, *Cornell v. St.*, 104 Wis. 527, 80 N. W. 745; *City of Chicago v. Didier*, 227 Ill. 571, 81 N. E. 698; *Duthey v. St.*, 131 Wis. 178, 111 N. W. 178, 10 L. R. A. (N. S.) 1032; *McKeon v. R. Co.*, 94 Wis. 477, 69 N. W. 175; *St. v. Privitt*, 175 Mo. 207, 75 S. W. 457. See as excluded, *Barber's Estate*, 63 Conn. 393, 27 Atl. 973; 22 L. R. A. 90; *Chicago etc. R. Co. v. Glenn*, 175 Ill. 238, 51 N. E. 896; *Detzur v. B. Stroh Brewing Co.*, 119 Mich. 282, 77 N. W. 948; *A. T. & S. F. R. Co. v. Brassfield*, 51 Kan. 167, 32 Pac. 814. ²² *M'Naghten's Case*, 10 Cl. & Fin. 200, 211; *Oliver v. R. Co.*, 170 Mass. 222, 49 N. E. 117; *Connell v. McNett*, 109 Mich. 329, 67 N. W. 344.

comes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.”²² This decision, in the highest judicial tribunal of Great Britain, is generally regarded as having established the modern law upon the question. On a trial for murder, subsequently occurring, evidence was called on the prisoner’s behalf, to prove his insanity. A physician, who had been in court during the whole trial, was then called, on the part of the prosecution, and asked whether, having heard the whole evidence, he was of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind. It was held, notwithstanding the opinion of the judges in the case of M’Naghten, that such a question ought not to be put, but that the proper mode of examination was to take particular facts, and, assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of the prisoner at the time the alleged act was committed.²³ “This,” said Chief Justice Shaw, “would be especially irregular, where the evidence is conflicting, because it puts it in the power of the expert to give an opinion upon the credibility of the testimony and the truth of the facts, which is purely a question for the jury; and then, upon the value and efficacy of the facts and circumstances, in his opinion thus proved, upon the question of soundness of mind.”²⁴

§ 597. [Continued.] Not to give Opinions upon Depositions Submitted to Them.—Experts called in a case in admiralty cannot give their opinions upon depositions submitted to them, but they must be examined upon a hypothetical state of facts submitted to them by the court, which facts the trier of the facts finds to be established by the evidence.²⁵ Upon the trial of an action brought to recover damages for the breach of a charter-party, the principal question was whether or not the ship, which had been disabled by a storm while near the port of Vera Cruz, could have put into any of the ports of the Gulf of Mexico or the Southern Atlantic States. Upon the trial, experts, called on behalf of the plaintiff, were asked, against the defendant’s objection and exception, the following question: “Under the state of facts mentioned in that deposition, what

²² Reg. v. Frances, 4 Cox Cr. Cas. 57.

²⁵ The Clement, 2 Curt. (U. S.) 363, 369.

²⁴ Woodbury v. Obear, 7 Gray (Mass.), 467, 471.

ports could the captain have made in the Gulf of Mexico?" They were also asked other questions of a similar import. It was held error to admit these questions, since they required each witness to determine for himself what facts were proved by the deposition, and thus to usurp the functions of a jury.²⁶

§ 598. [Continued.] Further Illustrations.—So, in a contest touching the validity of a will, it is not admissible to ask a medical expert whether, after having heard the evidence, he is or is not of opinion that the testator was of sound mind.²⁷ Nor can he, in such a case be asked to give his conclusion, in view of the testimony, as he has heard it, in connection with his own personal knowledge of the testator.²⁸ It was so held where a physician examined as an expert was asked a question in these words: "Now, then, you will state to the jury if the symptoms and indications testified to by the witnesses were proved, and if the jury were satisfied of the truth of them,—I wish you to state whether, in your opinion, having heard all the symptoms and indications, Joseph Hickenbottom was of sound or unsound mind, and if unsound, what is the nature and character of that unsoundness?"²⁹ So, where on a trial for murder,

²⁶ *Dolz v. Morris*, 10 Hun (N. Y.), 201.

²⁷ *Woodbury v. Obear*, 7 Gray (Mass.), 467; *Butler v. St. Louis Life Ins. Co.*, 45 Iowa, 93. See further, *Phillips v. Star*, 26 Iowa, 349; *St. v. Felter*, 25 Iowa, 67; 1 Greenl. Ev. § 440. See also *Freeman v. Lawrence*, 11 Jones & Sp. (43 N. Y. Sup.) 288.

²⁸ Thus, on a question respecting insanity of a deceased person, an expert witness had given his opinion based on his personal observation and treatment of the deceased. Afterwards, in answer to certain questions propounded to him, he stated that he had heard all the testimony that had been given in the case. The plaintiff's counsel then propounded to him the following questions: "Q. I will put this question. In view of the testimony as you have heard it, and in connection with your own

knowledge of the state of Mr. Butler at the time he was in the asylum in 1847, in your opinion, was he or not, at that time, insane?" A. "That opinion I have already expressed—that he was not insane—based upon my own personal knowledge." The Court: "He is giving you a hypothetical case." Q. (to the same as before). "I want the opinion now with your own individual observation from what has reached you in the testimony?" A. "The testimony has not served to induce me to change my opinion already expressed." It was held that the ruling of the court in allowing these questions to be put, against objection, was prejudicial error. *Butler v. St. Louis Life Ins. Co.*, 45 Iowa, 93.

²⁹ *Smith v. Hickenbottom*, 57 Iowa, 733, 738, 11 N. W. 664.

a physician, who stated that he had heard the statements of the witnesses as to the circumstances which immediately preceded the illness of the deceased, the appearance of the body after death, the condition of the limbs, etc., and could therefrom offer an opinion as to the cause of death, was permitted to testify what, in his opinion, was the cause of the death,—this was error.³⁰ So, in an action for damages growing out of a maritime collision, it was held improper to ask a nautical expert whether he thought, having heard the evidence in the case, that the conduct of the captain was correct or not.³¹ In an action against a common carrier by sea, to recover damages for injury to the freight by a collision with a collier, after a protest or statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy between the protest and some of the testimony, and the evidence covering a great variety of facts, a witness called as an expert by the plaintiff, after having testified that he had heard the testimony read to the jury on the previous day, and the protest, and had heard the testimony of one or two of the witnesses and the circumstances as detailed by them,—was asked, “under the circumstances detailed by these witnesses and in the protest,” and under certain circumstances which were specified, “what, in your opinion, should have been done by the persons in charge of the steamship?” It was held, applying the foregoing principle, that the question was incompetent.³²

§ 599. [Contra.] When the Evidence may be Submitted to Experts.—Contrary to the foregoing, there is considerable judicial opinion, apparently following the lead of *M'Naghten's Case*³³ to the effect that the cases where the expert cannot be asked to give his opinion upon the testimony as he has heard it detailed by the witnesses, are those in which the *facts are controverted*.³⁴ Upon this subject it has been reasoned: “Where the facts stated are not complicated, and the evidence is not contradictory, and the terms of

³⁰ *St. v. Bowman*, 78 N. C. 509.

³¹ *Sills v. Brown*, 9 Car. & P. 601.

³² *Gutterman v. Liverpool etc. Steamship Co.*, 83 N. Y. 358 (denying *Fenwick v. Bell*, 1 Car. & K. 312, and distinguishing *Transportation Line v. Hope*, 95 U. S. 297).

³³ 10 Cl. & Fin. 200, 211; ante, § 596.

³⁴ This seems to have been assumed in *U. S. v. McGlue*, 1 Curt. (U. S.) 1; and in *Gutterman v. Liverpool etc. Steamship Co.*, 83 N. Y. 358; and in *Davis v. St.*, 35 Ind. 496. Compare *Fairchild v. Bascomb*, 35 Vt. 398.

the question require the witness to assume that the facts stated are true, he is not [where he is called upon to give an opinion upon the evidence which he has heard], required to draw a conclusion of fact.”³⁵

§ 600. [Continued.] In Actions for the Value of Services.—In an action for work and labor, after plaintiff had testified as to the character of the services rendered, he called a witness who was asked: “What were his services, as he describes them, worth a month?” This was objected to, upon the ground that it was not competent for the witness to give an opinion based on the plaintiff’s statement. The objection was overruled. It was held that this was not error, since the question did not call upon the witness to determine the truth of the plaintiff’s evidence, but was simply asking him what were the services worth, assuming that they were rendered as described, and leaving the jury to determine that question.³⁶ A physician who had testified to his knowledge of cases of *cancer* and of the value of services in caring for them, who also testified that he had heard the evidence of other physicians who had treated and who described the cancer in question, and had heard the testimony of the plaintiff’s wife read, but who had no personal knowledge of the case, was asked: “What would be the value of the services rendered by her in nursing and dressing the cancer?” This was objected to, and the answer was received under exception. It was held that this mode of interrogation was erroneous; since the question called upon the witness to assume the correctness of, and to draw inferences from the evidence of other witnesses, and that his opinion should have been obtained by stating to him a hypothetical case.³⁷ But in such a case, a physician who knows the value of such services, and who is also acquainted with the particular case, may give his opinion as to the value of the services sued for.³⁸

§ 601. [Continued.] Other Instances where this has been done.—Cases are found where medical experts, who have heard the evidence, have been allowed to give their opinion based thereon. Thus, in a criminal case where the prisoner’s defense was insanity, a medical man, who had sat through the trial, might, it was held by Park, J.,

³⁵ Hunt v. Lowell Gaslight Co., § Allen (Mass.), 169, opinion by Chapman, J.

³⁶ McCollum v. Seward, 62 N. Y. 317.

³⁷ Reynolds v. Robinson, 64 N. Y. 589.

³⁸ Reynolds v. Robinson, *supra*.

be asked whether the facts proved showed symptoms of *insanity*.³⁹ An expert who was present at the trial and who heard all the testimony of the witnesses on the part of the defendant, in regard to the sanity of the party, was asked: "Upon the hypothesis that the testimony given by the witnesses in this case, etc., is *all true*, then what would be your opinion" of the *sanity* of the party. It was held that this question was substantially correct, as it was in effect putting a hypothetical state of case to the witness, from which his opinion was to be given.⁴⁰ In an action against a gaslight company, for a negligent injury caused by an escape of gas from its main pipe into the public street, exceptions to the following question, put to three medical experts, were held not well taken: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what, in your opinion, was their *sickness*, and do you see any adequate cause for the same?"⁴¹ So, where, in an action for *mal-practice* by a surgeon, an expert had heard the testimony of a particular witness as to the manner in which the operation had been performed, and was thereafter questioned as follows: "Suppose his statement relative to the amputation and its subsequent treatment to be truthful, was, or was not, the amputation well performed? Was the subsequent treatment of the patient proper or improper? And, in your opinion, was, or was not, the death of the patient the result of any neglect or want of skill in the surgeon?"—it was held that the court erred in rejecting these questions, though, as the testimony of the witness had been put to the expert as a supposed case, the error was without prejudice.⁴² So, it has been held, in an action for work and labor, where the *value of the services* is in question, that it is competent for a witness, who has heard the testimony of another witness as to the *nature and extent* of the *services* rendered, to give an opinion as to their value. The court said: "The question directed the attention of the witness to the testimony of a single witness upon a single subject, and was not other in effect than it would have been, if the counsel had recited the statement of services rendered by the party, and, on that statement, asked an opinion of their value." This was equivalent to a question, "as-

³⁹ *Rex v. Searle*, 1 Mood. & Rob. 75.

⁴⁰ *Negro Jerry v. Townshend*, 9 Md. 145, 159.

⁴¹ *Hunt v. Lowell Gaslight Co.*, 8 Allen (Mass.), 169.

⁴² *Wright v. Hardy*, 22 Wis. 348.

suming that the services rendered were as described by the witness, what were they worth?"⁴³

§ 602. [Continued.] **What if the expert has not heard all the Testimony.**—A medical expert called as a witness is not qualified to express an opinion, based on previous testimony in the case, where he has not heard all the testimony which may have been material to the subject of the inquiry.⁴⁴ Thus, it is not competent for a medical witness who has not heard all the testimony, given in a case of murder, tending to show the mental condition of the defendant, where the defense is insanity, to give an opinion founded upon the portion heard by him, as to his sanity.⁴⁵

§ 603. [Continued.] **Opinion founded on an Opinion.**—It has been said that an expert may give his opinion to the *facts* testified to by the witnesses, but not upon their *opinions*,—which means that an expert's opinion cannot be founded upon an opinion.⁴⁶

§ 604. **Hypothetical Questions, how Framed.**—The rule, then, is that the hypothetical questions must be based either upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed, of certain facts *assumed to be proved*, for the purpose of the inquiry. Such questions leave it for the jury to decide, in the first case, whether the evidence is true or not, and in the second case, whether the particular facts assumed are or are not proved.⁴⁷ It should exclude any opinion of the witness as to the way in which disputed facts should be found.⁴⁸

⁴³ Seymour v. Fellows, 77 N. Y. 178.

⁴⁴ Carpenter v. Blake, 2 Lans. (N. Y.) 206; People v. Lake, 12 N. Y. 358, 1 Park. Cr. (N. Y.) 495.

⁴⁵ People v. Lake, *supra*. In Missouri an opinion based on the testimony as the witness heard it, a recital of the only testimony he had not heard was allowed. St. v. Privitt, 175 Mo. 207, 75 S. W. 457. See also McKeon v. R. Co., 94 Wis. 477, 69 N. W. 175.

⁴⁶ Walker v. Fields, 28 Ga. 237. Thus he may not give his opinion as to the relative merits of the testimony of other experts. Lancaster

v. Lancaster's Exr., 27 Ky. Law Rep. 1127, 87 S. W. 1137. A question may be hypothesized, however, by "assuming the statement" of facts by the other to be true. Howland v. Oakland etc. Ry. Co., 110 Cal. 573, 42 Pac. 983; St. v. Watson, 81 Iowa, 380, 46 N. W. 868.

⁴⁷ Gottlieb v. Hartman, 3 Colo. 53, 63; adopting Carpenter v. Blake, 2 Lans. (N. Y.) 206.

⁴⁸ Livingstone v. Com., 14 Gratt. (Va.) 592; Bever v. Spangle, 93 Iowa, 576, 91 N. W. 1072. Thus a question so framed as to speak of one witness asserting certain facts and this being denied "by an unim-

§ 605. [Continued.] **Must not embrace Matters within Ordinary Experience.**—The hypothetical questions must not embrace matters within the range of ordinary human experience; because, as to such matters, the opinions of the twelve men in the jury box are better, in the eye of the law, than those of the experts.⁴⁹

§ 606. **Must be Based on the Evidence.**—Hypothetical questions must present facts which the evidence *tends to prove*; if the facts embraced in them are not proved or attempted to be proved, they are to be excluded by the court upon objection.⁵⁰ There must be testimony *tending to prove* every supposed state of fact embraced therein.⁵¹ The hypothesis must be *clearly stated*, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion.⁵² Mere *fanciful questions*, where there is no evidence at all in support of the facts assumed, or questions assuming facts which are wholly *irrelevant* to the subject of

peached witness of high official standing in the city" was held objectionable. *King v. Gilson*, 206 Mo. 264, 104 S. W. 52.

⁴⁹ *St. v. Anderson*, 10 Ore. 448, 455; *Hill v. Portland etc. R. Co.*, 55 Me. 439; *Star Brewing Co. v. Houck*, 222 Ill. 348, 78 N. E. 227; *Smith v. Stevens*, 33 Colo. 427, 81 Pac. 35; *Wolf v. New Bedford Co.*, 189 Mass. 591, 76 N. E. 222. If all of the facts can be ascertained and made intelligible to a jury, expert evidence should be held inadmissible. *Nat. Biscuit Co. v. Nolan*, 138 Fed. 6. The prime question is, whether the skill and experience of the expert will aid, and is necessary to aid, the jury. *Combs v. Rountree Cons. Co.*, 205 Mo. 367, 104 S. W. 77. Inadmissible when questions merely involve a conclusion of law. *Nat. Fire Ins. Co. v. Hanberg*, 215 Ill. 378, 74 N. E. 377.

⁵⁰ *St. v. Anderson*, 10 Ore. 448, 455; *Williams v. Brown*, 28 Ohio St. 547; *Bomgardner v. Andrews*, 55 Iowa, 638, 8 N. W. 481; *Hurst v.*

Railway Co., 49 Iowa, 76; *Goodwin v. St.*, 96 Ind. 550, 554; *Bishop v. Spining*, 38 Ind. 143; *Haish v. Payson*, 107 Ill. 365; *Russ v. Wabash W. R. Co.*, 124 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; *People v. Tuckewitz*, 149 N. Y. 240, 43 N. E. 548; *United Electric L. & P. Co. v. St.*, 100 Md. 634, 60 Atl. 248; *Frigstad v. R. Co.*, 101 Minn. 40, 111 N. W. 838.

⁵¹ *Hathway v. National Life Insurance Co.*, 48 Vt. 336; *Elzig v. Boles*, 135 Iowa, 208, 112 N. W. 540; *St. v. Hanley*, 34 Minn. 433, 26 N. W. 397; *Botwinis v. Allgood*, 113 Ill. App. 188.

⁵² *McMeichen v. McMeichen*, 17 W. Va. 684. Where material ingredients are omitted, which would qualify what is embraced, the question is objectionable. *LaLande v. Traction Co.*, 146 Mich. 77, 108 N. W. 365. The hypothesis must be so framed "as to acquaint court or counsel with the assumed state of the fact upon which the opinion is asked." *Shoemaker v. Elmer*, 70 N. J. L. 710, 58 Atl. 940.

the investigation, should be excluded.⁵³ But where there is evidence, either directly proving the facts assumed, or evidence from which such facts may be inferred, the court cannot invade the province of the jury and decide the facts. "It is," said Elliott, J., "only where there is *no evidence at all* in support of the facts assumed, or where the question is clearly *irrelevant*, or where it is merely *speculative*, or where it is *improperly framed*, that the court may interfere."⁵⁴ Within this rule, whether the facts are all proved, upon which the hypothetical question is based, or to what extent they are proved, is a question, not for the court, but for the jury.⁵⁵ In fine, there should be evidence in support of the hypothesis, of such probative strength that, according to the principles prevailing in the particular jurisdiction, the judge would be warranted in submitting such facts to the jury for their finding. In general, it is sufficient that there is *substantial evidence* tending to establish the hypothesis; for the judge cannot say, before the question reaches the jury, whether or not it has been established.⁵⁶

§ 607. Latitude in Framing them.—It was said in one case that "some latitude must necessarily be given, in the examination of medical experts, and in the propounding of hypothetical questions for their opinion, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury, as the counsel, by his questions, assumes them to be, the opinion may have some weight; otherwise, not. It is the privilege of the counsel, in such cases, to assume, within the limits of the evidence, any state of facts *which he claims the evidence justifies*, and have the opinion of experts upon the facts thus assumed."⁵⁷

⁵³ *People v. Augsbury*, 97 N. Y. 501. See also *Fairchild v. Bascomb*, 35 Vt. 398; *Williams v. Brown*, 28 Ohio St. 547.

⁵⁴ *Louisville etc. R. Co. v. Falvey*, 104 Ind. 409, 420, 3 N. E. 389, 4 N. E. 908.

⁵⁵ *Ibid.* If it assumes only what the jury have a right to find in the evidence as it then is or as there may be fair reason to suppose it may thereafter appear to be, this is sufficient. *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127.

⁵⁶ *Nave v. Tucker*, 70 Ind. 15, 18; *Birmingham etc. Power Co. v. Moore*, 148 Ala. 115, 42 South. 1024.

⁵⁷ *Filer v. New York etc. R. Co.*, 49 N. Y. 42, 46; *Order of Com. Travellers v. Barnes*, 75 Kan. 720, 90 Pac. 293; *Re Barber's Estate*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90. If "within the scope or range of the evidence." *Economy L. & P. Co. v. Sheridan*, 200 Ill. 439, 65 N. E. 1070. *Semble, Conway v. St.*, 118 Ind. 490, 21 N. E. 285. And courts may rely in many cases "to a great extent on

§ 608. **No Objection that they contain Errors.**—It is no objection to a hypothetical question that the state of facts which it assumes is erroneous, if within the possible or probable range of the evidence; since the judge cannot decide, as a preliminary question on an objection to evidence, whether it is erroneous or not,—the question being for the jury.⁵⁸

§ 609. **Not Necessary to State Facts as Proved.**—It is generally said in the books that, in putting hypothetical questions to an expert witness, counsel may assume the facts in accordance with *his theory* of them; it is not essential that he state them to the witness as they have actually been proved.⁵⁹ In discussing this question, it was said by Folger, J.: “The claim is, that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that, in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something, for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so, to the satisfaction of the jury; and, so assuming, shapes hypothetical questions to experts accordingly.”⁶⁰

counsel as to what they expect the evidence to be.” *Anderson v. Albertsamm*, 176 Mass. 87, 57 N. E. 215.

⁵⁸ *Hartnett v. Garvey*, 66 N. Y. 641. As an excellent illustration of range in evidence, see case of *Chicago City Ry. Co. v. Saxby*, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164. There the evidence showed injury, from accident, directly to the hip and ensuing pain to the knee. This was held sufficient to predicate a question, whether tuberculosis in the knee might be occasioned by violence. When the hypothesis is upon a sort of “guess-work,” the question is not admissible. *Lindenthal v. Hatch*, 61 N. J. L. 29, 39 Atl. 662.

⁵⁹ *Lovelady v. St.*, 14 Tex. App. 545, 560; *Guitterman v. Liverpool etc. Steamship Co.*, 83 N. Y. 358;

Cowley v. People, Id. 464; *Bowen v. Huntington*, 35 W. Va. 686, 14 S. E. 217; *Baker v. St.*, 30 Fla. 41, 11 South. 492. Nor is it necessary they be clearly proved. *Hicks v. Citizens Ry. Co.*, 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508. Thus a question may assume, sometimes, a condition continuing as last shown. *Bird v. Gold Min. Co.*, 2 Cal. App. 674, 84 Pac. 256. Where one is shown to have recovered from illness, the question may assume he is in good health. *Herbeck v. Germain*, 144 Mich. 157, 107 N. W. 901. But a fact must not be construed other than as the testimony means. *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101.

⁶⁰ *Cowley v. People*, 83 N. Y. 464, 470, 38 Am. Rep. 464.

§ 610. **Need not embody all the Facts.**—In general, it is not necessary that hypothetical questions should embody all the facts exhibited by the evidence; it is sufficient, on the contrary, that they embody such a state of facts, fairly within the range of the evidence, as the counsel propounding them deem to have been proved.⁶¹ But where the facts are not in dispute, it is proper to require that the hypothetical question shall embrace them all, and that the witness shall take them all into consideration, in giving his answer.⁶² Where, however, the *evidence is conflicting*, or the facts are in dispute, the party examining an expert witness is at liberty to frame a hypothetical state of facts, within the limits of the evidence, according to *his theory* of what the evidence tends to prove, or of what the finding of the jury should be; and it will be no objection that it is partial, and does not cover all the evidence in the case, or all the ultimate facts which there is evidence tending to prove.⁶³

§ 611. **[Continued.] Dicta upon this Subject.**—Thus, in a case in Indiana, it was said by Elliott, J.: “A doctrine which requires a prosecutor to assume and embody in one question conflicting testimony, cannot be defended on any ground consistent with sound reason. It would operate unjustly in practice, because it would

⁶¹ Goodwin v. St., 96 Ind. 550, 554 (denying People v. Thurston, 2 Park. Cr. (N. Y.) 49); Louisville etc. R. Co. v. Falvey, 104 Ind. 412, 3 N. E. 389, 4 N. E. 908; Elliott v. Russell, 92 Ind. 526; Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433, 437; Fulwider v. Ingels, 87 Ind. 414; Guetig v. St., 66 Ind. 94, 32 Am. Rep. 99; Nave v. Tucker, 70 Ind. 15; Bishop v. Spining, 38 Ind. 143; Davis v. St., 35 Ind. 496, 9 Am. Rep. 760; Ince v. St., 77 Ark. 426, 93 S. W. 65. But it should be framed to elicit an answer as broad as the issue on the particular subject inquired about. Thus in an action to recover the reasonable value of services, it is not allowable to ask what such and such services were worth when the statement was not full as to the services performed. Fuchs v. Tone, 218 Ill. 445, 75 N. E. 1014. Not stat-

ing all the facts in the hypothesis is proper, where cross-examination may correctly supply the omitted facts. Betts v. St., 48 Tex. Cr. R. 522, 89 S. W. 413.

⁶² Davis v. St., 35 Ind. 496.

⁶³ Davis v. St., 35 Ind. 496; Poffinbarger v. Smith, 27 Neb. 788, 43 N. W. 1150; Hanstad v. C. P. Ry. Co., 44 Wash. 505, 87 Pac. 832. The main inquiry is whether factors, true or assumed, which are necessary in the hypothesis, are embraced in it. Thus a question as to the time and space within which a street car could be stopped is insufficient, because it gives no data as to condition of street and track and the equipment for stopping a car. Impkamp v. Transit Co., 108 Mo. App. 655, 84 S. W. 119. See also Vermillion etc. Co. v. City of Vermillion, 6 S. D. 466, 61 N. W. 802.

impose upon an examining counsel the necessity of assuming as true that which he denies in fact, and thus the jury would be confused and perplexed by an apparent admission of facts antagonistic to the theory of the prosecution. It would require the court, whenever an objection was interposed, to determine what facts were proved, and what were not, and thus compel an invasion of the province of the jury. It would produce endless wrangling and confusion, darken and obscure the investigation of the recondite subject of mental capacity, and place the falsest testimony and the absurdest statements on an equality with the truest and most reasonable. On the other hand, no harm can be done the accused by holding that the examining counsel may assume such a case as the evidence, in his judgment, makes out, and which keeps within the range of the relevant testimony, because the prisoner's counsel may, on cross-examination, add to the hypothetical case supposed by the prosecutor, such facts as he deems the evidence to have established, or subtract from it such facts as he supposes to have been disproved, or not to have been proved."⁶⁴ In like manner it is said by Worden, C. J., in an earlier case in the same State: "The party seeking an opinion in such case may, within reasonable limits, put his case hypothetically as he claims it to have been proved, and take the opinion of the witness thereon; leaving the jury, of course, to determine whether the hypothetical case put is the real one proved."⁶⁵ Upon the same subject the Supreme Court of Wisconsin has said: "The rule in that respect must be that, in propounding a hypothetical question to the expert, the party may assume as proved, all facts which the evidence in the case tends to prove, and the court ought not to reject the evidence, on the ground that, in his opinion, such facts are not established by the preponderance of evidence. What facts are proved in the case, when

⁶⁴ Goodwin v. St., 96 Ind. 550, 554.

⁶⁵ Bishop v. Spining, 38 Ind. 143.

To the same effect see Gutterman v. Liverpool etc. Co., 83 N. Y. 358; Davis v. St., 35 Ind. 496, 9 Am. Rep. 760; Guetig v. St., 66 Ind. 94; Nave v. Tucker, 70 Ind. 15. It is said by a recent writer on this subject: "If framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he

should state the facts as they actually exist." Rogers' Expert Test. 39. Another recent writer thus states the rule: "It is the privilege of the counsel in such case to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." Lawson, Exp. & Op. Ev. 153.

there is evidence to prove them, is a question for the jury, and not for the court. The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established.”⁶⁶ In short, the rule seems to be that a physician testifying as an expert cannot be permitted to decide upon the credibility of witnesses, or to take into consideration facts known to him and not communicated to the jury; but after having communicated such facts in his testimony, he may take them into consideration in forming his opinion.⁶⁷

§ 612. **Long Hypothetical Questions Objectionable.**—The giving of long hypothetical questions, which assume the existence of a multitude of facts, is *erroneous*.⁶⁸ The reason of this rule is thus

⁶⁶ *Quinn v. Biggins*, 63 Wis. 664, 670, 24 N. W. 482.

⁶⁷ *Koenig v. Globe Mutual Life Ins. Co.*, 10 Hun (N. Y.); 558; *Hunt v. Lowell Gaslight Co.*, 8 Allen (Mass.), 169; *Van Zandt v. Mutual Benefit Ins. Co.*, 55 N. Y. 169, 14 Am. Rep. 215; *Bush v. Jackson*, 24 Ala. 273; *Bennett v. Fail*, 26 Ala. 605; *Louisville etc. R. Co. v. Falvey*, 104 Ind. 409, 419, 3 N. E. 389, 4 N. E. 908.

⁶⁸ *People v. Brown*, 53 Mich. 531, 19 N. W. 172; *Haish v. Payson*, 12 Bradw. (Ill.) 539, 546, affirmed on this point, 107 Ill. 365, 371. This case furnishes a strikingly fantastic illustration of an abuse of the rule in this regard. The so-called hypothetical question was long enough to fill two and a half pages of a book of standard law reports. It was, according to the description of the appellate court, “replete with absolute assertions of facts and even extended into the domain of pure speculation.” It was “a high-sounding prologue;” it “abounded with strong adjectives,” and with “now and then a rhetorical expletive,” and “em-

bodied a rather vigorous argument to prove the magnitude of the victory, which the plaintiffs had won for the defendant; his immediate gains, his rescue from impending perils, the superior advantages which he thereby acquired over other persons with whom he had no connection; a victory, whose stupendous results to the defendant, the argument traced down through the next succeeding fourteen years of the uncertain future, showing that the defendant might realize, as a crowning result of the plaintiff's services, the great sum of \$1,120,000, if he would but attend to his business during that time.” And although it was put to *six expert lawyers* on a question of the *value of professional services*, it was drawn in such a manner as obliged the court to assume that even *they* would not be able to understand it, and it was therefore held bad. *Thomas v. Fidelity Casualty Co. (Md.)*, 67 Atl. 259; *Davis v. Ins. Co.*, 59 Kan. 74, 52 Pac. 67. While mere length is no legal objection (*Jones v. Village*

stated by Mr. Justice Campbell: "In most cases it asks the witness to usurp the functions of the jury, and may often lead them to disregard their own functions and accept conclusions which they should form for themselves. But it may also be observed that another result, even where the question involves science, is nearly as dangerous. No opinion of a scientific question can be of any service to a jury, either in giving them direct knowledge, or in enabling them to compare opinions, unless they know just what elements enter into the opinion. Human memory is not usually so tenacious that a question of such great length, involving many distinct facts or elements, can be fully remembered by the witness to whom it is propounded on the stand; and it is practically unlikely, if not impossible, that when he answers it, he answers it with a view of all these separate elements. He necessarily answers it by assuming for himself what is material and what is immaterial, and if he were at the same time to show what matters he has eliminated, there could be no difficulty in ascertaining what is needed, and testing all witnesses by the same standard. But where this process is repeated by different witnesses, they may not all act on the same basis, and conflicts of opinion will appear, which are more apparent than real. In science, as everywhere else, all inquiries should be brief and clear enough to leave out all rubbish and direct attention to tangible results." ⁶⁹ There is another, and, within certain limits, an obviously sound view, which was thus expressed in a late opinion of the Supreme Court of the United States, given by Mr. Justice Field: "The length of hypothetical statements presented to a witness to ascertain his opinion upon any matter growing out of the facts supposed, will necessarily depend upon the simple or complicated character of the transactions recited, and the number of particulars which must be considered for the formation of the opinion desired; and this subject, like the extent to which the examination of a witness may be allowed, must, in a great degree, be left to the *discretion* of the court." ⁷⁰

of Portland, 88 Mich. 598, 50 N. W. 731) it has been held that trial court indiscretion might exclude same. Forsythe v. Doolittle, 120 U. S. 78. And it was observed that "it might be wiser to exclude such questions altogether when they are very com-

plicated or involve much detail." Howes v. Colburn, 165 Mass. 385, 43 N. E. 125.

⁶⁹ People v. Brown, 53 Mich. 531, 535, 19 N. W. 172.

⁷⁰ Forsythe v. Doolittle, 7 S. C. 408, 120 U. S. 73.

§ 613. Whether Witness concurs in the Testimony of Another Expert.—An expert who has heard the testimony of another expert, may not properly be asked whether he concurs therein, and if not, wherein he differs from it. Such a mode of eliciting the opinion of the witness may have the merit of being expeditious, but it may be attended with unfairness toward the witness himself, as well as toward the opposite party. “Witnesses called upon to testify professionally should be left free to give their own individual opinion, upon the facts involved, unconnected with, and untrammelled by the opinions of others who may have been examined.”⁷¹

§ 614. [Continued.] Instances of Proper Hypothetical Questions.—In an action for damages against a druggist for selling opium to the plaintiff's wife, whereby she became sick, emaciated, etc., the following question was put to a doctor of medicine: “In your judgment, speaking from your experience as a physician and surgeon, what would be the natural result of three of these bottles of opium, called laudanum, be upon Mrs. Hoard, as you know the woman, and her situation and constitution, and all that?” It was held that the question was clearly proper. The court, speaking through Foster, J., said: “If it had been based upon the evidence which had then been given, there is good ground for holding that it should have been excluded, because the witness would have been called upon to determine as to the truth or the falsity of all of the evidence, and he would have also to found his conclusions as to the effect to be given to it, both of which belong exclusively to the jury; while, in the form in which the question was put, if the jury found that the facts proved did not warrant any or all of the assumptions of the hypothetical question, they would treat the answer of the doctor as not relevant to the case. The true rule is to state a hypothetical case to the witness.”⁷² The following form was approved in a case where it was deemed proper to take the opinions of witnesses upon the evidence, as they heard it:⁷³ “Suppose all the facts stated, by the several witnesses to be true, was Mr. Woodbury laboring under an insane delusion, or was he of an unsound mind?”⁷⁴ In another case the same court ruled that the proper question to be put to a medical witness was this: “If the symptoms and indica-

⁷¹ *Horne v. Williams*, 12 Ind. 325, 329, opinion by Worden, J.

⁷³ *Ante*, § 599.

⁷² *Hoard v. Peck*, 56 Barb. (N. Y.) 203, 210.

⁷⁴ *Woodbury v. Obear*, 7 Gray (Mass.), 467, 468.

tions testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his opinion, the party was insane, and what was the nature and character of the insanity; what state of mind did they indicate, and what he would expect to be the conduct of such person in any supposed circumstances.”⁷⁵

§ 615. **Whether Expert can give Opinion upon the whole Case.**—It has been ruled, and the decision followed, that, where scientific men are called as witnesses, they are not entitled to give their opinions as to the merits of the case, but only as to the facts as proved at the trial.⁷⁶ This is undoubtedly the general rule, as shown by the cases in the next section. It is equally true that great difficulty must arise in applying it, where the issue is whether a certain person was, at the doing of a certain act, *sane or insane*,⁷⁷ and it is believed that in most of these cases the question is so framed—and unavoidably so—as to call for the opinion of the expert upon the very fact in issue. What else can he generally answer in such a case? Moreover, the view, already shown,⁷⁸ that, in certain cases, experts may be permitted to give their opinions upon the evidence as they have heard it detailed by the witnesses, would seem to carry with it the conclusion that the opinions which they are to give are opinions upon the main issue. Accordingly, we find that it has been held not a good objection that the question goes to the whole merits, and that the witness is required to give an opinion upon the very question which the jury are to determine. It was so held, where a person, skilled in the art of navigation, was asked *to what the loss was attributable*.⁷⁹ But, in general, the hypothetical ques-

⁷⁵ *Com. v. Rogers*, 7 Metc. (Mass.) 500, 505.

⁷⁶ *Jameson v. Drinkald*, 12 Moore, 148; *People v. Lake*, 12 N. Y. 358, per Hand, J. See also *Rex v. Wright*, Russ. & Kir. 456; *Norman v. Wells*, 17 Wend. (N. Y.) 136, 161; *Mayor v. Pentz*, 24 Wend. (N. Y.) 668; *Fish v. Dodd*, 4 Denio (N. Y.), 311. See cases to note 20, § 595, ante.

⁷⁷ *People v. Lake*, supra. Compare *White v. Bailey*, 10 Mich. 155.

⁷⁸ Ante, § 599.

⁷⁹ *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427, 443; *City of Chicago v. McNally*, 227 Ill. 14, 81

N. E. 23. There seems something of refinement of distinction here often elusive. It has been held in Missouri that there is an essential difference between permitting a witness to give an opinion and permitting him to draw a conclusion. *Taylor v. Grand Avenue R. Co.*, 185 Mo. 230, 84 S. W. 873. And a witness cannot by opinion usurp the province of the jury, as to that which is directly in issue. *Roscoe v. Street Ry. Co.*, 202 Mo. 576, 101 S. W. 32. But a question which calls for an opinion on the probable cause of a result is generally proper. *Franklin v. R. Co.*, 188 Mo. 533, 87

tions may and must be so framed as to call for the opinion of the witness upon an assumed state of facts, without requiring him *in form* (though it may require him *in substance*) to decide the whole controversy. Perhaps a good instance of this is afforded by a case where the action was against a carrier by water, to recover damages for a loss of goods alleged to have occurred through the negligence of the defendant's servants and agents, while towing the plaintiff's barge from Jersey City to New Haven, through Long Island Sound. It was held that no error was committed by asking an expert: "With your experience, would it be safe or prudent for a tug boat on Chesapeake Bay, or any other tide water, to take three boats abreast, with a high wind?"⁸⁰

§ 616. [Continued.] Instances of Questions bad because calling for a Decision of the Whole Case.—But, in an action to recover damages for injuries alleged to have been sustained by the plaintiff's *canal-boat*, through the *negligence* of the defendant, it was held improper to ask a witness for the defendant as follows: "Did Mr. Carpenter (the plaintiff), in your opinion as a canal-boat man, in any way omit or neglect to do anything which he might have done to save his boat?"⁸¹ The court said: "An expert may be asked

S. W. 930; McCaffery v. R. Co., 192 Mo. 144, 90 S. W. 816. And in Taylor v. Grand Avenue R. Co., *supra*, it was said that it was error to permit witness to testify, that he attributed the condition of plaintiff to a certain injury, but he could have been asked, after stating to him the nature and extent of the injury, if that condition might, could or would have been the result of that injury. See also Lutz v. St. Ry. Co., 123 Mo. App. 499, 100 S. W. 46. And it would make no difference that this *opinion* might go to the very issue on trial. Wood v. St. Ry. Co., 181 Mo. 433, 81 S. W. 152. In Illinois it was ruled that the question should have limitation in inquiry by the words *might have been produced*. See Chicago v. Didier, 227 Ill. 571, 81 N. E. 698. In Texas it is said, that

the mere fact, that the answer may decide the question at issue is no ground of objection. Galveston etc. Ry. Co. v. Henefy (Tex. Civ. App.), 99 S. W. 884. It would seem, then, that the necessity of limiting the question by "might" "could" or "would"—depends greatly on what is contested or controverted. If a plaintiff has been shown to have received an injury and only one injury and there is no controversy as to his present and former condition, it would be immaterial in what form the question is put, if it cannot be claimed with any sort of reason that something else may have brought on his condition.

⁸⁰ Transportation Line v. Hope, 95 U. S. 297.

⁸¹ Carpenter v. Eastern Transportation Co., 71 N. Y. 574.

whether certain acts, which are proven, are *seamanlike* and proper, under a given state of circumstances; but he cannot be allowed to express an opinion as to what was, or was not done as matter of fact.”⁸² So, in an action for damages against a *railway company*, grounded upon *negligence*, it is not competent for the defendant to ask a witness, who is an experienced railroad man, whether or not, in his opinion, certain signals “were reasonable or unreasonable,” “prudent or extraordinary;” or whether or not similar signals are given by other railway corporations. Such questions sought to obtain from the witness answers to questions which the jury were to answer, where the facts were of a character equally within the knowledge and comprehension of the jury as of the witnesses. They asked for mere naked expressions of opinion as to the character and quality of acts which were open to common observation.⁸³ So, on the trial of an action for *damages resulting in death*, the deposition of a medical man was read, containing the following question and answer: “Do you think that, with different, or in the exercise of greater care, he would probably have recovered?” Answer: “The treatment and care of Laughlin were, in my opinion, prudent. I believe a change in either would not have produced any different results.” It was held that this should have been excluded. The court said: “This question and answer put the witness in the place of the jury, to determine the ultimate fact, and it was therefore error to admit them. The witness might properly state what facts he knew respecting the treatment and care, and then give his medical opinion upon such facts; or he might be asked his opinion upon an assumed state of facts, which the testimony of the other witnesses tended to establish. But such a question, as asked, was improper, because the witness might base his opinion upon facts which *he assumed*, but which the jury might not find, or which had no existence in the case. A medical man’s opinion is very competent when the facts upon which it is based are testified to by himself, or by others; but his opinion, without the facts, is not competent, because he is not authorized to find or assume the facts at his pleasure; they are to be found by the jury, and if they do not exist as he assumes them, his opinion may go for naught.”⁸⁴ So, in an action against a *surgeon* for the *negligent and unskillful treat-*

⁸² *Carpenter v. Eastern Transportation Co.*, 71 N. Y. 574, 579.

⁸⁴ *Muldowney v. Illinois Cent. R. Co.*, 39 Iowa, 616, 622.

⁸³ *Hill v. Portland etc. R. Co.*, 55 Me. 439.

ment of a dislocated arm, the defendant claimed "consecutive luxation," or a displacement after an actual reduction. It was held that it was not competent to ask a surgical witness, "Do you believe, from what you have heard of the testimony in this case, that this arm has been the subject of consecutive luxation?"—since this required the witness to perform the function of the jury.⁸⁵ A medical witness having testified to seeing the decedent, some two or three months before the making of the will, which was challenged on the ground of a *want of testamentary capacity*, was asked: "From what you saw, what was his mental capacity?" This question was understood as referring to his mental capacity to make a will, and it was held incompetent, because presenting to the witness a question of law, and not of medical science,⁸⁶—a conclusion which does not seem to be sound.

§ 617. **What if the Answers go beyond the Questions.**—It is no objection to the answers of the experts, that they include considerations not referred to in the questions, as constituting the basis of the opinions given, provided they are such as the testimony tends to prove, and such as might properly have been included in the questions.⁸⁷

§ 618. **Reasons on Examination-in-chief.**—An expert may give the grounds and reasons of his opinion, on his examination-in-chief, as well as the opinion itself; it is not necessary that he should wait to have them drawn out on cross-examination.⁸⁸

§ 619. **Opinions founded upon Books.**—While medical books, which are stated by medical witnesses to be works of authority, cannot be put in evidence upon an issue upon which they might speak, yet medical witnesses may be asked their judgment, and the grounds of it, upon the question; and it is no objection to their answers that

⁸⁵ *Carpenter v. Blake*, 2 Lans. (N. Y.) 206.

⁸⁶ *White v. Bailey*, 10 Mich. 155.

⁸⁷ *Hathaway v. National Life Ins. Co.*, 48 Vt. 336.

⁸⁸ *Keith v. Lathrop*, 10 Cush. (Mass.) 454; *Com. v. Webster*, 5 Cush. (Mass.) 295, 301; *Collier v.*

Simpson, 5 Car. & P. 73; *Howard v. Creech*, 31 Ky. Law Rep. 201, 101 S. W. 974; *Com. v. Johnson*, 188 Mass. 382, 74 N. E. 939. Court may permit witness to answer and make explanation. *Com. v. Parsons*, 195 Mass. 560, 81 N. E. 291.

they are in some degree founded upon these books, as a part of their general knowledge.⁸⁹

§ 620. **Experiments in the Presence of the Jury.**—These are generally discountenanced, owing to the liability which exists of the jurors being imposed upon by skillful manipulation or jugglery.⁹⁰ On the other hand, experiments coming within the range of ordinary knowledge or experience may well be permitted, and circumstances can be imagined under which the refusal to permit them would be error. Such a case arose in Iowa. The action involved the genuineness of the signature to a note. The clerk of the court was called by the defendant as an expert. He testified that, in his opinion, certain signatures were not made with the same ink. Being recalled by the plaintiff, he stated that, since his examination by the defendant, he had examined writings upon the court record made with the same ink, which apparently differed in color. He accounted for this difference by the fact that a blotting pad had been used in the one case and not in the other. Being asked to point out the difference on the record, and illustrate the effect of the blotting pad, an objection of the defendant thereto was sustained. This was held error.⁹¹

§ 621. **Medical Opinion as to the Permanency of Physical Injury.**—In every action for damages for a physical injury, all the damages accruing from the injury, past, present and prospective.

⁸⁹ Collier v. Simpson, 5 Car. & P. 73; St. v. Baldwin, 36 Kan. 1, 12 Pac. 318. It is not allowable to read extracts and ask the witness if they correspond with his opinion. Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 109. Though he may read questions from a book or propound them from memory. Thompson v. West, 56 Conn. 478, 16 Atl. 237.

⁹⁰ See post, ch. 27. It was held in Pennsylvania not error to allow a physician, a witness for the state, to refer to defendant's manner of answering questions as a witness, where it was claimed epilepsy had brought on mental impairment.

Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228.

⁹¹ Farmers' etc. Bank v. Young, 36 Iowa, 45. As examples of illustration of testimony see Tudor Iron Works v. Weber, 129 Ill. 535, 21 N. E. 1078 (plaintiff putting on clothing he wore when injured to show how it happened); Leonard v. Southern Pac. Co., 21 Ore. 555, 28 Pac. 887, 15 L. R. A. 221 (defendant producing rail to show by experiment accident could not have occurred as claimed); St. v. Murphy, 118 Mo. 7, 25 S. W. 95 (identification case); St. v. Elwood, 17 R. I. 763, 24 Atl. 782 (using lantern, mask and other implements ordinarily

must be included in the one recovery.⁹² It is therefore competent, in order to assist the jury in arriving at a conclusion as to the character of an injury and the probability of its permanency, to take the opinion of medical experts on the subject.⁹³

ARTICLE II.—CROSS-EXAMINATION.

SECTION

625. Incompleteness of Hypothesis of one Party remedied by Cross-Examination.
626. Facts and Reasons on Cross-Examination.
627. Questions going beyond the Scope of the Evidence.
628. Scope allowed in Cross-Examining a Medical Expert.
629. [Illustration.] What a Doctor would Think if he should Find a Man Dead with Certain Appearances.
630. Cross-Examination of Medical Experts who have examined the Body of the Plaintiff.
631. Irrelevant Facts admissible for the Purpose of Testing Knowledge of Expert.
632. [Continued.] Illustration — Cross-Examination as to Age.
633. Reading Books of Science to Expert to test his Knowledge.
634. Questions affecting Credibility.
635. Instance of an Improper Cross-Examination under the American Rule.

§ 625. **Incompleteness of Hypothesis of one Party remedied by Cross-examination.**—When the witness has expressed an opinion, based upon facts assumed by the party whose witness he is, the other party may cross-examine him, by taking his opinion, based upon any other state of facts assumed by him to have been proved by the evidence, provided that such hypothetical state of facts

used by burglars to enable witnesses to describe appearance of burglar); *Osborne v. City of Detroit*, 32 Fed. (C. C.) 36 (thrusting, by medical attendant a pin in side of plaintiff who claimed to be paralyzed).

⁹² *Elkhart v. Ritter*, 66 Ind. 136; *North Vernon v. Voegler*, 103 Ind. 314; *Louisville etc. R. Co. v. Falvey*, 104 Ind. 409, 422, 3 N. E. 389, 4 N. E. 908.

⁹³ *Finney v. New Jersey Steamboat Co.*, 12 Abb. Pr. (N. S.) (N. Y.) 1; *Filer v. N. Y. etc. R. Co.*, 49

N. Y. 42; *Wilt v. Vickers*, 8 Watts (Pa.), 227; *Kent v. Lincoln*, 32 Vt. 591; *Johnson v. Central etc. R. Co.*, 56 Vt. 707; *Hoard v. Peck*, 56 Barb. (N. Y.) 202; *Montgomery v. Scott*, 34 Wis. 338; *Toledo etc. R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Anthony v. Smith*, 4 Bosw. (N. Y.) 503; *Louisville etc. R. Co. v. Falvey*, supra; *Mo. Pac. R. Co. v. White*, 80 Tex. 202, 15 S. W. 808; *Alabama G. S. R. Co. v. Bailey*, 112 Ala. 167, 20 South. 313; *Bryant v. R. Co.*, 98 Iowa, 483, 67 N. W. 392.

is within the scope of the evidence. Such a cross-examination, to reach its true value, should develop fully the reasons upon which the expert bases his opinion. The cross-examining counsel should be allowed to call the attention of the expert to any and every view of the facts which will tend to test the correctness of his opinion. This right of cross-examination has been justly characterized as of the utmost importance to the defendant in a criminal trial, especially where the experts are introduced and examined *in rebuttal*, so that the defendant cannot introduce them as his own witnesses at that stage of the case, or bring others to overcome their evidence.⁹⁴

§ 626. **Facts and Reasons on Cross-Examination.**—A familiar illustration of the rule that the expert is to give, on cross-examination, the *reasons for his opinion*, is found in a proposition already stated,⁹⁵ that where a witness has given his *opinion as to value*, he may be asked, even on his examination-in-chief, the facts and reasons on which his opinion is founded.⁹⁶

§ 627. **Questions going beyond the Scope of the Evidence.**—Such being the scope of the cross-examination, it is obvious that it will not be a good objection to a question, that it goes beyond the scope of evidence; since questions propounded for the purpose of eliciting the *reasons* upon which the expert bases his opinion, or the extent of his knowledge, may often go beyond the evidence. Thus, in an action for injuries causing death, where the injury happened in a steamboat explosion and the body was subsequently found in the water, it was held that a medical witness, who had examined the body and testified that death was caused by drowning, might properly be asked, “What would have been the indications if a person had been suffocated first, and had afterwards fallen into the water?”—although there was no evidence that this was the fact.⁹⁷

⁹⁴ Davis v. St., 35 Ind. 496; Grubb v. St., 117 Ind. 284, 20 N. E. 257; In re Mullen's Estate, 110 Cal. 252, 42 Pac. 645. It has been ruled that “almost any state of facts” may furnish assumption in testing the knowledge and experience of the witness. Taylor v. Star Coal Co., 110 Iowa, 40, 81 N. W. 249. A test of the limit of cross-examination in testing opinion evidence is not

whether what might be brought might be used to corroborate opinion. Pierson v. Ry. Co., 191 Mass. 223, 77 N. E. 769.

⁹⁵ Ante, § 413.

⁹⁶ Dickenson v. Fitchburg, 13 Gray (Mass.), 546.

⁹⁷ Erickson v. Smith, 2 Abb. App. Dec. (N. Y.) 65; Braham v. St., 143 Ala. 28, 38 South. 919. In a suit for fraudulent representation of value

§ 628. **Scope allowed in cross-examining a Medical Expert.**—In a case in Indiana it is said by Elliott, J.: “In cross-examining a medical expert, counsel have a right to assume the facts as they believe them to exist, and to ask the expert’s opinion upon the facts thus assumed. An examination-in-chief cannot be so conducted as to compel the cross-examining counsel to merely follow the line of questions that are asked; but when a general subject is opened by an examination-in-chief, the cross-examining counsel may go further into details, and may put the case before the expert witness in various phases. Each side has a right to take the opinion of the witness upon his theory of the facts established by the evidence. While it is true that a cross-examination must be confined to the subject of the examination-in-chief, it is not true that the cross-examining party is confined to any particular part of the subject. He has a right, in such a case as this, to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved; and he also has a right to add to the question such facts as he thinks the evidence establishes.”⁹⁸

§ 629. **[Illustration.] What a Doctor would Think if he should Find a Man Dead with certain Appearances.**—Where a medical expert testified, on a trial for manslaughter, which was committed by striking the deceased upon the head with a stone, that the ap-

in the sale of stock, and defendants showed by experts from examination of books, that the stock was not overvalued as at the date of sale, it was held competent to ask whether or not the fact of there being no assets a year later did not show that there was overvaluation of assets in the books. *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666. And where expert testified as to value of property, his own act in fixing valuation on a lot in his hands for sale and its having been for sale a long time as attacking his credibility about property being readily saleable at a higher price, his lot and that being in every respect similar. *Pierce v. City of*

Boston, 164 Mass. 92, 41 N. E. 227. See also *Harris v. R. Co.*, 141 Pa. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

⁹⁸ *Louisville etc. R. Co. v. Falvey*, 104 Ind. 409, 421, 3 N. E. 389, 4 N. E. 908. See also *Davis v. St.*, 35 Ind. 496, 9 Am. Rep. 760; *Rogers Exp. Test.*, 46; *Conway v. St.*, 118 Ind. 482, 21 N. E. 485; *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125. Where one medical expert testifies from personal knowledge and another on the basis of a hypothetical question, the latter may be asked whether the former was not in a better position to judge of the matter than he. *Galveston etc. R. Co. v. Fink*, 44 Tex. Civ. App. 544, 99 S. W. 204.

pearances disclosed upon a *post mortem* examination of the head of the deceased, as described by another witness, were those of apoplexy,—it was held that he might be asked on cross-examination, what would he think to be the cause of death, if he should find a man dead, and a *post mortem* examination should disclose similar appearances to those described, and it should be proved that he had been struck violently upon the head with a stone.⁹⁹

§ 630. **Cross-examination of Medical Experts who have examined the Body of the Plaintiff.**—In an action for personal injuries, “where medical experts are ordered to examine a plaintiff, and they are called and questioned by the defendant as to the result of their examination, the plaintiff has a right to ask, on cross-examination, how the examination was conducted, and this necessarily includes the right to ask what questions were propounded to the plaintiff. If it were otherwise, the plaintiff could not get fully before the jury, the method of investigation pursued by the medical experts; and to deny this would be an unjustifiable restriction of the important right of cross-examination.”¹ Another reason adduced in support of the same view is the rule that, where a party gives evidence of a *part of a transaction*, his adversary has a right to *full details* of the transaction.²

§ 631. **Irrelevant Facts admissible for the purpose of testing Knowledge of Expert.**—It is laid down by Mr. Justice Stephen in his work on evidence that, “facts not otherwise relevant, are deemed to be relevant, if they support, or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant.”³ The reason given for this rule is that it is a proper rule to be resorted to, in order to test the capacity of the witness, and to ascertain the reasonableness, or establish the unreasonableness of his

⁹⁹ Com. v. Mullins, 2 Allen (Mass.), 295. This mode of interrogation was regarded as within the rule laid down in Woodbury v. Obear, 7 Gray (Mass.), 467.

¹ Louisville etc. R. Co. v. Falvey, supra.

² Ibid.

³ Steph. Ev., art. 50; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072. But the rule as to excluding

matters purely collateral, e. g. mistakes of witness in testifying in other cases, may, nevertheless, be applied. Com. v. Tucker, 189 Mass. 457, 76 N. E. 127. And so where plaintiff called a witness to testify as to removal of a degenerate kidney, cross-examination could not extend to the cause of degeneration. Maure v. Gould & Eberhardt, 77 N. J. L. 314, 60 Atl. 1134.

opinion.⁴ It is therefore admissible, on the cross-examination of an expert witness, to state hypothetical cases to him, and to ask his opinion thereon, for the purpose of testing his knowledge and skill.⁵

§ 632. [Continued.] **Illustration—Cross-examination as to Age.**—In an action by a lady against a railroad company for a physical injury, a witness for the defendant was asked, among other questions, what the apparent age of the plaintiff was. To this he answered: "In my opinion she was twenty-two or twenty-three, say twenty-four or twenty-five; from twenty-three to twenty-five in appearance." On cross-examination the plaintiff's counsel pointed out a bystander and asked the witness: "How old do you think he is." The witness answered: "Well, I think he is about fifty-five." In giving evidence in rebuttal the plaintiff called the bystander, who testified that his age was forty-six. It was held, applying the above rule, that in allowing this to be done the court committed no error. It was competent, for the purpose of showing that the witness was not capable of judging of the age of a person by his appearance.⁶

§ 633. **Reading Books of Science to Expert to test his Knowledge.**—Where a physician testified as to the symptoms of a disease of which a person died whose life was insured, and pronounced it *delirium tremens*, induced by the use of intoxicating liquors, it was held that paragraphs treating of that disease might be read to him, and that he might be asked, on cross-examination, whether he agreed with the authors, as one of the means of testing his knowledge, and that this was in no just sense reading books of science to the jury. At the same time the court, speaking through Scott, J., said: "The rule announced may be liable to abuse. Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination."⁷

⁴ Louisville etc. R. Co. v. Falvey, supra; Folks v. Chadd, 3 Doug. 157; Davis v. St., 35 Ind. 496, 9 Am. Rep. 760.

⁵ Louisville etc. R. Co. v. Falvey, supra; Davis v. St., 35 Ind. 496,

498, 9 Am. Rep. 760; Rogers' Exp. Test. 50.

⁶ Louisville etc. R. Co. v. Falvey, supra.

⁷ Conn. Mut. Life Ins. Co. v. Ellis, 89 Ill. 516. If he states that a med-

§ 634. **Questions Affecting Credibility.**—It is competent to cross-examine an expert witness as to the *fee which has been paid him* for attending at the trial in the character of an expert. Nevertheless, as there is nothing discreditable to the party or the witness, in the one paying and the other receiving a reasonable fee, it is proper for the court, on request, or even without request, to say so to the jury, in *instructing them*.⁸

§ 635. **Instance of an improper Cross-examination under the American rule.**—In a case in California, where the American rule of strict cross-examination⁹ obtains, an expert witness, called on behalf of the plaintiff, had testified that he had made a *post mortem* examination of the body of George W. Gridley, and as to the condition of the brain, pelvic viscera, and particularly the kidneys and bladder and the prostate gland and urethra; that he had found nitrate of urea in crystals in washing the membranes of the brain and crystals of urea in the arachnoid sac, etc.; that the kidneys were apparently in a normal state, except that they were engorged with blood; that the membranes of the brain, the *pia mater*, the arachnoid and *dura mater* were “thickened, discolored, adherent, and matted together;” and that the prostate gland was enlarged, thickened, and indurated, and its walls pressed together. In his opinion, the deceased must have been of unsound mind for five years prior to his death, by reason of the facts that the condition of the prostate gland had obstructed the elimination of urea, causing it to enter into the circulation and poisoning the cranial membranes, and that the patient had died of uraemic convulsions, thus produced; that the thickened condition of the brain coverings established insanity, and that the thickening produced by the chronic uraemic poisoning must have been gradual, continuing several years. One B., called as an expert witness, by the defendant, after stating that he had been a practicing physician and surgeon since

ical book is standard authority, he may be asked whether or not certain passages are in conflict with his opinion. *Beadle v. Paine*, 46 Ore. 424, 80 Pac. 903. Or witness may be required to read them. *Byers v. R. Co.*, 94 Tenn. (10 Pickle) 345, 29 S. W. 128.

⁸ *Alford v. Vincent*, 53 Mich 555.

Not, however, when appointed by the court at the request of one of the parties (in discretion), but he may be asked, where he testifies as to tests, if they were fairly and properly made. *Rowe v. Ry. & Light Co.*, 44 Wash. 658, 87 Pac. 921.

⁹ Ante, §§ 432 et seq.

1864 (about 17 years), that he was a graduate of certain medical schools, and that he had been superintendent about two years of an insane asylum in Lancashire, England, proceeded to testify, in effect, that he had never known crystals of urea to be found in the brain or any of its surroundings; that nitrate of urea is perfectly soluble in water; that uric and urea are specifically different. He added, that taking the condition of the coverings of the brain and the brain itself, and of the kidneys, the bladder, the prostate gland, and the urethra, as described by M. and by Dr. C. [who had assisted at the *post mortem* examination], he could not understand how any such condition of his brain, or of its membranes could be attributed to *uraemic* poisoning, without disease of the kidneys antecedent to it; and declared that disease or unsoundness of mind could not be predicated on the condition of the coverings of the brain as described by M. and C. On cross-examination of B. the plaintiff wished to put to him a hypothetical question, in all respects similar to such questions propounded to the plaintiff's witness on direct examination. It was held that, since the testimony of B. on direct examination was confined to a contradiction of the theory of M. as to the mental unsoundness of Gridley produced by slow *uraemic* poisoning, the question was not proper on cross-examination; as the answer of the witness thereto, if it sustained the plaintiff's views, would have constituted part of her case, which should have been made out before she rested. Nor was the question proper as testing the capacity of B., as an expert; for if the answer of B. had been the same as that given by the plaintiff's experts, it would have strengthened the plaintiff's affirmative case; if different, it would have tended no more to prove the incompetency of B. than to prove the incompetency of the plaintiff's experts.¹⁰ In another jurisdiction it has been held that where a witness has testified, but *not* as an expert, under the so-called American rule, it is not competent to put to him questions on cross-examination which would be only admissible in case of an expert witness; the cross-examining party must call him as his own witness.¹¹

¹⁰ Gridley v. Boggs, 62 Cal. 191.

¹¹ Olmstead v. Gere, 100 Pa. St. 127.

CHAPTER XXIII.

OF THE ACCUSED AS WITNESSES.

SECTION

- 640. Competency.
- 641. General Form of Enabling Statutes — Special Provisions.
- 642. Subject to the same Rules of Examination as other Witnesses.
- 643. And to the same Modes of Impeachment.
- 644. Right of Impeachment and Manner Thereof.
- 645. Disqualification of Witnesses for Conviction of Crime as Respects Accused's Privilege to Testify.
- 646. Co-defendants and Co-Indictees as Witnesses.
- 647. Testimony, Evidence against him on a Subsequent Trial.
- 648. May Testify as to his Intent or Motive.
- 649. View that he may be Cross-Examined as any other Witness.
- 650. [Continued.] Interrogated as to former Arrests and Convictions.
- 651. [Continued.] Illustrations of this View.
- 652. View that Cross-Examination is confined to Examination-in-Chief.
- 653. [Continued.] Previous Arrests, Convictions, etc., not Inquired into.
- 654. Crimes not affecting Credibility.
- 655. [Continued.] Illustrations.

§ 640. **Competency.**—The competency of an accused, in a criminal trial, to testify is purely statutory. The series of these enabling enactments began with that of Maine in 1864. They are now found in the laws of the federal government and of every state and territory, except Georgia. It was not from any spirit of unfairness, that this disqualification at the common law took longer for removal than other incapacities, such as affected civil parties and where interest was involved. Before that time in England, and by statute in some of the states, the practice was to allow the accused to make a "statement," as is still the rule in Georgia.¹ The privilege (and this is the almost invariable thought in these statutes) seemed to the legislative mind to carry a potency of danger, for in varying form it is prescribed, that failure to exercise such privilege shall create no presumption against the accused. Necessarily this may amount to nothing more than legislative advice, and some of the states, as recognizing its inherent ineffectiveness, forbid, *ex industria*, any reference by the prosecution to such failure. There

¹ For consideration of the "statement" rule, see ch. 24, post.

has been much discussion of the policy of such legislation as being or not being of advantage to the accused. Sawyer, C. J., in an early case in California, has stated an objection to the legislation in a clear and forceful way. "The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection, that has been urged against it, is, that it places a party charged with crime in an embarrassing position; that even when innocent, a party upon trial upon a charge for a grave offense may not be in a fit frame of mind to testify advantageously to the truth even, and yet, if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony."²

§ 641. General Form of Enabling Statutes—Special Provisions.

These enabling statutes generally give to an accused the option or privilege of becoming a competent witness or of remaining silent. Only in a few instances is it stated as to the course or order of examination and whether or not he is subject to cross-examination or impeachment. It is stated with emphasis in all of the statutes, that it is solely in the exercise of a privilege, that he becomes a competent witness. In Florida it is expressly stated that he "shall be subject to examination as other witnesses." In Iowa "the State shall be strictly confined (in cross-examination) to matters testified to in the examination in chief." In Louisiana he "may be cross-examined as to all matters concerning which he gives testimony." In Maine "he shall not be compelled to testify on cross-examination to facts that would convict or furnish evidence to convict him of any other crime." In Michigan, conviction of crime may be shown to affect his credibility. In Missouri, the cross-examination is "as to any matter referred to in his examination in chief." The statute also provides he may be impeached "as any other witness." In Oregon, the statute limits the cross-examination to "all facts upon which he has testified tending to his conviction or acquittal." In the jurisdictions where specific direction is not expressed by statute,

² For discussion upon utility and advantage of the rule and its disadvantages see various articles in Law Times, 99 p. 103; 100 p. 412; 101 p. 582; 103 p. 297; 104 p. 415. Also Best on Ev. 8th Ed. § 622 A.

consideration has been given to the question, whether or not an accused upon taking the stand as a witness is to be treated in the same way as an ordinary witness as to cross-examination and impeachment.

§ 642. **Subject to the same Rules of Examination as other Witnesses.**—Where the statute does not indicate any difference between the witness-character of an accused and that of any other witness it has been generally held, that none was intended.³ In those jurisdictions, therefore, where the American, as distinguished from the English, rule obtains, he would be subject to that⁴ and *vice versa*.⁵ Thus the Supreme Court of the United States, following the American rule, has reaffirmed a former ruling that: "A prisoner who takes the stand in his own behalf waives his constitutional right of silence and may be cross-examined upon his evidence in chief, as to the circumstances connecting him with the crime, with the same latitude that would be exercised in the case of an ordinary witness."⁶ The Supreme Court of Alabama has held that waiver in the exercise of the testimonial privilege is thorough, and the examination is carried over to the English rule of no limitation to evidence in chief. Thus it was said: "Decisions of this court have established, that a defendant in a criminal case by exercising the privilege given by the statute of testifying waives the constitutional right of protection against compulsion to give evidence against himself and becomes subject to cross-examination and impeachment as are other witnesses."⁷ The opinion from which the above is quoted referred to a prior case⁸ authorizing the State by way of impeaching a defendant as a witness to make proof of confessions not shown to have been voluntary. But Wisconsin Supreme Court

³ *St. v. Lewis*, 56 Kan. 374, 23 Pac. 265; *People v. Sutherland*, 104 Mich. 468, 62 N. W. 566; *St. v. Hefernan*, 28 R. I. 20, 65 Atl. 284; *St. v. Caron*, 118 La. 349, 42 South. 754; *St. v. Stukes*, 73 S. C. 386, 53 S. E. 643; *Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593; *Smith v. St.*, 137 Ala. 22, 34 South. 396; *Fitzpatrick v. U. S.*, 178 U. S. 304; *Wallace v. St.*, 41 Fla. 547, 26 South. 713; *St. v. Duncan*, 7 Wash. 336, 35 Pac. 113.

⁴ *St. v. Blackburn* (Iowa), 110 N. W. 275 (not reported in state

reports.); *St. v. Zdarowicz*, 69 N. J. L. 619, 55 Atl. 743; *St. v. Teasdale*, 120 Mo. App. 692, 97 S. W. 995 (statute applied).

⁵ *St. v. Rowell*, 75 S. C. 494, 56 S. E. 23; *Guy v. St.*, 90 Md. 29, 44 Atl. 997; *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

⁶ *Sawyer v. U. S.*, 202 U. S. 1, 50 L. Ed. 972.

⁷ *Smith v. St.*, 137 Ala. 22, 34 South. 396.

⁸ *Hicks v. St.*, 99 Ala. 169; see also *Com. v. Falliner*, 119 Mass. 312.

thought this unreasonable and unjust, as getting in evidence indirectly when forbidden directly.⁹

§ 643. **And to the same Modes of Impeachment.**—While the general proposition is true that the *moral character* of the accused in a criminal case is not in issue, unless he chooses to bring it into question by first offering evidence in support of it,¹⁰ it has become the rule in some jurisdictions that, if he avails himself of the privilege of testifying, he testifies under the same rules, and may be impeached in the same manner, as other witnesses.¹¹ The fact of his having been previously *convicted of crime*, may be proved for this purpose;¹² though it has been held that this fact cannot be

⁹ Sheppard v. St., 88 Wis. 185, 59 N. W. 449. As in accord with Alabama and Massachusetts cases is that of Harrold v. Territory, 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604, and as contra 36 Tex. Cr. R. 235, 36 S. W. 435. The Texas Court later held, in effect, that the accused could be subjected to the severest of cross-examinations, but the court hesitated about going to the length of approving his being compelled to submit to an experiment—such as putting on a cap, for identification by prosecutrix in a rape case. See Turman v. St., 50 Tex. Cr. R. 7, 95 S. W. 533. The waiver extends, it has been decided, even to other crimes, if within legitimate cross-examination of another witness. People v. Dupounce, 133 Mich. 1, 94 N. W. 388. In North Dakota contra, where only inquired about to affect credibility. St. v. Kent, 5 N. D. 516, 67 N. W. 1052.

¹⁰ Fletcher v. St., 49 Ind. 124; Knight v. St., 70 Ind. 375; Morrison v. St., 76 Ind. 335, 337.

¹¹ Mershon v. St., 51 Ind. 14; St. v. Beal, 68 Ind. 345; Morrison v. St., 76 Ind. 335; St. v. Clinton, 67 Mo. 380, 29 Am. Rep. 506; Brandon v. People, 42 N. Y. 265; Connors v. People, 50 N. Y. 240; Fletcher v. St., 49 Ind. 124, 19 Am. Rep. 673; Mershon v. St., 51 Ind. 14; In *Mis-*

souri the law is in this shape, that in a criminal trial where the defendant offers himself as a witness in his own behalf, it is not error to allow the State, over his objection, to examine witnesses touching his general moral character. He may be impeached as any other witness, except that, on his cross-examination, he can only be examined as to matters in respect of which he has testified on his examination-in-chief. St. v. Bulla (Mo.), 6 West. Rep. 440. On the last point see St. v. Palmer (Mo.), 5 West. Rep. 387; St. v. Grant, 79 Mo. 113; St. v. Clinton, 67 Mo. 380. We understand the Missouri rule to mean that, while such a witness may be impeached by independent testimony, yet it is not competent to lay a foundation for impeaching him by asking questions on his cross-examination as to his former antecedents' declarations, etc., as may be done in the case of other witnesses. But he may be impeached by disproving facts stated by him, the same as any other witness may. St. v. Rider (Mo.), 6 West. Rep. 458, 461.

¹² People v. Reinhart, 39 Cal. 449, per Rhodes, J. Former conviction may be shown by examination of witness or record of judgment, Cal. Code Civ. Proc. 1909, § 2051. See Ins. Co. v. Ingersoll, 153 Cal. 1.

drawn from him on cross-examination, since it is provable by the *record* only,¹³ that being the best evidence.¹⁴ The State may afterwards examine witnesses to prove his general bad character or reputation.¹⁵

§ 644. **Right of Impeachment and the Manner Thereof.**—If as is generally held the accused becomes subject to examination and cross-examination as an ordinary witness, by reason of his electing to become a competent witness, it would be to work out an excessive refinement, if indeed it would not amount to an interpolation of the statute, to say, that he was not impeachable as an ordinary witness. It is well established, that his moral character as an accused cannot be put in issue, unless he puts it in issue himself.¹⁶ But impeachment of his witness-character is of that which he has brought into the case of his own volition, and to say he has the right to tell the State every witness in his behalf may be impeached in the ways and manner of impeachment except himself is to rule he is not an ordinary witness, all of which is against the general trend of decision. That he may be impeached as a witness both by proof of contradictory statements¹⁷ and as being of bad moral character¹⁸ has been repeatedly held, care being taken that specific traits not going to disparage credibility be not shown.¹⁹ Prior conviction of crime has also been shown against him as in the case of an ordinary witness,²⁰ there being no specific statutory provision (except in one

¹³ *People v. Reinhart*, *supra*.

¹⁴ *Newcomb v. Griswold*, 24 N. Y. 298; *People v. Herrick*, 13 Johns. (N. Y.) 82; *Rex v. Inhabitants etc.*, 8 East, 77; *Carpenter v. Nixon*, 5 Hill (N. Y.), 260. See *Spigel v. Hays*, 118 N. Y. 660; IV Consol. L. N. Y. 1909, § 2444, p. 2820.

¹⁵ *St. v. Clinton*, 67 Mo. 380; *St. v. Beatty*, 25 Mo. App. 214; *People v. Beck*, 58 Cal. 212. For exhaustive review of rule, see *St. v. Beckner*, 194 Mo. 281. Under the California statute, the inquiry extends to his character for *truth*, *honesty* and *integrity*. Cal. Code Civ. Proc. 1909, § 2051; Cal. Penal Code, 1909, § 1102.

¹⁶ *People v. Shay*, 147 N. Y. 78, 41 N. E. 508; *Downey v. St.*, 115 Ala. 108, 22 South. 479; *St. v. Beatty*, 62 Kan. 266, 62 Pac. 658;

Morrison v. St., 76 Ind. 335, 337; *St. v. Murphy*, 45 La. Ann. 958 959, 13 South. 229.

¹⁷ *Haddix v. St.*, 76 Neb. 369, 107 N. W. 781; *Smith v. St.*, 137 Ala. 22, 34 South. 396; *Harrold v. Territory*, 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604.

¹⁸ *St. v. Brooks*, 202 Mo. 106, 100 S. W. 416; *Cecil v. St. (Tex. Cr. R.)*, 100 S. W. 390 (not reported in state reports); *Mitchell v. St.*, 148 Ala. 618, 42 South. 1014; *People v. De Camp*, 146 Mich. 533, 109 N. W. 1047.

¹⁹ *Maloy v. St.*, 52 Fla. 101, 41 South. 791; *St. v. Richardson*, 194 Mo. 326, 92 S. W. 649; *St. v. Grove*. 61 W. Va. 697, 57 S. E. 297.

²⁰ *Bise v. U. S.*, 147 Fed. 374 (C. C. A.); *St. v. Herlihy*, 102 Me. 310, 66 Atl. 643.

or two States) and this conclusion recognizing him merely as an ordinary witness.

§ 645. **Disqualification of Witnesses for Conviction of Crime as Respects Accused's Privilege to Testify.**—This kind of disqualification prevails to a limited extent in America. A small number of the states and the United States prescribe disqualification for conviction for perjury and subornation of perjury. Texas makes a conviction for any felony disqualify, while in Tennessee there is a long list of offenses, conviction for any one of which disqualifies a witness from testifying. The remaining states either specifically provide, or the practice prevails, to allow proof of conviction as affecting credibility, as do the states which prescribe disqualification for specifically named offenses. The question arises in those states, where conviction for crime incapacitates, whether an accused, by reason of having been convicted of a disqualifying crime, forfeits the right to offer himself as a witness and testify in his own behalf. Decision upon this question is limited, because of the jurisdictions being in the minority, where such disqualification would pertain to any witness and because the conjunction of the circumstance of an accused offering himself as a witness and that of his having been convicted of the specific disqualifying crime would rarely arise. On principle, however, and according to the comprehensive language giving to every accused person a defensive weapon to be used merely for his own advantage and not adversely to any individual right or interest, it would seem, that the option to make himself a "competent witness" should be deemed absolute.

§ 646. **Co-defendants and Co-indictees as Witnesses.**—The enabling statutes as to an accused testifying, though finally embracing all of the American states, have not found corresponding statutes as to co-defendants and co-indictees testifying for each other. A few of the states have treated this question specifically and the condition to testimonial competency has been usually that the co-defendant must be first discharged from the case before he can be called as a witness, either by the state or the remaining defendant or defendants. Such statutes are, perhaps, only intended to offer a means, during the progress of a trial, of taking one out of the record as a party, and then under the rule of interest not disqualifying, the discharged party would become, ipso facto, a competent witness. But the fact of such statutes being found presupposes disqualification of co-defendants, jointly indicted, as was the

common law rule. Does the removal of the disqualification of an accused as a party extend beyond his right to testify for himself and make him a competent witness generally in the case? Many cases are to be found where defendants are separately indicted and of there being severance on the trial, and in such an instance it is generally held, that a co-indictee or a co-defendant may be called either by the state or the accused. But recurring to the question of testimonial competency of an accused, is that or not limited to his being merely a witness for himself, as if he were the only party indicted or, at least, the only party on trial? Shelly, J., argued on this question as follows: "When any defendant chooses to testify, the statute permits him to do so. It does not matter whether his testimony is for or against himself, or for or against his co-defendant. The only limitation in the statute is, that he shall not be made a witness, except upon his own request. Being sworn as a witness at his own request, he is amenable generally to the rule governing other witnesses. He could testify against or for his co-defendant on trial with him, because the only reason he could not do so at common law was that he was a party to the record and interested in the case. In other words, the only common-law reason for his exclusion was that he was a defendant also on trial. The statute clearly removes that objection. The fact that two defendants were on trial does not prevent the statute applying. There is nothing in it to confine its operation to cases where but a single defendant is named in the indictment." ²¹

For cases where a co-defendant has been called to testify for the prosecution,²² and where called for accused.²³

The reasoning, however, in the above quoted extract seems not applicable where the statute says the accused becomes at his option "a competent witness in his own behalf" and the like, as several of the statutes do. Also it might be thought, that the fact, that generally these statutes provide against inference or presumption from failure to testify implies that testimony in behalf of the accused was all that was contemplated. Furthermore as it is by offering himself only, that the accused becomes a witness this implies, too, that he is concerning himself merely so far as his individual interest

²¹ Wolfson v. U. S., 101 Fed. 430, 436.

²² People v. Plyler, 121 Cal. 160, 53 Pac. 553; St. v. Hyde, 22 Wash.

551, 61 Pac. 718; St. v. Smith, 8 S. D. 547, 67 N. W. 619.

²³ Richards v. St., 91 Tenn. 723, 20 S. W. 533; McGinnis v. St., 4 Wyo. 115, 53 Pac. 492.

demands, and he is not there to help out the prosecution or to be a volunteer for another defendant.

§ 647. **Testimony Evidence against him on a Subsequent Trial.** If the accused waives his privilege and takes the witness stand in his own behalf, at any stage of the prosecution, he waives it for every subsequent stage. Thus, if he gives testimony on his preliminary examination, the same may be put in evidence against him on the trial.²⁴ So, if he takes the stand as a witness on his own behalf on one trial, what he so testifies may be put in evidence against him on a subsequent trial.²⁵ These decisions proceed upon the obvious principle that statements or admissions, voluntarily made by a party, are always evidence against him.

§ 648. **May testify as to his Intent or Motive.**—As already seen,²⁶ it is competent for a party testifying as a witness to state what his intent was in doing a particular act, whenever the question of intent is material to the issue.²⁷ This rule of evidence is of great value to persons accused of crime who may elect to testify in their own behalf; since in most crimes and misdemeanors intent is a necessary ingredient of the offense. Under this rule, the accused, when so testifying, is competent to state what the intent was, with which he did the act imputed to him as a crime.²⁸ He may explain what he *meant by words* shown to have been used by him.²⁹ Where the charge is murder and the accused sets up the so-called “plea of *self-defense*,” he is entitled to testify whether, at the moment when he committed the fatal act, he did or did not really believe that he was in danger of death or great bodily harm at the hands of the

²⁴ *People v. Kelley*, 47 Cal. 125; *St. v. Glass*, 50 Wis. 218. Compare *People v. Gibbons*, 43 Cal. 557.

²⁵ *Com. v. Reynolds*, 122 Mass. 454; *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250. There is much decision to the point of the wife's evidence for co-defendant being excluded, but it was prior to the enabling statutes making her competent to testify for her husband and are therefore of little use as to the particular question suggested.

²⁶ *Ante*, § 383.

²⁷ *Greer v. St.*, 53 Ind. 420 (over-

ruling *Zimmerman v. Marchland*, 23 Ind. 474, and qualifying *Columbus v. Dahn*, 36 Ind. 330); *Thurston v. Cornell*, 38 N. Y. 281; *White v. St.*, 53 Ind. 595; *Van Sickel v. Brown*, 68 Mo. 627, 634; *Thacher v. Phinney*, 7 Allen (Mass.), 146; *Snow v. Paine*, 114 Mass. 520.

²⁸ *Bolen v. St.*, 26 Ohio St. 371; *Kerrains v. People*, 60 N. Y. 221; *St. v. Banks*, 73 Mo. 592; reversed on another point, 10 Mo. App. 111; *Babcock v. People*, 15 Hun (N. Y.), 347.

²⁹ *People v. Farrell*, 31 Cal. 577.

deceased.³⁰ Where the charge is assault and battery with *intent to ravish*, he may testify that the assault was made with a different intent;³¹ and where the charge is *larceny*, he may testify as to what his intention was in respect of the goods, at the time when they came into his possession.³²

§ 649. **View that he may be Cross-Examined as any other Witness.**—There is a difference of view as to the scope of cross-examination, where the accused in a criminal case offers himself as a witness. One view is that, unless the language of the statute is restrained, it places him, in respect of his cross-examination, in the same situation as that of any other witness.³³ So, where a party in a *civil action* becomes a witness in his own behalf, he thereby subjects himself to all the rules regulating the direct and cross-examination of other witnesses.³⁴ According to this view, his cross-examination is subject to the same rules, and the same questions may be put to him for the purpose of affecting his credibility.³⁵ Questions calling for facts in his history, which would disgrace him or disparage his character, may be put to him, where they might be put to any other witness.³⁶ Under this view, he may refuse to answer a question which would disgrace him,³⁷ under the same circumstances which would entitle any other witness to exercise that privilege.³⁸ But this is his privilege *as a witness*, and not as a party.³⁹ He therefore cannot, through his counsel, object to a question put to him on the witness stand, upon this ground; but if he does not wish to answer it, he must claim his privilege.⁴⁰ But this view is very much *discarded*, as we shall presently see, and some of the cases cited in this section must be regarded as *overruled* in the same jurisdictions.

§ 650. [Continued.] **Interrogated as to former Arrests and Convictions.**—Under this view, whether a witness, or defendant in a criminal trial testifying in his own behalf, may be asked on cross-examination touching his commission of another crime, for the purpose of affecting his credibility, is a matter resting largely within

³⁰ *St. v. Harrington*, 12 Nev. 126.

³¹ *Greer v. St.*, 53 Ind. 420.

³² *White v. St.*, 53 Ind. 595.

³³ *Connors v. People*, 50 N. Y. 240; *Fralich v. People*, 65 Barb. (N. Y.) 48; *People v. Reinhart*, 39 Cal. 449; *St. v. Abrams*, 11 Ore. 169, 173; *St. v. Ober*, 52 N. H. 459, 13 Am. Rep. 88; *St. v. Efler*, 85 N. C. 585.

³⁴ *Clark v. Reese*, 35 Cal. 89.

³⁵ *Gill v. People*, 5 Thomp. & C. (N. Y.) 308.

³⁶ *Brandon v. People*, 42 N. Y. 265.

³⁷ *Ante*, § 287.

³⁸ *People v. Reinhart*, 39 Cal. 449.

³⁹ *Ante*, § 306.

⁴⁰ *People v. Reinhart*, *supra*.

the *discretion* of the trial court. "The limits to which a witness may be cross-examined on matters not relevant to the issue for the purpose of judging of his character and credit from his own voluntary admissions, rest in the sound discretion of the court trying the cause. Such questions may be allowed where there is reason to believe it will tend to the ends of justice; but they ought to be excluded when a disparaging course of examination seems unjust to the witness and uncalled for by the circumstances of the case."⁴¹

§ 651. [Continued.] Illustrations of this View.—For instance, where the prosecution is for the *unlawful selling of intoxicating liquors*, he may be asked whether he has not recently been tried and convicted several times for the unlawful selling of such liquors.⁴² So, it has been held within the discretion of the trial court to allow a witness to be asked, "Are you not now under indictment for murder in the second degree in this court?"⁴³ So, where, on the trial of an indictment for murder in the first degree, the accused took the stand as a witness in his own behalf, it was held within the discretion of the trial court to allow the State's counsel to ask him, on cross-examination, whether he had not once before been arrested for an assault with intent to kill.⁴⁴ So, it was held that a prisoner, testifying in her own behalf, might properly be asked whether she had ever been arrested for theft,⁴⁵ the question being one which the court, in the exercise of its discretion, might allow in the case of another witness.⁴⁶ Where a witness was on trial for a felonious assault and elected to testify as a witness in his own behalf, it was held that the people might ask him, on cross-examination, "How many times have you been arrested?"⁴⁷

⁴¹ Wroe v. St., 20 Ohio St. 460; Hanoff v. St., 37 Ohio St. 178, 181; St. v. Pfefferle, 36 Kan. 90; St. v. Lawhorn, 88 N. C. 634; St. v. Patterson, 2 Ired. L. (N. C.) 346; St. v. Garrett, Busbee (N. C.), 357. Compare St. v. Davidson, 67 N. C. 119; People v. Clark (N. Y.), 8 N. E. 38. By the statute of Maine the record of a previous conviction of a criminal offense is made competent to affect the credibility of a witness. Rev. Stat. Me., ch. 84, § 119; St. v. Watson, 63 Me. 128. Such a record may be offered in a case where the accused testifies as a

witness in his own behalf. St. v. Watson, 65 Me. 74, 79. And it is not admissible for the accused to give evidence to contradict it; it imports absolute verity. Ibid.; St. v. Lang, 63 Me. 215.

⁴² St. v. Pfefferle, 36 Kan. 90.

⁴³ Wroe v. St., 20 Ohio St. 460.

⁴⁴ Hanoff v. St., *supra*. Compare Lee v. St., 21 Ohio St., 151; People v. Crapo, 76 N. Y. 288.

⁴⁵ Brandon v. People, 42 N. Y. 265.

⁴⁶ LeBeau v. People, 34 N. Y. 223; Great Western etc. R. Co. v. Loomis, 32 N. Y. 127; *ante*, § 464.

⁴⁷ Connors v. People, 50 N. Y. 240.

§ 652. **View that Cross-Examination is Confined to Examination-in-Chief.**—The other view is that the cross-examination of the accused is confined to those matters which were touched upon in his examination-in-chief, and that it cannot extend beyond this, although the questions may pertain to the issues.⁴⁸ If the trial court permit a more extensive cross-examination, the constitutional privilege of not being a witness against himself is violated.⁴⁹ Irrespective of the terms of the statute, or of the considerations touching the privilege of the accused, this view is in some jurisdictions adhered to where the American rule of strict cross-examination, already considered,⁵⁰ prevails;⁵¹ whereas in those jurisdictions where the English rule prevails, the defendant, by taking the witness stand in his own behalf, might subject himself to the hazards of a general cross-examination.⁵² In any view, the accused may be interrogated as to any matter concerning which he has testified on his direct examination.⁵³ In one jurisdiction, which follows the so-called American rule, the defendant in a criminal prosecution testified that two of the prosecuting witnesses had a grudge against him. It was held admissible for his counsel to ask him to state the grounds of the grudge, for the reason that such evidence would introduce collateral issues.⁵⁴

§ 653. **[Continued.] Previous Arrests, Convictions, etc., not inquired into.**—As already seen,⁵⁵ it is a general rule applicable to the cross-examination of witnesses, that it is within the discretion of the court to allow collateral facts affecting the credibility of the witness to be inquired into, subject to another rule, that his answers are

⁴⁸ *St. v. Chamberlain*, 89 Mo. 129, 1 S. W. 145; *St. v. McGraw*, 74 Mo. 573; *St. v. Turner*, 76 Mo. 350; *St. v. McLaughlin*, 76 Mo. 320; *St. v. Porter*, 75 Mo. 171; *St. v. Douglass*, 81 Mo. 231; *St. v. Patterson*, 88 Mo. 88, *St. v. Lurch*, 12 Ore. 99; *St. v. Saunders*, 14 Ore. 300. See *R. S. Mo. 1909*, § 5242; *Cal. Penal Code*, 1909, § 1329; *St. v. Keener*, 225 Mo. 488, 125 S. W. 747; *St. v. Miller*, 190 Mo. 413, 87 S. W. 377. But the prevailing view in the United States now is that where a defendant in a criminal prosecution tenders himself as a witness in his own behalf, he is subject to the same treatment as any other witness, so long as his constitutional rights or privileges, not in some way expressly waived by

him, are not infringed upon. *St. v. Waldron* (128 La.) 54 South. 1009; *Elliott on Evidence*, Vol. 4, p. 6, § 2705.

⁴⁹ *People v. O'Brien*, 66 Cal. 602 (*McKee, J.*, dissenting).

⁵⁰ *Ante*, § 432.

⁵¹ *People v. McGungill*, 41 Cal. 429. *People v. Wong Ah Long*, 99 Cal. 440, 34 Pac. 105.

⁵² *Com. v. Mullen*, 97 Mass. 545; *People v. Meadows*, 121 N. Y. Supp. 17, 136 App. Div. 226, 92 N. E. 148; *Carrothers v. St.*, 75 Ark. 574, 88 S. W. 585.

⁵³ *People v. Russell*, 46 Cal. 121; *People v. Ebanks*, 117 Cal. 652.

⁵⁴ *Chelton v. St.*, 45 Md. 564.

⁵⁵ *Ante*, §§ 464, 465.

conclusive and cannot be contradicted. Under this view, as also seen, the witness may be questioned concerning previous arrests and convictions for crime. But under the view stated in the preceding section, where the accused, on a criminal trial, avails himself of the privilege afforded by the enabling statute, and takes the witness stand in his own behalf, he cannot be interrogated as to previous arrests, convictions, or other disparaging circumstances in his history. He cannot be examined, against his objection, as to former indictments against him for other offenses not pertaining to the issue to be tried.⁵⁶ He cannot be required to answer such a question as, "Did you not belong to Jesse James' gang?"⁵⁷ He cannot be required to answer questions, the answers to which would *disgrace* him and disparage his character.⁵⁸ He cannot be required to write his own name, or that of another person, in the presence of the jury, in order that they may compare it with the signature on a note, which he is charged with having uttered knowing it to be forged—the reason being that such a course violates the prisoner's right of not giving criminating evidence against himself.⁵⁹ He cannot be asked whether he has been convicted of crime,—the reason that, in a criminal cause, a witness cannot be impeached or sustained by proof of general moral character,⁶⁰ and, *a fortiori*, by proof of an isolated act of good or bad conduct.⁶¹ He cannot be asked, on cross-examination, whether he had killed a man in another State, or how often he had been without a pistol, or whether he had not been at target practice most of the time at a particular place,—the reason being that, to compel a prisoner thus to testify as to his whole life on the witness stand, would not merely discredit him as a witness, but would prejudice the jury against him and against his defense in a particular case.⁶² But his examination should be limited to

⁵⁶ *Smith v. St.*, 79 Ala. 21.

⁵⁷ *Clarke v. St.*, 78 Ala. 474. In the opinion in this case the court quote the following observation of Campbell, J., in *People v. Thomas*, 9 Mich. 314: "But perhaps, the worst thing would be the degradation of our criminal jurisprudence by converting it into an inquisitorial system, from which we have been thus far happily delivered." But see *St. v. Waldron* (128 La.) 54 South. 1009, which holds that this class of questions may be asked accused where he tenders himself as

a witness. Also *Dotterer v. St.*, 172 Ind. 357, 88 N. E. 689; *Leo v. St.*, 63 Neb. 723, 89 N. W. 303.

⁵⁸ *Hayward v. People*, 90 Ill. 492; *Gifford v. People*, 87 Ill. 210; *People v. Hamblin*, 68 Cal. 101; *People v. Elster* (Cal.), 3 West Coast Rep. 33 37; *People v. White*, 142 Cal. 292.

⁵⁹ *St. v. Lurch*, 12 Ore. 99.

⁶⁰ *Fletcher v. St.*, 49 Ind. 124. This, though the rule in *Indiana*, is not the universal rule. *Ante*, § 552.

⁶¹ *Parley v. St.*, 57 Ind. 331.

⁶² *St. v. Saunders*, 14 Ore. 300.

matters pertaining to the issue, in order to prevent a conviction of one offense by proof that the accused may have been guilty of another.⁶³ To require the prisoner, as the price of taking the witness stand in his own behalf, to run the gauntlet of being interrogated as to every disparaging fact connected with his past history, is deemed to deprive him in a large measure of the privilege conferred by the enabling statute, and also to violate his constitutional privilege against self-crimination. The reason given for the conclusion of the foregoing cases, by Chief Judge Church, of the Court of Appeals of New York, has been frequently quoted with approval by other courts: "By taking the stand as a witness, while he may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party; and it follows that his counsel, while he is in the witness box, has a right to speak for him, and that an error committed by the court against him may inure to his benefit as a party. Especially ought this protection to be afforded to persons on trial for criminal offenses, who often, by a species of moral compulsion, are forced upon the stand as witnesses; and being there, are obliged to run the gauntlet of their whole lives on cross-examination, and every immorality, vice or crime of which they may have been guilty or suspected of being guilty, is brought out, ostensibly to affect credibility, but practically used to produce a conviction for the particular offense for which the accused is being tried, upon evidence which otherwise would be deemed insufficient. Such a result is manifestly unjust, and every protection should be afforded to guard against it."⁶⁴

§ 654. **Crimes not Affecting Credibility.**—For stronger reasons, an accused person who takes the witness stand in his own behalf, cannot be interrogated as to other offenses, or acts of misconduct, which do not necessarily affect his credit or veracity.⁶⁵ In so holding, it was said by Mr. Chief Judge Church, in giving the opinion of the New York Court of Appeals: "The discretion which courts

⁶³ *People v. Brown*, 72 N. Y. 571; *Clarke v. St.*, 78 Ala. 474, 481.

⁶⁴ *People v. Brown*, 72 N. Y. 571, 574 (distinguishing *People v. Brandon*, 42 N. Y. 265; *People v. Connors*, 50 N. Y. 240; *People v. Real*, 42 N. Y. 270).

⁶⁵ *People v. Crapo*, 76 N. Y. 288, 289, 293; *People v. Brown*, 72 N. Y.

571; *St. v. Huff*, 11 Nev. 17, 26. See 24 N. Y. 299; *Gale v. People*, 26 Mich. 159; *St. v. Nyhus* (N. D.), 124 N. W. 71; *St. v. Cottrell*, 56 Wash. 543, 106 Pac. 179; *Johnson v. St.*, 8 Wyo. 494, 58 Pac. 761; *Allen v. U. S.*, 115 Fed. 3, 52 C. C. A. 597; *Reed v. St.*, 42 Tex. Cr. R. 572, 61 S. W. 925.

possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility, should be exercised with great caution, when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust; and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient. It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life. * * * No rule of law is violated, in requiring that, to entitle questions to be put to accused persons, which are irrelevant to the issue, and are calculated to prejudice him with the jury, they should at least be of a character, which clearly go to impeach his general moral character, and his credibility as a witness. The old rule, not to allow irrelevant questions to such persons, would be preferable, and more in accordance with sound principles of justice; but it is unnecessary in this case to go beyond the requirement that the answer must tend directly to impeach him.”⁶⁶ In an earlier case in the same State it was said, on obvious grounds, by Jewett, J., that, “the single fact that he [the witness] had been complained of and held for trial, for the commission of a crime, did not affect his moral character.”⁶⁷

§ 655. [Continued.] Illustrations.—Thus, it has been held that a prisoner, on trial for *burglary* and *larceny*, who elects to take the stand as a witness in his own behalf, cannot be asked, on cross-examination, whether he has been arrested on a charge of *bigamy*.⁶⁸ On the same principle, it has been held that, where the defendant, on trial for *murder*, takes the witness stand, he cannot be cross-

⁶⁶ *People v. Crapo*, 76 N. Y. 288, 289, 293; *Folger and Earl, JJ.*, dissented. The Chief Judge, in his opinion, distinguishes *People v. Brandon*, 42 N. Y. 265, and *People v.*

Connors, 50 N. Y. 240, on the ground that the objection did not involve the point under consideration.

⁶⁷ *People v. Gay*, 7 N. Y. 378.

⁶⁸ *People v. Crapo*, 76 N. Y. 288.

examined as to *assaults* and *batteries*; since, while this might carry the inference that he was a violent and dangerous man, it would not tend to prove that he was a *liar*. Accordingly, the following line of cross-examination of the defendant in such a case, permitted by the court against the objection of the defendant's counsel, was held prejudicial error: "Q. How many times have you been arrested in Virginia City for *unlawfully beating* men and women? A. Three times, I believe. Q. Were you convicted each time? A. Yes, sir. Plead guilty twice and was tried two times. Q. What was the name of that woman you were arrested for beating? A. Katie Devine. Q. Was that one of the persons that you assaulted, and was convicted of the offense? A. I believe it was. Q. Do you know Mr. Robey? A. Yes, sir. Q. You were arrested and charged with beating him and cutting off his beard? A. I was. Q. And convicted? A. I was. Q. Were you arrested for striking a man with a monkey wrench? A. No. Q. You threw it at him and was convicted of assault and battery? A. I was."⁶⁹ For like reasons, it has been held error to allow the State to ask the prisoner, on the witness stand, "How many times have you been arrested?"⁷⁰ But the same court, in a later decision, has declared a rule which seems much better calculated to subserve the rights of society and to develop the real object of a judicial inquiry, the ascertaining of the truth. It is, that it is within the sound *discretion* of the trial court how far the examination of a prisoner, who elects to take the stand in his own behalf, may be carried with reference to his *past history* and *mode of life*.⁷¹

⁶⁹ St. v. Huff, 11 Nev. 17, 26.

⁷¹ People v. Clark (N. Y. Ct. of

⁷⁰ People v. Brown, 72 N. Y. 571. App.), 8 N. E. 38.

CHAPTER XXIV.

OF THE UNSWORN STATEMENT OF THE ACCUSED.

SECTION

- 660. Disqualification at Common Law—Passing of the Old Rule.
- 661. Implication of Repeal of Right to Make Statement.
- 662. The Georgia Statute.
- 663. Control of Court over Form and Substance of Statement.
- 664. The Statement as a Foundation for Evidence.
- 665. Failure to Make as Subject of Comment.
- 666. The Court's Instructions on the Statement.
- 667. General Observations.

§ 660. **Disqualification at Common Law—Passing of the Old Rule.**—At common law the defendant was often accorded the privilege of making an unsworn statement to the jury in his own behalf—especially in capital cases.¹

Since our author's first edition of this work, however, the right of an accused to testify has been established by statute, both in England and in the United States in every jurisdiction with the single exception of the State of Georgia, Alabama Constitution of 1901 giving him such right.² In Florida the accused was up to 1895 in a certain sense a witness, as to him was accorded "the right of making a statement to the jury, under oath, of the matter of his or her defense."³

In that year, however, it joined the other States in an enabling statute permitting him to exercise "the option" of being "sworn as a witness in his own behalf" and "to be subject to examination as other witnesses."⁴ In England the ancient practice was superseded in 1898, by an enabling statute prescribing that "every person charged with an offense, and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defense at every stage of the proceedings," and his examination as

¹ Whart. Crim. Ev., § 427; Reg. v. Walking, 8 Carr. & P. 243. But the practice was somewhat unsettled, and a prisoner without counsel was rather permitted to make a statement, than if he had none. See

Reg. v. Boucher, 8 Carr. & P. 141; 18 Am. Law Rev. 97.

² Ala. Const. 1901, art. 1, § 6.

³ R. S. 1892, § 2908.

⁴ St. 1895, c. 4400.

a witness was limited by the provision that "he shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted or been charged with any offense other than that wherewith he is then charged."⁵ In the dominion of Canada a somewhat similar enabling act was passed in 1893,⁶ and in some of the Provinces this has been followed either generally or as to specifically named offenses. It is more or less interesting thus to note the passing of the old practice, but as a matter of practical importance former rulings in England and America are now obsolete. This remark applies as well in the state of Georgia, where the accused is still disqualified, as elsewhere, for decision there is upon the statute, which will hereinafter be set forth at large.

§ 661. **Implication of Repeal of Right to Make Statement.**—Massachusetts was an early follower of the original enabling statute of Maine passed in 1864, its own statute being in 1866.⁷ But it appears that nearly thirty years later the Supreme Judicial Court of that State found it necessary to rule upon a claim of right by an accused to make an unsworn statement to the jury giving his side of the case, the accused exercising his option of refusing to be sworn as a witness. It was held, that being represented by counsel he had no such right.⁸ In Louisiana where an enabling statute was later enacted, the request by accused to make an unsworn statement came before the court in a somewhat different way, the ruling of the court indicating that difference. Thus it was held, that where accused is tendered by his counsel to make, in his capacity, as the accused on the trial, an unsworn statement, he could not embody therein matters about which he could not testify to under oath.⁹ The implication here is, that there was an election to make a statement or to testify, but one could not supplement the other nor could the statement embrace what would not be competent as testimony. But it seems to be true that, practically, the unsworn statement, except as before stated, is no longer a feature in criminal trials. Where it was allowed in discretion, courts may justly deny it, because of the statutory right, and where there was a statute prescribing it, repeal was deemed to follow, either expressly or impliedly. The very

⁵ St. 61 & 62 Vict. c. 36, § 1.

⁶ St. 1893, § 4.

⁷ Rev. Laws 1902, c. 175, § 20.

⁸ Com. v. Burrough, 162 Mass. 513, 39 N. E. 184.

⁹ St. v. Perioux, 107 La. 601, 31 South. 1016.

absence of decision on this subject shows this to be the conclusion everywhere accepted.

§ 662. **The Georgia Statute.**—The sole relic in American jurisprudence of the ancient practice allowed, in discretion, to an accused of an unsworn statement is found in the Georgia statute which reads as follows: "In all criminal trials the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case." The statute also gives to the accused "the right to refuse to answer any questions on cross-examination should he think proper to decline to answer."¹⁰ The same statute further provides that an accused is neither "competent nor compellable to give evidence for or against himself." Thus it is seen, that the statement is not "evidence," because what is said is by one not competent to "give evidence," and yet it is something that the jury may take as the equivalent of evidence, even to the displacing or setting aside that which is evidence. Strictly, then, it might not be considered as disproving a case for the prosecution which otherwise might be considered by the jury as persuasive of conviction, but it may give the jury legal reason for the conclusion that the prosecution ought to fail.

§ 663. **Control of Court over Form and Substance of Statement.**—The defendant can be confined in the making of his unsworn statement to a narrative account of the matter under investigation.¹¹ and, if he becomes rambling and introduces irrelevant matter, he may be admonished by the court to confine himself to the question at issue.¹² The court also has discretion to require that he shall say all he desires to say in one statement and may deny him the privilege of making a supplemental,¹³ or second statement.¹⁴ In its discretion the court may permit his attention to be called by counsel to an omitted matter and cannot make his reference thereto a condition of being cross-examined to that or any other extent.¹⁵

¹⁰ Code 1895, §§ 1010, 1011.

¹³ Dixon v. St., 116 Ga. 186, 42

¹¹ Nero v. St., 126 Ga. 554, 55 S. E. 404.

S. E. 357.

¹⁴ Owens v. St., 120 Ga. 209, 47

¹² Long v. St., 118 Ga. 319, 45

S. E. 545.

S. E. 416.

¹⁵ Walker v. St., 116 Ga. 537, 42 S. E. 787.

§ 664. **The Statement as a Foundation for Evidence.**—We have seen that by the terms of the statute, fairly construed, the statement is not in itself evidence. This view is further emphasized by holdings that it cannot lay the foundation for the introduction of evidence otherwise inadmissible. Thus it cannot open the door for evidence of uncommunicated threats or of the character of deceased for violence.¹⁶ Any paper or document referred to or used by accused as illustration or otherwise in the making of his statement is not even carried into the case to the extent that his counsel may use same in his argument to the jury.¹⁷ Further it is held that the making of a statement does not, as is the rule where an accused testifies, give the state any right to assail the general moral character of the accused, as if he were a witness.¹⁸

§ 665. **Failure to make as Subject of Comment.**—The statute does not specifically provide, that failure to make a statement shall not be commented on, but the Georgia jurisdiction, deeming this as a personal right of which accused could avail himself of or not at his election, holds that the prosecution has no right to comment on its non-exercise, or to ask accused's counsel, in the presence of the jury for an explanation of such failure.¹⁹ And the Supreme Court, in the way of caution, has said, that, if allusion is made by the judge in his instructions as to questions propounded on cross-examination, that he had best tell the jury simply what is the statute in regard to this and "leave the matter there."²⁰

§ 666. **The Court's Instructions on the Statement.**—The general trend of decision on this subject is to recognize the clearness and fullness of the statutory terms and of their being self-explanatory. Therefore it has been held, that the trial judge can use no better language in his charge or instructions than the statute itself.²¹ He must somewhere in his general charge give a place to an instruction on this subject,²² and, if he omits such a material portion of the statute as that the jury may take the statement in preference to

¹⁶ *Nix v. St.*, 120 Ga. 162, 47 S. E. 516.

¹⁷ *Nero v. St.*, 126 Ga. 554, 55 S. E. 404.

¹⁸ *Doyle v. St.*, 77 Ga. 513.

¹⁹ *Barker v. St.*, 127 Ga. 276, 56 S. E. 419.

²⁰ *Grant v. St.*, 124 Ga. 757, 53 S. E. 334.

²¹ *Caesar v. St.*, 127 Ga. 710, 57 S. E. 66. See also *Parker v. St.*, 1 Ga. App. 781, 57 S. E. 1028.

²² *Tolbert v. St.*, 124 Ga. 767, 53 S. E. 327.

the sworn testimony, this is reversible error.²³ The judge is not permitted to disparage its force under the statute, or intimate it is unworthy of belief any more than he can intimate his opinion as to the weight of evidence.²⁴ It was held, however, not to constitute disparagement for a judge to add to a correct instruction the words: "It is not delivered under oath and he incurs no penalty in not telling the truth."²⁵ Generally it is ruled, that the charge should be so framed, that the jury, while advised of their power under the statute to accept or reject the statement in preference to sworn testimony, or such parts thereof, as they saw fit, yet they have no right to act arbitrarily in respect to what should be done with it.²⁶

§ 667. **General Observations.**—The statute fails to supply much of ruling in the way of analogy, because it is remarkably clear and comprehensive. There is room, for debate as to whether or not, on the whole, it is not more satisfactory than testimony, and the incident perils of cross-examination and impeachment. After all the statement of an accused, whether sworn or unsworn, would not in the trial of a grave offense usually weigh greatly with a jury. The consistency and reasonableness of what is said by the accused would be more looked to, along with his demeanor and appearance on the stand.

²³ *Fields v. St.*, 2 Ga. App. 41, 58 S. E. 327.

²⁴ *Field v. St.*, 126 Ga. 571, 55 S. E. 502.

²⁵ *Ryals v. St.*, 125 Ga. 266, 54 S. E. 168.

²⁶ *Adams v. St.*, 125 Ga. 11, 53 S. E. 804.

CHAPTER XXV.

OBJECTIONS TO EVIDENCE AND EXCEPTIONS TO THE RULINGS THEREON.

ARTICLE I.—TENDERS OF EVIDENCE.

ARTICLE II.—OBJECTIONS TO EVIDENCE AND EXCEPTIONS.

ARTICLE III.—STRIKING OUT AND WITHDRAWING.

ARTICLE I.—TENDERS OF EVIDENCE.

SECTION

- 675. Court Rules upon all Offers of Evidence.
- 676. Evidence to be admitted if Prima Facie Relevant.
- 677. [Continued.] Illustrations.
- 678. Offer must show Materiality.
- 679. [Continued.] Counsel required to state the Substance of the Offer.
- 680. [Continued.] *Aliter* on Cross-examination.
- 681. Tender of Witness Competent as to some Matters only.
- 682. When Witness presumed Material.
- 683. Questions must be Specific.
- 684. Question must be Relevant at the Time.
- 685. Counsel must have Witnesses ready to sustain Offer.
- 686. Must not repeat Offer after Adverse Ruling.
- 687. When Offer not made in Hearing of Jury.

§ 675. **Court Rules upon All Offers of Evidence.**—At the outset it is to be observed that it is for the court to rule upon all offers of evidence, and to decide, when necessary, all questions of fact which are involved in the question whether the evidence is admissible.¹

§ 676. **Evidence to be admitted if Prima Facie Relevant.**—Where an instrument of evidence is offered, and its relevancy is supported by other testimony, the judge will admit it, when sufficient supporting evidence has been heard to warrant the jury in inferring the existence of the fact upon which its relevancy de-

¹ Ante, ch. 13; *Currier v. Bank of Louisville*, 5 Cold. (Tenn.) 460; *Tabor v. Stannells*, 2 Cal. 240; *Robinson v. Ferry*, 11 Conn. 460; *Harris v. Wilson*, 7 Wend. (N. Y.) 57; *Ch-*

quot's Champagne, 3 Wall. (U. S.) 114; *Prall v. Hinchman*, 6 Duer (N. Y.), 351; *Holly v. St.*, 55 Miss. 424, 430; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452.

pends.² This is not a negation, but is an affirmation of the principle already discussed, that questions of fact involved in preliminary offers of evidence are first to be decided by the judge. Where proof of one fact is necessary to let in proof of another fact, and there is evidence *conducting to prove* the preliminary fact, the court should not, as a general rule, exclude the main evidence from the jury.³ The rule under this head was thus stated by Marshall, C. J., in the Kentucky Court of Appeals: "If the fact on which the relevancy of the disputed evidence depends be merely preliminary, and not otherwise essential than as it may lay the foundation for receiving the evidence in question, then it may, perhaps, in all cases, be proper to make the admissibility of the disputed evidence depend upon the judge's opinion as to the sufficiency of the proof to establish the preliminary fact. But where the preliminary fact is otherwise material in the cause, and essentially involved in the issue, the general practice, is, to admit the evidence, if, in the opinion of the judge, there be evidence conducting to prove the preliminary fact, and from which a jury might rationally infer it. A contrary practice would, in many instances, as in this, take the whole case from the jury, and subject it to the decision of the judge upon the weight of the evidence, thus destroying the established distinction between their respective functions. When it is necessary to prove a deed, the instrument is assumed to be read to the jury, upon evidence conducting to prove its execution. Could a judge afterwards exclude it on motion, on the ground that the proof of its execution was not fully satisfactory to his mind? Or could he have rejected it on this ground, even in the first instance? The execution of the deed, being a material fact in the issue, the judge does not decide it peremptorily, though it is in one aspect a preliminary fact; but, having decided that there is evidence conducting to prove it, he places the whole question before the jury. We are satisfied that, in this and similar cases, where the relevancy of one

² Winslow v. Bailey, 16 Me. 319. See Howard v. St., 108 Ala. 571, 18 South. 813; Fitzgerald v. R. Co., 154 N. Y. 263, 48 N. E. 514. It has been held, broadly, that any fact, though otherwise collateral, is relevant, if it has a direct tendency to show, that testimony to establish a material fact is more reasonable and, therefore more credible than that,

with which it is in conflict. Glas-berg v. Olson, 89 Minn. 195, 94 N. W. 154. Thus an extraneous fact may be proven to fix a date which is material. Levels v. R. Co., 196 Mo. 606, 94 S. W. 275. In such case it is merely association of events guiding the memory of a witness.

³ Swearingen v. Leach, 7 B. Mon. (Ky.) 287.

fact depends upon another material fact in the cause, the admissibility of the evidence in support of the dependent or secondary fact, depends not upon the absolute proof of the principal fact, but upon their being such evidence as conduces to prove it, and as would authorize the jury to find it.”⁴ This is agreeable to the view taken by another court, that, where the preliminary proof is clear and uncontradicted, the court will decide the question of admissibility; but if it is doubtful, it will submit the matter to the jury, and let them decide the doubt, when such doubt depends upon a question of fact,⁵—that is, will admit the evidence. But as already seen,⁶ the judge can never allow the jury to say, in the first instance, whether an objection to evidence shall be sustained. Thus, where a party offers to prove a contract by parol evidence, and it is objected that the contract was reduced to writing, and a witness is introduced to show that there was a writing, he must state the contents of it *to the court*, so that the court may judge whether it relates to the same contract or to something else; and it is error to leave this fact to the jury.⁷ While the authorities leave this question in a state of embarrassment, yet in view of what has already been said,⁸ the following propositions may be safely affirmed: 1. The judge will never submit to the jury, in the first instance, whether an objection to testimony shall be sustained—to do this is error. 2. Where the evidence fairly tends to support the preliminary proposition of fact, the existence of which is necessary to the admission of the evidence, the judge will admit it, and let the jury say what weight and effect they will give to it; and it is error to withhold it from them. 3. The decision of the judge in admitting evidence, where it has been necessary to decide a preliminary question of fact, will not be overthrown by a reviewing court, where there is any substantial evidence to support his conclusion.

§ 677. [Continued.] Illustrations.—This corresponds to what has already been observed,⁹ that, where the fact which the judge must decide on a preliminary offer of evidence involves the *decision of the whole case*, the judge merely decides, and so cautions the jury, that the fact has been *proved to him*. Where the fact involved in the preliminary offer decides the whole case, and there is substantial

⁴ Swearingen v. Leach, 7 B. Mon. (Ky.) 287.

⁵ Funk v. Kincaid, 5 Md. 405.

⁶ Ante, § 318.

⁷ Ratliff v. Hurtley, 5 Ired. L. (N. C.) 545.

⁸ Ante, ch. 13.

⁹ Ante, § 319.

evidence in support of it, it is error for the judge to reject the evidence; since this ruling, by withholding the question from the ultimate decision of the jury, has the effect of usurping their province. This is well illustrated by a case where the defendant, in an action of trespass, justified under an execution issued by a magistrate and assigned to such defendant. The plaintiff objected to the admission of the execution in evidence, and offered to prove that the plaintiff therein was dead before it was issued. The court received evidence touching the question of the death, and decided that the execution was not admissible under the circumstances. It was held that this was error, since it had the effect of withdrawing the question from the jury.¹⁰ So, in an action of ejectment, the plaintiff claimed under a conveyance from husband and wife, and insisted that the defendants were the tenants of the wife, and therefore estopped from disputing his title; but the tenancy was denied, and the defendants offered to prove, by the former husband of the wife, her alleged former marriage, and the court admitted this evidence. It was held: 1. That this evidence was admissible, if there was no tenancy, and that, by admitting it without qualification, the court decided that there was none, which the court had no right to do, it being a question of fact for the jury, and there being testimony to show that there was a tenancy. 2. That, if the evidence rendered the question of tenancy or no tenancy a doubtful one in the opinion of the court, the court might have admitted it, instructing the jury that if they believed there was a tenancy, then the testimony was not properly before them.¹¹

§ 678. Offer must show Materiality.—In order to put the trial court in the wrong, on appeal or writ of error, for rejecting an offer of evidence on direct examination, the offer, as stated in the bill of exceptions, must show the materiality of the evidence which was tendered.¹² Where the question does not suggest the answer, coun-

¹⁰ *Day v. Sharp*, 4 Whart. (Pa.) 339.

¹¹ *Funk v. Kincaid*, 5 Md. 405. No doubt an abundance of cases might be found to illustrate this position. One somewhat analogous to that instanced arose in California. Plaintiff brought an action to quiet title to a prescriptive right in an

irrigation ditch and defendants claimed adverse user. Evidence tending to show which having been received, plaintiff gave evidence of leases to them by his predecessor in title. *Bashore v. Mooney*, 4 Cal. App. 276, 87 Pac. 553.

¹² *U. S. v. Gilbert*, 2 Sumn. (U. S.) 20; *Bank of Pleasant Hill v. Wills*,

sel must, in general, disclose what it will be, or what he expects it will be, or *what he proposes to prove*.¹³ Where there is in the bill of exceptions neither a formal offer of evidence, nor any statement of what the witness will testify to, there is no available error.¹⁴ Thus, it is said to be a settled rule, where a *conversation* between persons is offered in evidence, to require the party offering it to disclose *how* it may be material.¹⁵ So, where a tender of evidence is made to prove certain facts, some of which are admissible and others inadmissible, the offer is properly rejected as a whole; the court is not bound to separate it and admit such parts of it as are competent, although it may do so in its discretion.¹⁶ Where a *wit-*

79 Mo. 275; Aull Savings Bank v. Aull, 80 Mo. 199; Jackson v. Hardin, 83 Mo. 175, 187; Seibert v. Hatcher, 205 Mo. 83, 102 S. W. 962; American Theatre Co. v. Sigel-Cooper Co., 221 Ill. 145, 77 N. E. 588; Nightingale v. Eiseman, 121 N. Y. 588, 24 N. E. 475; Pryor v. Morgan, 170 Pa. 568, 33 Atl. 98. This rule does not apply to questions, which are in proper form, relevant and admit of favorable answers, and the court does not require an offer, as the question of a more particular offer is waived and the court passes upon that of materiality. Stanley v. Beckham, 153 Fed. 152, 82 C. C. A. 304. A general offer of documentary evidence with no accompanying statement of purpose presents no question for review, if it is rejected. Canada-Atlantic & Plant S. S. Co. v. Flanders, 145 Fed. 875, 76 C. C. A. 1. Especially, if necessary to be connected with other evidence to become relevant. Oldham v. Ramsner, 149 Cal. 540, 87 Pac. 18.

¹³ Jackson v. Hardin, *supra*; Bridgers v. Bridgers, 69 N. C. 451; Straus v. Beardsley, 79 N. C. 59; Oberman v. Coble, 13 Ired. L. (N. C.) 1; Roberts v. Roberts, 85 N. C. 9; Mergentheim v. St., 107 Ind. 567, 8 N. E. 568; Tedrowe v.

Esher, 56 Ind. 443, 448; Toledo etc. R. Co. v. Goddard, 25 Ind. 185, 191; Shellito v. Sampson, 61 Iowa, 40, 15 N. W. 572. Compare Jenks v. Knott's Co., 58 Iowa, 549, 12 N. W. 588; Votaw v. Diehl, 62 Iowa, 676, 680; Mitchell v. Harcourt, Id. 349. Martz v. Martz, 25 Gratt. (Va.) 361, 367; First Nat'l Bank v. Carroll, 35 Mont. 302, 88 Pac. 1012; Hager v. Donovan, 74 Kan. 43, 88 Pac. 637. Or where it does not clearly admit of an answer favorable to the party propounding it. Origet v. Hadden, 155 U. S. 228, 39 L. Ed. 130; Winchell v. Exp. Co., 64 Vt. 15, 23 Atl. 728.

¹⁴ Batten v. St., 80 Ind. 395, 401; Henderson v. Agon, 148 Mich. 252, 111 N. W. 778; Dunbar v. R. Co., 79 Vt. 474, 65 Atl. 528. In Georgia it was ruled, that it must appear that a pertinent question was asked, that the court refused to allow the answer to be taken that a statement was made to the court, at the time, showing what the answer would have been and that such testimony was material. Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606.

¹⁵ Trustees v. Brooklyn Fire Ins. Co., 23 How. Pr. (N. Y.) 448.

¹⁶ Smith v. Arsenal Bank, 104 Pa. St. 518; McQuiggan v. Ladd, 79 Vt. 90, 64 Atl. 503; Robinson v. Stewart,

ness which a party tenders is *competent as to certain facts*, but not as a general witness, and he is objected to as incompetent,—the party tendering him should state what he proposes to prove by him, so that the court may know that it is proper; otherwise an appellate court cannot say that there is any error in refusing to allow him to testify.¹⁷ In Virginia we find a *qualified statement of the rule*, which is, that where an objection is made to a question, *on the ground of irrelevancy*, and sustained, it is necessary for the party asking the question, in order to put the court in the wrong, to show upon the record what he expects to prove by the witness.¹⁸ But in that State this rule has no application where the objection is to the *competency of a witness*; since here it is a question whether the witness shall be heard at all, though his testimony be ever so relevant or important.¹⁹

§ 679. [Continued.] Counsel required to State the Substance of the Offer.—The court may, in the exercise of a sound discretion, require counsel to state the substance of evidence which is tendered, so as to enable the court to judge of its materiality and relevancy;²⁰

73 Tex. 267, 11 S. W. 275; Parry v. Parry, 130 Pa. 94, 18 Atl. 628; Hern-
don v. Black, 97 Ga. 327, 22 S. E.
924. And so, if the evidence is ad-
missible as to one only of defend-
ants and the offer does not so limit
it. Bain v. Bain, 150 Ala. 453, 43
South. 562; Thorne v. Joy, 15 Wash.
83, 45 Pac. 642.

¹⁷ Stewart v. Kirk, 69 Ill. 509;
Hoffman v. Joachim, 86 Wis. 188,
56 N. W. 636. The rule as formul-
ated by Alabama Supreme Court
is, that, if such a witness is asked a
question which might involve mat-
ters as to which he is incompetent
to testify, a general objection would
be available, unless counsel pro-
pounding the questions states what
he expects to show. Nevers Lumber
Co. v. Fields, 151 Ala. 367, 44 South.
81. See also Kern v. Pridwell, 119
Ind. 226, 21 N. E. 664, 12 Am. St.
Rep. 409.

¹⁸ Carpenter v. Utz, 4 Gratt. (Va.)
270.

¹⁹ Martz v. Martz, 25 Gratt. (Va.)
361, 367.

²⁰ Morgan v. Browne, 71 Pa. St.
130, 136; McClelland v. Lindsay, 1
Watts & S. (Pa.) 360. In North
Carolina the court should call on
counsel, ordinarily, to state the sub-
stance of his offer. Hicks v. Hicks,
142 N. C. 231, 55 S. E. 106. The re-
quirement is not met by a general
offer to prove the facts stated in a
pleading. Alexander v. Thompson,
42 Minn. 498, 44 N. W. 534. See
also Taylor v. Calvert, 138 Ind. 67,
37 N. E. 531; Dwyer v. Rippetoe,
72 Tex. 720, 10 S. W. 668; Kennedy
v. Currie, 3 Wash. 442, 28 Pac. 1028.
Counsel then takes the risk of stat-
ing a purpose, which will show ma-
teriality and cannot claim error, if
it is competent for some other pur-
pose. Young v. Otto, 57 Minn. 307,
59 N. W. 199.

and a reviewing court will not control the trial court in the exercise of such a discretion.²¹ If this is not required, and the evidence is admitted generally, no error is committed, provided the evidence was competent for any purpose.²² "A party," says Parker, J., "having a witness on the stand, may be called upon by his adversary to state what he proposes to prove, and in that case he must state it. But he need make no such statement, unless called upon to do so. It is enough for him to proceed and put his questions to the witness unless desired to state what he expects to prove."²³

§ 680. [Continued.] **Aliter on Cross-examination.**—It should be added that the foregoing rule is not applicable on *cross-examination*. Here the party is examining his adversary's witness, and from the nature of the case cannot be expected to know what the answers to his questions will be.²⁴ It is erroneous to reject questions, propounded on cross-examination, which relate to the subject of the cross-examination, even though it be not apparent that the answers would have benefited the cross-examining party, unless it affirmatively appear that he could not have been injured by the re-

²¹ Roy v. Targee, 7 Wend. (N. Y.) 359.

²² McClelland v. Lindsay, 1 Watts & S. (Pa.) 360. While it is true that evidence generally competent may be rejected, if not competent for the purpose stated (Delaware L. & W. R. Co. v. Dailey, 37 N. J. L. 526), yet it is not true, that evidence competent for any purpose, but admitted on an erroneous ground, constitutes error. Parsons v. R. Co., 113 N. Y. 355, 21 N. E. 145, 10 Am. St. Rep. 450, 3 L. R. A. 683. Where also evidence is objected to generally and it is admissible for a special purpose, the presumption is that this is why it is received. Gen. Hospital Co. v. Rendering Co., 79 Conn. 581, 65 Atl. 1065.

²³ Beal v. Finch, 11 N. Y. 128, 135. If the court excludes offered testimony on the stated ground, that there is no specific testimony it is to meet or repel, counsel must call the court's attention to such testi-

mony on the theory of its having been overlooked by the court or he cannot claim error. Perkins v. City of Poughkeepsie, 83 Hun, 76, 31 N. Y. S. 368.

²⁴ Harness v. St., 57 Ind. 1; Hutts v. Hutts, 62 Ind. 214, 225; Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075; Hyland v. Miller, 99 Ind. 269, 273; Burt v. St., 23 Ohio St. 394, 402. And therefore the bill of exceptions need not show what the answers would have been. Cunningham v. R. Co., 88 Tex. 534, 31 S. W. 629. Contra: it being held that court may ask counsel to make avowal of what he expects to show. Louisville & N. R. Co. v. Williamson, 29 Ky. Law Rep. 1165, 96 S. W. 1130. And, if he be asked, the purpose of a question and it is not admissible on the ground stated, no exception is available because it was admissible upon some ground not stated. Colby v. Colby, 64 Minn. 549, 67 N. W. 663.

jection; and it has been held that this error is not cured by allowing the party to go fully into the same matters with his own witnesses. He has a right to a full cross-examination, and cannot, for that purpose, be compelled to make the witness his own. "Cross-examination," said Christiancy, C. J., "is the great test of the knowledge, as well as of the veracity of witnesses. The right to pursue it may sometimes be abused; and when it is sought to be abused,—as when counsel insists upon going over the same ground again and again, or when it is apparent that the witness has already fully answered without any appearance of evasion, and it is evident the counsel is merely pushing the witness for the sake of annoyance, or for any illegitimate purpose,—it is competent for the court in its discretion, to put an end to it."²⁵

§ 681. **Tender of Witness Competent as to some Matters only.**—Where a party is competent as a witness for a limited purpose, and tenders himself as a witness "generally in his own behalf," it is error to exclude him without being sworn, unless it distinctly appear that he does not wish to be sworn at all, unless allowed to give evidence at large. He should be sworn, and the objection to his competency should be taken to any evidence which he may offer as to which he is incompetent.²⁶ In other words, where a witness has been called to the stand, who is incompetent to be sworn and to testify on some matters, but who may not speak of other matters, it is not proper to object to his competency generally and to exclude

²⁵ O'Donnell v. Segar, 25 Mich. 367, 374. Court stopping a proposed line of inquiry, under misapprehension of its purpose, commits no reversible error, where counsel fails to correct the misapprehension by statement of what he proposes further to ask, or in respect to what particular facts he wishes to inquire. Pickford v. Talbott, 28 App. D. C. 498. Unskillfulness in cross-examination often develops testimony not brought out in direct examination resulting often in losing the case for the cross-examiner.

²⁶ Brown v. Richardson, 20 N. Y. 474. If he testifies as an expert, without objection being interposed, it is in court's discretion to regard

objection as waived, considerable testimony having been given. Adams v. Ins. Co., 135 Iowa, 299, 112 N. W. 651. It is too late to object, for the first time, to general competency, when the cause is on appeal. O'Laughlin v. Covell, 222 Ill. 162, 78 N. E. 59. Where the witness is competent only under certain conditions, e. g. a surviving party to a contract, the existence of the conditions should be stated or shown. Krumrine v. Grenoble, 165 Pa. 98, 30 Atl. 824. A party, offering her husband, must state what facts she expects to prove by him. Hoffman v. Joachin, 86 Wis. 188, 56 N. W. 636.

him. In such a case, it will not be presumed that an improper question will be asked of him. It is only by objecting to improper questions when asked, that a party can exclude improper evidence.²⁷

§ 682. **When Witness presumed Material.**—It has been held that, where a bill of exceptions states that a witness was asserted to be competent by the counsel tendering him, and was rejected by the court,—a court of error will infer that the witness was *material* to sustain the issue, without a direct statement to that effect in the bill of exceptions.²⁸

§ 683. **Questions must be Specific.**—Where questions are *too general* in their character, they may be properly rejected for that reason alone. Thus, in an action against a sheriff for an escape, it was held that a new trial would not be granted because the judge refused to allow a question to be put in this form: "By what means and in what manner did the prisoner break jail?" To entitle the party to enter upon such an inquiry he should apprise the judge of his intention to show such a state of facts as would excuse the sheriff.²⁹

§ 684. **Question must be Relevant at the Time.**—In order to put the court in error for rejecting a question, or a tender of evidence, it must appear that it was relevant *at the time when it was offered*, unless the party offering it proposes to make it relevant by the introduction of some other evidence distinctly specified.³⁰ It is not sufficient that it became relevant by something that transpired at a subsequent stage of the trial.³¹ The mere fact that such evi-

²⁷ Beal v. Finch, 11 N. Y. 128, 134.

²⁸ Haussknecht v. Claypool, 1 Black (U. S.), 431.

²⁹ Fairchild v. Case, 24 Wend. (N. Y.) 381. Matthieson Alkali Works v. Matthieson, 150 Fed. 241 (C. C. A.). A question should not be so indefinite as not to put the adverse party on notice as to the testimony sought. Slaughter v. Heath, 127 Ga. 747, 57 S. E. 697.

³⁰ McCurry v. Hooper, 12 Ala. 823; Scofield v. Walrath, 35 Minn. 356, 28 N. W. 926; St. v. Staley, 14 Minn. 105; Austin v. Robertson, 25 Minn. 431; Bradley v. Dinneen, 88

Minn. 334, 93 N. W. 116. Whether it may become relevant "is one of the considerations to be passed upon by the presiding magistrate in determining, whether to admit such evidence at the time it is offered or not. And it is necessary in the conduct of trials, that such discretion should be exercised." O'Brien v. Keefe, 175 Mass. 274, 54 N. E. 588.

³¹ Carpenter v. Bennett, 4 Fla. 284, 334; Winlock v. Hardy, 4 Litt. (Ky.) 272; Weidler v. Farmers' Bank, 11 Serg. & R. (Pa.) 134.

dence may be a part of a *chain of evidence*, the other *links* of which the counsel tendering the evidence intends to supply, is not of itself sufficient to put the court in the wrong in rejecting it; since, as was well observed by Gibson, J., "if this were admitted, no court could, without error, ever reject evidence for irrelevancy,—as there is no fact so entirely irrelevant as to be incapable of being connected with the question, however remotely, by the intervention of a chain of possible circumstances. But the question is, how did the matter stand as it was proposed to the court? If it was altogether irrelevant, the court might reject it, although it might not, perhaps be error to admit it. If it would be relevant, when taken in connection with other facts, it ought to be proposed in connection with those facts, and an offer to follow the evidence proposed, with proof of those facts at the proper times. But the court is not bound to spend its time in an inquiry which, from the showing of the party, can produce no results. Dislocated circumstances may doubtless be given in evidence, particularly if there be no objection to the order of time; but the proposal of the evidence must contain, in itself, by reference to something that has preceded it, or that is to follow, information of the manner in which the evidence is to be legitimately operative."³² Thus, where a witness for the plaintiff, in an action for slander, is unable to say whether the words were spoken *before* or *after* the commencement of the suit, the testimony is properly excluded, because the judge cannot see whether or not it is relevant.³³

§ 685. Counsel must have Witnesses ready to Sustain Offer.—

It is not competent for counsel simply to make an offer of proof which he has no witnesses to sustain, and insist upon the court deciding the question which the offer raises; since that would be invoking from the court a decision upon a mere moot question. Nor is it competent for counsel to make an offer of proof, without stating to the court that he can sustain it by competent witnesses.³⁴ If no witnesses are tendered, it is not error for the court to reject the offer for that reason; and it follows from this that, in order to reverse a judgment because of the rejection of a tender of competent

³² Weidler v. Farmers' Bank, 11 Serg. & R. (Pa.) 134, 139; Pier v. Speer, 73 N. J. L. 633, 64 Atl. 161.

³³ Scovell v. Kingsley, 7 Conn. 284.

³⁴ Eschbach v. Hurtt, 47 Md. 61.

evidence, it should appear that a witness was offered to prove it.³⁵ But it does not follow that it will be *presumed*, on error, that the offer was a sham. "If," said Waite, C. J., "the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof, before it rejects the offer; but if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly."³⁶

§ 686. Must not repeat Offers after Adverse Ruling.—While counsel may offer evidence for the purpose of obtaining, in case of doubt, a distinct ruling as to its admissibility, and may vary the form of the offer or include other matters, in order that the particular question desired may be distinctly raised—yet where an adverse ruling has once been obtained, other offers governed by such ruling must not be made.³⁷

§ 687. When offers not made in Hearing of Jury.—In an important case in Michigan it is said: "If counsel * * * make the offers in the presence and hearing of the jury, and the court permits them to be made in this manner, the character of the offers so made may be such, even although they were rejected below, as to require, on error, a reversal of the judgment where the party making such rejected offers obtains a verdict and judgment in the case. Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be, so far as possible, kept from coming

³⁵ Robinson v. St., 1 Lea (Tenn.), 673. Record should show witness was present; had been sworn; question was propounded and objected to; that objection was followed by statement of what he would swear to; that a ruling was made, and exception saved. Fleener v. Johnson, 38 Ind. App. 334, 77 N. E. 366.

³⁶ Scotland County v. Hill, 112 U. S. 183, 186.

³⁷ Scripps v. Reilly, 38 Mich. 10; Chicago & S. L. R. Co. v. Kline, 220

Ill. 334, 77 N. E. 229; St. Louis S. F. & T. Ry. Co. v. Knowles (Tex. Civ. App.), 99 S. W. 867 (not reported in state reports). Counsel need not repeat his offer, even where petition is amended, where, as in suit on a contract, the court held the contract absolutely void, and stated that no change in pleading could make it admissible. Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 Pac. 917.

to their knowledge during the trial. An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him when he retires to deliberate upon the verdict to be given, and no matter how honest and conscientious he may be, or how carefully he may have been instructed by the court not to permit such incompetent matters to influence him, or have any bearing on the case, it will be very difficult, if not impossible, for him to separate the competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. But whatever the reason for the rule may be, all courts agree in excluding incompetent testimony, and that an error in this respect will be sufficient cause for reversal. This rule would be but slight protection, if counsel or witnesses could be permitted to make a statement, but not under oath, of the incompetent testimony, or counsel state the same fully to the jury, in their argument, or otherwise. The essence of the wrong consists in the fact that such incompetent testimony is brought to the attention of the jury, more than in the method adopted in communicating the fact. No matter how the information is derived, the result is the same. In this case, after counsel had obtained a clear and distinct ruling of the court as to the inadmissibility of a certain class of articles [newspaper articles], a large number of the same class were offered, and in making each separate offer, counsel stated the purport of the article, or read the headings. This course was objected to, but permitted by the court, and the articles offered were all excluded, the objection as to their admissibility having been sustained. We think the course adopted was not correct, and that, although perhaps not fully covered by the letter of the previous decision in this case, yet that it comes clearly within the reason and the spirit of the rules there laid down. Where the offer is likely to be of such a character that it would have a tendency to prejudice or influence the jury, the correct practice would be to present the article, if in writing, to the court and counsel for examination, without stating either the purport or substance of it. The cases are but few where such objectionable articles are likely to come up on the trial, and, when such a case arises, the good sense of court and counsel will not only see the necessity, but will readily discover and adopt the means requisite to keep them from the reach of the jury.”³⁸

³⁸ *Scripps v. Reilly*, 38 Mich. 10, prejudice can be claimed. *City of Philadelphia v. Reeder*, 173 Pa. 281, 14. If the proof wholly failed, no

ARTICLE II.—OBJECTIONS TO EVIDENCE AND EXCEPTIONS.

SECTION

- 690. Necessity of Objecting and Excepting.
- 691. Evidence having no Probative Value.
- 692. Waiver of Right to Object.
- 693. Specific Grounds of Objection must be pointed out.
- 694. Instances under the foregoing Rule.
- 695. [Continued.] Objections to Specific Portions of Testimony must state clearly the Portions Objected to.
- 696. Exceptions to Testimony *en Masse*.
- 697. Effect of sustaining and overruling General and Specific Objections.
- 698. If Ground stated, it must be a Good one.
- 699. Right to rebut Irrelevant Evidence.
- 700. Time of Objecting and Excepting.
- 701. [Continued.] Objections to Depositions.
- 702. Error to admit Depositions *de bene esse* when Witness is present in Court.
- 703. What the Record must show.
- 704. [Continued.] Where the Objection was Sustained.
- 705. Whether necessary to repeat Objections.
- 706. Of Waivers and Estoppels in Respect of Objections to Evidence.
- 707. Errors without Prejudice.
- 708. When Error not Cured by Subsequent Evidence to the same Effect.
- 709. Objections must be Renewed in Motion for New Trial.
- 710. Court Excluding Illegal Evidence of its own Motion.
- 711. Prosecuting Attorneys not to Object in Doubtful Cases.
- 712. Arguing the Objection.
- 713. Effect of Examination of a Party before Trial.

§ 690. **Necessity of Objecting and Excepting.**—The general rule is that, *in actions at law*, appellate tribunals review the judgments of trial courts only in respect of errors of law; such cases are not re-examined upon the whole evidence, as is done in cases in equity, admiralty and in actions for divorce. It is therefore necessary, in order to save the rulings of the trial courts for review in actions at law, to preserve a record of such rulings, by *excepting* to them in

34 Atl. 17. Court's discretion is largely relied on in respect to this matter. *Moss v. R. Co.*, (Tex. Civ. App.), 103, S. W. 221; *Holland v. Williams*, 126 Ga. 617, 55 S. E. 1023. Where counsel made a statement, as within his personal knowledge of a fact, which he was not permitted to prove, it was prejudicial error for the court to re-

fuse to tell the jury such statement was improper and they must disregard same. *Jones v. Portland*, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437. In Indiana it is held that the opposing counsel should ask, that the jury be sent out. *Board v. O'Connor*, 137 Ind. 622, 35 N. E. 1006.

the trial court when they are made, by bringing to the attention of the court the distinct ground of the exception, and by having the exception embodied in a *bill of exceptions*, which, when signed and sealed by the judge in conformity with law, becomes a part of the record in the cause, which is brought to the appellate court by appeal or writ of error. Unless objections are seasonably made upon specific grounds, and exceptions properly taken in the trial courts, the rulings of such courts, in actions at law, cannot be reviewed in the appellate tribunals. If this were not the rule, the spectacle would be presented of causes tried upon one theory in the court of *nisi prius*, and decided upon a different theory in the court of appeal.³⁹ The rule is, therefore, general in actions at law, that no objection to a ruling made on the progress of the trial is available upon error or appeal unless it was first made and ruled upon in the court below.⁴⁰ Subject to the qualification stated in the next following section, the rule applies with as much force to the objections to evidence as to objections to any other ruling made in the progress of a trial.⁴¹ The necessity of making seasonable objections to incompetent testimony is just as important in *criminal* as in civil trials, and where the defendant in such a trial fails to object to such testimony when it is offered, he cannot raise the objection for the first time on appeal.⁴²

§ 691. **Evidence having no Probative Value.**—An exception to the foregoing rule relates to cases where the evidence, which is admitted without objection, is of such a character that the law ascribes to it no probative value whatever. In such a case,—at least according to one view,—if the jury return a verdict in consequence of it in an action at law, the verdict will be set aside as being unsupported by evidence; and, as already suggested, in suits in equity and in other proceedings where the appellate court tries the case

³⁹ To this general principle see *Letton v. Graves*, 26 Mo. 251; *Peyton v. Rose*, 41 Mo. 257; *Jennings v. Prentice*, 39 Mich. 421, 423; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; *Kuhn v. Freund*, 87 Mich. 545, 49 N. W. 867; *Hunt v. U. S.*, 61 Fed. 795, 10 C. C. A. 74, 19 U. S. App. 683.

⁴⁰ *Spencer v. St. Paul etc. R. Co.*, 22 Minn. 30; *Rush v. French*, 1

Ariz. T. 99, 102; *Martin v. Traversers*, 12 Cal. 243; *People v. Glenn*, 10 Cal. 32; *Frier v. Jackson*, 8 Johns. (N. Y.) 496; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622; *Whiteside v. Jackson*, 1 Wend. (N. Y.) 418; *Waters v. Gilbert*, 2 Cush. (Mass.) 29; *Covillaud v. Tanner*, 7 Cal. 38.

⁴¹ *Hewett v. Buck*, 17 Me. 147.

⁴² *St. v. McLaughlin*, 44 Iowa, 82; *St. v. Polson*, 29 Iowa, 133.

anew, it will not be allowed to have any weight in influencing the decree of the court,—especially if the attention of the court is directed to its want of probative value. Notwithstanding this, it is *unsafe*, whether in an action at law or in equity, to allow such matters to be rehearsed as evidence without objection.

§ 692. Waiver of Right to Object.—A party who agrees that his adversary may go into evidence which may be inadmissible if objected to, cannot afterwards complain of the reception of such evidence, or of the reception of other evidence of the same character. The reason is, that *modus et conventio vincunt legem*; having established a law of his own, he must be content to abide by it.⁴³

§ 693. Specific Grounds of Objection must be pointed out.—Where evidence is objected to at the trial, if the party would save an exception to the ruling of the court if adverse to him, such as will be available on appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in his bill of

⁴³ *Rundell v. Butler*, 10 Wend. (N. Y.) 119. Compare *Adams v. Farnsworth*, 15 Gray (Mass.), 423, 426; *Spaulding v. R. Co.*, 98 Iowa, 205, 67 N. W. 227; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846; *Fuller v. Valiquette*, 70 Vt. 502, 41 Atl. 579. West Virginia Supreme Court states, in quaint fashion, the principle: "Strange cattle having wandered through a gap made by himself, he cannot complain." *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721. Party examining upon incompetent or immaterial evidence thereby renders it competent and opens way for cross-examination.

⁴⁴ *Dozier v. Jerman*, 30 Mo. 216; *Letton v. Graves*, 26 Mo. 250; *Camden v. De Doremus*, 3 How. (U. S.) 515; *Bank of Missouri v. Merchants' Bank*, 10 Mo. 123, 128; *Roussin v. St. Louis etc. Ins. Co.*, 15 Mo. 244; *Weston etc. R. Co. v. Cox*, 32 Mo. 456; *Buessemeyer v. Stuckenberg*, 33 Mo. 546; *Hannibal etc. R. Co. v. Moore*, 37 Mo. 338; *Peyton v. Rose*,

41 Mo. 257, 260. See also *Davidson v. Peck*, 4 Mo. 438; *Cozzens v. Gillispie*, 4 Mo. 82; *Peck v. Chouteau*, 91 Mo. 138, 3 S. W. 577; *Shelton v. Durham*, 76 Mo. 434; *Primm v. Raboteau*, 56 Mo. 407; *Margrave v. Ausmuss*, 51 Mo. 561, 566; *Buckley v. Knapp*, 48 Mo. 152, 164; *Woodburn v. Cogdal*, 39 Mo. 222; *St. Louis Public Schools v. Risley*, 40 Mo. 357; *Fields v. Hunter*, 8 Mo. 128; *Dickey v. Malechi*, 6 Mo. 177, 186; *Frost v. Pryor*, 7 Mo. 314; *Watson v. McClaren*, 19 Wend. (N. Y.) 557; *Baier v. Berberich*, 85 Mo. 50; affirmed, 13 Mo. App. 587; *People v. Apple*, 7 Cal. 289, 290; *Kiler v. Kimball*, 10 Cal. 267; *Martin v. Travers*, 12 Cal. 243; *Baker v. Joseph*, 16 Cal. 173, 180; *Mabbett v. White*, 12 N. Y. 442, 451; *Kan. Pac. R. Co. v. Painter*, 9 Kan. 620, 629; *Wilson v. Fuller*, Id. 176, 186; *Walker v. Armstrong*, 2 Kan. 198, 226; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622, 639; *Michel v. Ware*,

exceptions.⁴⁴ He *waives* all grounds not so specified.⁴⁵ The *reason of the rule* is twofold: 1. To enable the trial judge to understand the precise question upon which he has to rule,⁴⁶ and to re-

3 Neb. 229, 235; Johnson v. Adleman, 35 Ill. 265; Carroll v. Benicia, 40 Cal. 390; Rosenheim v. American Ins. Co., 33 Mo. 230; Greene v. Gallagher, 35 Mo. 226; Clark v. Conway, 23 Mo. 438; Grimm v. Gamache, 25 Mo. 41; Stone v. Great Western Oil Co., 41 Ill. 85; Graham v. Anderson, 42 Ill. 514; Howell v. Edmonds, 47 Ill. 79; Moser v. Kreigh, 49 Ill. 84; Hanford v. Obrecht, 49 Ill. 146; Harmon v. Thornton, 3 Ill. 351; Gillespie v. Smith, 29 Ill. 473; Sargeant v. Kellogg, 10 Ill. 273; Swift v. Whitney, 20 Ill. 144; Buntain v. Baily, 27 Ill. 409; Weide v. Davidson, 15 Minn. 330; Schell v. Nat. Bank, 14 Minn. 47; Gilbert v. Thompson, 14 Minn. 544; Bickham v. Smith, 62 Pa. St. 45; Batdorff v. Bank, 61 Pa. St. 179; Moore v. Bank, 13 Pet. (U. S.) 302; Elliott v. Piersol, 1 Pet. (U. S.) 328; Hinde v. Longworth, 11 Wheat. 199; People v. Durfee, 62 Mich. 487, 29 N. W. 109; Delphi v. Lowery, 74 Ind. 520; Forbing v. Weber, 99 Ind. 588; Carter v. Bennett, 4 Fla. 234, 337; Camden v. Doremus, 3 How. (U. S.) 515; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398, 406. See also the following cases as more or less illustrating the rule: Irvinson v. Van Riper, 34 Ind. 148; Feriter v. St., 33 Ind. 283; Sutherland v. Venard, 32 Ind. 483; Hamrick v. Danville etc. Co., 32 Ind. 347; Watts v. Green, 30 Ind. 98; Sharp v. Flinn, 27 Ind. 98; Marcus v. St., 26 Ind. 101; Gibson v. Green, 22 Ind. 422; Every v. Smith, 18 Ind. 461; Smith v. Allen, 16 Ind. 316; Rowe v. Haines, 15 Ind. 445; Boxley v. Carney, 14 Ind. 17; Wolcott v. Yeager, 11 Ind. 84; Lackey v.

Hernby, 9 Ind. 536; Manly v. Hubbard, 9 Ind. 230; Ellis v. Miller, 9 Ind. 210; Boggs v. St., 8 Ind. 463; Coleman v. Dobbins, 8 Ind. 156; Priddy v. Dodd, 4 Ind. 84; Prather v. Rambo, 1 Blackf. (Ind.) 189; Howard Supply Co. v. Bunn, 127 Ga. 663, 56 S. E. 757; Churchill v. Mace, 148 Mich. 456, 111 N. W. 1034; People v. Burman, 154 Mich. 150, 117 N. W. 589; Bragg v. St. Ry. Co., 192 Mo. 331, 91 S. W. 527. This applies as well to answer in deposition as to witness in court. Short v. Fink, 151 Cal. 83, 90 Pac. 200. A general objection is, however, good against a question plainly irrelevant. Paris & G. N. R. Co. v. Calvin, 101 Tex. 291, 106 S. W. 879. Or one palpably improper. Thomas v. Williamson, 51 Fla. 332, 40 South. 831.

⁴⁵ People v. Manning, 48 Cal. 335. "All the equities," said Dunne, C. J., "and all the presumptions are, not that the ruling is correct, but that evidence offered ought to come in, unless at the time it was offered good reason is shown why it should be excluded. 'Competency is presumed until the contrary is shown.' " Rush v. French, 1 Ariz. T. 99, 128; citing Hall v. Gittings, 2 Harr. & J. (Md.) 112, 120, and the cases cited by Chase, C. J., at the last page; Stoddert v. Manning, 2 Harr. & J. (Md.) 147; Callis v. Tolson, 6 Gill & J. (Md.) 80, 91; Saxon v. Boyce, 1 Bailey (S. C.) 66; Smith v. White, 5 Dana (Ky.), 376, 382, 383; Glassey v. Sligo Fur. Co., 120 Mo. App. 24, 96 S. W. 310; Pearlstone v. Phoenix Ins. Co., 74 S. C. 246, 54 S. E. 74.

⁴⁶ Brown v. Weightman, 62 Mich.

lieve him from the burden of searching for objections which counsel is unable to discover, or which he sees fit to conceal.⁴⁷ 2. To afford the opposite party an opportunity to obviate it before the close of the trial, if well taken.⁴⁸ It is, therefore, a part of the rule that the party objecting to testimony will not be permitted to *change his ground* on appeal; ⁴⁹ otherwise the trial court might decide the objection on one ground, and the appellate court on another.⁵⁰ This would produce uncertainties and injustice. Thus, it would be a monstrous rule that would permit a defendant in an action of ejectment to object to a deed, on which the plaintiff depended to make out his title, on the ground that it was defectively acknowledged, and then to renew his objection in the appellate court, on the ground that it was a forgery, or that he should object to it in the trial court on the ground of irrelevancy, without stating any other ground, and should then renew his objection in the appellate court on the ground of a defective acknowledgment. Such a rule would level the appellate courts to the position of trial courts, would overturn all just conceptions of appellate procedure in cases at law, and would result in making the hearing of an appeal in such an action a trial *de novo*, without the presence of witnesses or the means of obviating errors or omissions.⁵¹

557, 29 N. W. 98; *Dickey v. Malechi*, 6 Mo. 177, 186; *Alabama G. S. Ry. Co. v. Sanders*, 145 Ala. 449, 40 South. 402; *Moynahan v. Perkins*, 36 Colo. 481, 85 Pac. 1132.

⁴⁷ *Bundy v. Hyde*, 50 N. H. 121.

⁴⁸ *Gill v. McNamee*, 42 N. Y. 44; *Sparrowhawk v. Sparrowhawk*, 6 N. Y. Week. Dig. 281, 11 Hun (N. Y.), 528; *Rush v. French*, 1 Ariz. T. 99, 125; *Graves v. Bonness*, 97 Minn. 278, 107 S. W. 163.

⁴⁹ *Tooley v. Bacon*, 70 N. Y. 34; *Briggs v. Wheeler*, 16 Hun (N. Y.), 583; *McDonald v. North*, 47 Barb. (N. Y.) 530; *City of Chicago v. Saldman*, 225 Ill. 625, 80 N. E. 349; *Hoodless v. Jernigan*, 51 Fla. 211, 41 South. 194.

⁵⁰ *Dickey v. Malechi*, 6 Mo. 177, 186.

⁵¹ "The object," said Dunne, C. J., "of requiring the ground of objec-

tion to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, that the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time;—and thus appeals could often be saved, delays avoided and substantial jus-

§ 694. *Instances under the foregoing Rule.*—Under the foregoing rule, objections presented by the bill of exceptions in the following form: "Counsel for the plaintiff objected, objection overruled and plaintiff excepted," are too general in their terms to present any question for review on error or appeal.⁵² So, of objections on the ground that the evidence is "*illegal and incompetent.*"⁵³ So of an objection that the evidence is "*incompetent,*" without pointing out the ground on which this claim is made.⁵⁴ So, of an objection

tice administered. Counsel are held to the grounds of objection stated at the time they call for the decision of the court below; because they are supposed to know the law of their case, and if they do not offer objections they are supposed to waive them, and evidence admitted without valid objection should stand. Counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and if it goes the other way, move to exclude it; neither must they be permitted to plead inattention as an excuse. It is their business to be attentive on the trial, and if they miss a point by neglect, they must lose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books and study out their objections and urge them here. They must stand or fall upon the case they made below; for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case, as presented, were correct or not." *Rush v. French*, 1 *Ariz. T.* 99, 124. Where once waived, renewal of objection cannot be allowed in appellate court. *Allen's Admrs. v. Allen's Admrs.*, 79 *Vt.* 173, 64 *Atl.* 1110. The rule of confining objection to the speci-

fic position taken in trial court received a very strict construction in a Texas case, where it was held in a suit between two claimants of right to purchase public land under certificates from commissioner of the Land Office, that, as plaintiff objected to the whole of the certificate held by defendant, he could not urge it was partly bad. See *Winans v. McCabe*, 41 *Tex. Civ. App.* 99, 92 *S. W.* 817. This seems a very harsh application of the doctrine, as each claimant ought only to have been regarded as having a right to purchase to the extent the certificate authorized, and no farther, which was the gist of the entire controversy.

⁵² *Peck v. Chouteau*, 91 *Mo.* 138, 3 *S. W.* 577; *Hagin v. Aetna Ins. Co.*, 75 *S. C.* 225, 55 *S. E.* 323. A general objection does not raise any question as to form of question or answer. *Ward v. Meredith*, 220 *Ill.* 66, 77 *N. E.* 118. Nor that evidence is secondary. *Tucker v. Duncan*, 224 *Ill.* 453, 79 *N. E.* 613.

⁵³ *Clark v. Conway*, 23 *Mo.* 438.

⁵⁴ *Jones v. Angell*, 95 *Ind.* 376; *Lake Erie etc. R. Co. v. Parker*, 94 *Ind.* 91; *McClellan v. Bond*, 92 *Ind.* 424; *Stanley v. Sutherland*, 54 *Ind.* 339, 352; *Harvey v. Huston*, 94 *Ind.* 527; *Fitzpatrick v. Papa*, 89 *Ind.* 17; *Cox v. Stout*, 85 *Ind.* 422; *Underwood v. Linton*, 54 *Ind.* 468; *Murray v. Phillips*, 59 *Ind.* 56; *Manning v. Gasharie*, 27 *Ind.* 399; *Bundy v.*

that the evidence is "*incompetent and irrelevant*,"⁵⁵ or "*irrelevant, incompetent and immaterial*,"⁵⁶ or, "*inadmissible*."⁵⁷ So, an objection that testimony is "*irrelevant*," without specifying wherein, how or why it is irrelevant, will not be considered on appeal or error, if the testimony could, under any possible circumstances, have been relevant.⁵⁸ So, where the objection is that the evidence is "*incompetent*" and "*illegal*" it is the duty of the court to overrule it if the evidence is admissible for any purpose.⁵⁹ So, an objection that evidence is "*irrelevant, incompetent and immaterial*" is held to be merely a general objection, and properly overruled if the evidence is admissible for any purpose.⁶⁰ So, it has been held that an objection that evidence is "*incompetent*," does not raise any issue as to whether the question is *leading*; the only way to raise such an issue is to object specifically that it is *leading*.⁶¹ So, objections that evidence is "*irrelevant, immaterial or improper*" will not be sufficient to raise the question of the competency of the witness, even where he is clearly incompetent by express statute.⁶² So, an objection to a deposition for substance will not enable the objecting party to claim its exclusion on the ground of *incompetency*, just as the court commences to charge the jury. The reason is that

Hyde, 50 N. H. 121; Davis v. Holy Terror Min. Co., 20 S. D. 399, 107 N. W. 374.

⁵⁵ Louisville etc. R. Co. v. Falvey, 104 Ind. 409, 415, 3 N. E. 389, 4 N. E. 908; Over v. Schiffling, 102 Ind. 191; Shafer v. Ferguson, 103 Ind. 90, 2 N. E. 302; Bottenberg v. Nixon, 97 Ind. 106; Jones v. Angell, 95 Ind. 376; Lake Erie etc. R. Co. v. Parker, 94 Ind. 91; Harvey v. Huston, 94 Ind. 527; McClellan v. Bond, 92 Ind. 424; Stanley v. Sutherland, 54 Ind. 339.

⁵⁶ Lake Erie etc. R. Co. v. Parker, 94 Ind. 91, 94; Shandrew v. Chicago, St. P. & C. R. Co., 142 Fed. 320, 73 C. C. A. 430; John Schoen Plumbing Co. v. Empire Brewing Co., 126 Mo. App. 268, 102 S. W. 1064.

⁵⁷ Leet v. Wilson, 24 Cal. 398, 402; American Car Foundry. Co. v. Brinkman, 146 Fed. 712, 77 C. C. A. 138.

⁵⁸ Dreux v. Domec, 18 Cal. 83.

⁵⁹ Sneed v. Osborn, 25 Cal. 627; Bohanan v. Hans, 26 Tex. 450.

⁶⁰ Voorman v. Voight, 46 Cal. 397. Objection that evidence is incompetent, irrelevant and immaterial and is not applicable to any issue in the case, and does not tend to prove any issue in the case is but a general objection. Malott v. Central Trust Co., 168 Ind. 428, 79 N. E. 369. Likewise, that an order of distribution of an estate is contrary to the statute of distribution. Brown v. Brown, 75 S. C. 25, 54 S. E. 538.

⁶¹ Kan. Pac. R. Co. v. Pointer, 9 Kan. 620, 627.

⁶² Cornell v. Barnes, 26 Wis. 473, 480. Or where he testifies as an expert. Hammond v. Decker (Tex. Civ. App.), 102 S. W. 453.

if the objecting party had placed his objection on the ground of incompetency at the time, the plaintiff might have availed himself of other testimony on the particular points.⁶³ So, the general objection to the witness that he is "*incompetent*" will not be available on appeal, where it appears that he was a competent witness as to certain facts, although he may have been incompetent as to other facts.⁶⁴ It is well laid down that, "there is a wide distinction between *immaterial* and *incompetent* evidence. It may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case, but immaterial to any issue before the court."⁶⁵

§ 695. [Continued.] Objections to Specific Portions of Testimony must state clearly the Portions objected to.—Where certain evidence is objected to, which is clearly admissible, if it is a part of one entire conversation on which the plaintiff relies, but which is left in uncertainty by reason of the indistinct recollection of the witness offered to prove it, the court ought not to let it go to the jury to be considered by them, if they shall find it to have been an entire conversation relied upon. In so holding it was said by Church, J., in giving the opinion of the Connecticut court: "Although it is the privilege and prerogative of the jury to determine all matters of fact which are involved in the issue submitted to them, yet it is equally the exclusive duty of the court to determine all matters of law, even if they involve the necessity of deciding upon the truth of facts."⁶⁶ Upon the same principle where, in two instances, after certain testimony had been offered, the defendant objected to certain portions of it as matter which the witness had testified to from hearsay, and not from his own knowledge, and the court merely instructed the jury to reject all statements not made by the witnesses on their own knowledge; and in one of the instances the plaintiff particularly requested the court to instruct the jury specifically as to what particular evidence was to be thus excluded, but the court did not comply with the request,—it was held that this was error." Loomis, J., in giving the opinion of the court said: "As the matter of admitting or rejecting evidence is within the exclusive province of the court, and not of the jury, it should

⁶³ Motley v. Head, 43 Vt. 636; McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341.

⁶⁵ People v. Manning, 48 Cal. 335.

⁶⁶ Robinson v. Ferry, 11 Conn.

⁶⁴ Forbing v. Weber, 99 Ind. 588. 460.

not have been left to them to say what evidence should be excluded; and the party has a right to know where he has taken his objection with particularity, precisely what evidence is received and what rejected.⁶⁷

§ 696. **Exceptions to Testimony en Masse.**—An exception to testimony *en masse* is unavailing, where any of it is properly admitted. Thus, if a party excepts to the entire testimony of a witness, without specifying particular portions of it, and if any of it was properly admitted, the exception is unavailing.⁶⁸

§ 697. **Effect of Sustaining and Overruling General and Specific Objections.**—In a case already much quoted from, in the opinion given by Dunne, C. J., the following judicious observations occur: "There are numerous authorities and adjudications in support of the natural, common-sense proposition that a general objection raises no issue, except it is as to whether the evidence would, under any circumstances or for any purpose, be admitted; and that a specific objection raises no other issue than the particular one tendered. They are also in support of the proposition that if a judge overrule a general objection, he must be sustained unless it clearly appears that, under no possible circumstances in the case would the evidence come in; and that if he sustain a general objection, he must be reversed if it is possible that, under any view of the case, the evidence might be admitted; that if he overrule a special objection, he must be sustained if the particular objection is bad, no matter how many other good objections might have been offered; but if he sustain a special objection, he must be reversed if the special objection urged is not good, notwithstanding that there may be other objections, which, had they been urged, would have sustained his rulings. The policy of the law is evidently to admit evidence unless a good objection to it is clearly shown."⁶⁹

⁶⁷ Morford v. Peck, 46 Conn. 380, 382.

⁶⁸ Beebe v. Bull, 12 Wend. (N. Y.) 504; Kerbaugh v. Caldwell, 151 Fed. 194, 80 C. C. A. 470; Jones v. St., 118 Ind. 39, 20 N. E. 634.

⁶⁹ Rush v. French, 1 Ariz. T. 99, 127. A loose view is found in one case, that a general objection to evidence will enable the objector to

assign any cause for the objection which is valid. If the proponent of the evidence wishes the ground of the objection to be specified, he must call upon the objector to state them at the trial and to have them incorporated in the bill of exceptions. Penn. Mutual Aid Society v. Corley (Pa.), 11 Ins. Law Journ. 493.

§ 698. **If Ground Stated, it must be a Good One.**—Where the objecting party states the ground of his objection, it is incumbent upon him, if he would save an exception to the overruling of it, which will be available on error or appeal, to state a valid ground. If he fails to do this, his objection will not avail him, although he might have stated a valid ground.⁷⁰ In other words, he cannot change his ground and object to the evidence on one ground, in the trial court, and on another in the appellate court.

§ 699. **Right to rebut Irrelevant Evidence.**—Upon this subject there are *two views*. One is that, where one party introduces irrelevant evidence, the other is entitled to rebut it, and that the party first entering upon such line of inquiry, is estopped to object that the rebutting evidence is irrelevant.⁷¹ Thus, where the plaintiff was interrogated on the witness stand by the defendant, touching certain admissions made in the presence of certain persons and at a certain time, and did not set up that what he said was in reference and with a view to a *compromise of the case*, but gave his version of the conversation,—it was held that the defendant should be allowed to give his version of the same transaction, either by himself or by other witnesses, and that his version should not be ruled out on the ground of having been made in view of a compromise.⁷² So, where a defendant is improperly permitted to *assail the character* of the plaintiff by evidence, no error is committed by permitting

⁷⁰ Harris v. Panama Railroad Co., 5 Bosw. (N. Y.) 312; Brown v. St., 46 Fla. 159, 35 South. 82. And if the objection is to a question embracing more than one fact and it is good only as to a part of the question, it may be overruled. Davis v. Hopkins, 18 Colo. 155, 32 Pac. 70; Lipscomb v. St., 75 Miss. 559, 23 South. 210. The existence of a rule of court, generally known by the Bar, that where objection is made to evidence an adverse ruling is to be considered as also excepted to, yet is necessary that the record on appeal show that such exceptions were saved at the time. Green v. Ter. R. Ass'n, 211 Mo. 18, 109 S. W. 715.

⁷¹ Havis v. Taylor, 13 Ala. 324; Hale v. Philbrick, 47 Iowa, 217;

Patton v. Philadelphia, 1 La. Ann. 98; Scattergood v. Wood, 79 N. Y. 263; Brown v. Perkins, 1 Allen (Mass.), 89; Sherwood v. Titman, 55 Pa. St. 77; McCartny v. Territory, 1 Neb. 121; Thomson v. Brothers, 5 La. 277; Ward v. Washington Ins. Co., 6 Bosw. (N. Y.) 229. Compare People v. Dowling, 84 N. Y. 479; Wallis v. Randall, 81 N. Y. 164. If objection is made and overruled and exception taken, no right is waived by introducing evidence to meet or overcome that which is claimed to be irrelevant or incompetent. In re Cheney's Estate, 78 Neb. 274, 110 N. W. 731.

⁷² Scales v. Shackelford, 64 Ga. 170.

the plaintiff to countervail it, by evidence of good character.⁷³ This view is supported by the sensible and just consideration that evidence, though immaterial, may be prejudicial; and if prejudicial the party against whom it is leveled ought to have the right to countervail its prejudicial effect. *The other view* is that the fact that improper evidence has been used on one side, does not justify the same kind of evidence, if objected to, being used on the other side,⁷⁴—which seems to mean that it is *within the power* of the court to stop the progress of the irrelevant inquiry, and such is the rule;⁷⁵ which power the court will exercise, to avoid the consumption of public time and the diversion of the attention of the jury from the real issues in the case.⁷⁶ A further reason is, that the plaintiff's *consent* to the admission of incompetent evidence for the defendant, furnishes no reason why he should be allowed to introduce other incompetent evidence, to which the defendant objects.⁷⁷ So, it has been ruled that *incompetent testimony* cannot be admitted to *rebut incompetent testimony* which has been offered by the other side.⁷⁸ On the other hand, it has been ruled that the verdict will not be set aside because this is done.⁷⁹

§ 700. **Time of Objecting and Excepting.**—Moreover, it is incumbent on the defendant in a criminal case, as it is on a party in a civil case, if he would avail himself, on error or appeal, of any irregularities committed on the trial of the case, to make his objection and to save his exception *at the time* when the irregularity was committed.⁸⁰ Objections to evidence cannot, as a general rule, be made by a *motion to instruct* the jury to disregard the particular evidence. It has been well said: "To allow a party to permit, with-

⁷³ Findlay v. Pruitt, 9 Port. (Ala.) 195.

⁷⁴ Walkup v. Pratt, 5 Harr. & J. (Md.) 51; Mitchell v. Sellman, 5 Md. 377; Stringer v. Young, 3 Pet. (U. S.) 320, 337. In such a case it was said by Chief Justice Marshall: "Whether a case may exist in which improper testimony may be calculated to make such an impression upon the jury, that no instructions given by the judge can efface it, and whether, in such a case, testimony, not otherwise admissible, may be introduced, which is strictly and directly calculated to disprove it, are questions

on which this court does not mean to indicate any opinion." Stringer v. Young, *supra*.

⁷⁵ Farmers' etc. Bank v. Whinfield, 24 Wend. (N. Y.) 420, 422.

⁷⁶ Davis v. Keyes, 112 Mass. 436.

⁷⁷ Wilkinson v. Jett, 7 Leigh (Va.), 115; Manning v. Burlington etc. R. Co., 64 Iowa, 240, 20 N. W. 169.

⁷⁸ McCartny v. Territory, 1 Neb. 121.

⁷⁹ Furbush v. Goodwin, 25 N. H. 426.

⁸⁰ Bull v. Com., 14 Gratt. (Va.) 613; Read v. Com., 22 Gratt. (Va.) 924; Stoneman v. Com., 25 Gratt.

out objection, the admission of evidence, and for the first time make his objection in instructions, would be intolerable practice. If he had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him, and, when it turns out otherwise, raise his objection; but must be held to have *waived it*.”⁸¹ Such an objection comes too late, when made for the first time in a *motion for a new trial*.⁸² If a party allows *competent evidence* from an *incompetent witness* to go to the jury without objection, he cannot afterwards complain of the finding of the jury thereon, and make his objection for the first time on a motion for a new trial.⁸³ It is not available, where such evidence has gone in without objection, and the objection is made for the first time to a substantial *repetition* of it.⁸⁴

§ 701. [Continued.] **Objections to Depositions.**—Objections to depositions, which might have been obviated if made when they were taken, come too late when made for the first time at the trial, when it is proposed to read them. “In such cases,” said Mr. Justice Swayne, “the objection must be noted when the deposition is taken, or be presented by a motion to suppress before the trial is begun. The party taking the deposition is entitled to have the question of its admissibility settled in advance. Good faith and due diligence are required on both sides. When such objections, under the circumstances of this case, are withheld until the trial is in progress, they must be regarded as waived, and the deposition should be admitted in evidence. This is demanded by the interests of justice. It is necessary to prevent surprise and the sacrifice of subsequent rights. It subjects the other party to no hardship. All that is exacted of him is proper frankness. The settled rule of this court

(Va.) 887, 905; *Price v. Com.*, 77 Va. 393; *Whart. Cr. Pl. & Pr.* (8th ed.) § 77; *Vernon v. U. S.*, 146 Fed. 121, 76 C. C. A. 547; *People v. Huson*, 187 N. Y. 97, 79 N. E. 835; *People v. Collins*, 5 Cal. App. 654, 91 Pac. 158; *St. v. Stark*, 202 Mo. 210, 100 S. W. 642; *Dunnett v. Gibson*, 78 Vt. 439, 63 Atl. 141. Objection must be made before answer is given. *Birmingham Ry. L. & P. Co. v. Taylor*, 152 Ala. 105, 44 South. 580; *Oxford etc. Bank v. Cook*, 134 Iowa, 185, 111 N. W. 805.

⁸¹ *Maxwell v. Hannibal etc. R. Co.*, 85 Mo. 95, 106.

⁸² *St. v. Peak*, 85 Mo. 190; *Harvey v. St.*, 40 Ind. 516.

⁸³ *Atchison etc. R. Co. v. Stanford*, 12 Kan. 354, 380.

⁸⁴ *McCormick v. Laughran*, 16 Neb. 87, 20 N. W. 107; *Hickman v. Layne*, 47 Neb. 177, 66 N. W. 298; *Brill v. Miller*, 35 S. C. 537, 15 S. E. 272. A deed improperly certified, having been once admitted without objection, cannot be objected to on that ground, when offered for an additional purpose. *Mills v. Snypes*, 10 Ind. App. 19, 37 N. E. 422.

is in accordance with these views." It was therefore held that it was error to exclude the deposition under such circumstances.⁸⁵ More broadly, the rule is that no objection to a deposition will be entertained when made at the trial, which could have been remedied, if seasonably made by the taking of a new deposition.⁸⁶ An objec-

⁸⁵ *Doane v. Glenn*, 21 Wall. (U. S.) 33, 35. See also *York Co. v. Central R. Co.*, 3 Wall (U. S.) 113; *Shutte v. Thompson*, 15 Wall. (U. S.) 151, 160; *Buddicum v. Kirk*, 3 Cranch (U. S.), 293; *Albers Com. Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075. While the trial judge may examine a witness, his examination must give no hint of his opinion of the veracity of the witness, or any impression of his opinion as to the merits of the case. *Dreyfus v. St. L. & Sub. R. Co.*, 124 Mo. App. 585, 102 S. W. 53.

⁸⁶ *Wright v. Cabot*, 89 N. Y. 570; *Commercial Bank v. Union Bank*, 11 N. Y. 205; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 87; *Zellweger v. Caffee*, 5 Duer (N. Y.), 100; *Union Bank v. Torrey*, 2 Abb. Pr. (N. Y.) 269; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267. In conformity with the above text the general rule is that objections which go to the form and manner of taking the deposition must be made and settled prior to the trial. *Crowell v. Western R. Bank*, 3 Ohio 409; *Akers v. Demond*, 103 Mass. 322; *Kyle v. Bostick*, 10 Ala. 591; *Towns v. O'Brien*, 2 Ala. 381; *Overton v. Tracy*, 14 Serg. & R. 324; *Lee v. Stowe*, 57 Tex. 444, 451; *Bartlett v. Hoyt*, 33 N. H. 151. Under the Civil Code of Nebraska objections to depositions, except on the ground of incompetency or irrelevancy, must be reduced to writing and filed before the commencement of the trial or they will be disregarded. See *Cobbey's Ann. Stat. Neb.* (1907) § 1375. *Sioux City etc. R. Co. v. Finlayson*, 16 Neb. 579, 587, 20 N. W. 860. See also *Weeks on*

Depositions, § 404. "It may be taken, as the rule, that, where a party is *deprived of the benefit of the cross-examination* of a witness, by the act of the opposite party, or by the refusal to testify, or other misconduct of the witness, or by any means, other than the act of God, the act of the party himself, or some cause to which he assented, that the testimony given on the examination in chief may not be read. *People v. Cole*, 43 N. Y. 508; *Smith v. Griffith*, 3 Hill (N. Y.), 333; *Forrest v. Kissam*, 7 Hill (N. Y.), 465. And the rule may be applied to the examination of a witness on commission, or conditionally out of court, when, in such case, the party desiring the benefit of a cross-examination has not been present or represented at the taking of the testimony, and had no opportunity to push his cross-examination, or to know of the refusal of the witness to testify, or of his neglect to answer any question, or of other like misconduct of the witness. *Smith v. Griffith*, supra. But where the party is present at the examination of the witness, in person or by counsel, and is there fully apprised of the facts upon which he afterwards relies at the trial to suppress the testimony, and does not, at the examination or afterwards before the trial, seek to avail himself of them to that end, or to procure for himself, before or at the trial, the benefit of a full cross-examination, he may not, waiting until the trial, then for the first time object to the reading of the deposition, or move to suppress it. He should take an

tion to the *form of a question* in a deposition *de bene esse*, is waived, if not taken before the officer taking the deposition.⁸⁷ Thus, it has been held that the objection that a question is *leading* in its form is an objection, not to the substance or relevancy of the evidence, but to the form and manner of obtaining it, and should be made at the time the question is propounded.⁸⁸ Where a motion to suppress depositions is grounded upon the objection that *certain portions* of them are *irrelevant*, it will not be sustained; the remedy is a motion to strike out the irrelevant parts.⁸⁹ Coming down to a more specific point of time it is held in Indiana that the *swearing of the jury* is, for the purpose of this rule, to be deemed the commencement of the trial. The court said: "The rule provided by the statute is convenient, as well as fair; for why impanel and swear a jury to try a cause, which the parties may afterwards be prevented from trying by the suppression of depositions after the jury are sworn?"⁹⁰ It has been ruled that it is irregular to arrest the reading of a deposition on the ground that the witness testified that he was the agent of the plaintiff, and that his authority was in writing and ought

earlier opportunity for action, so that, if successful, his opponent might move for a commission to examine his witness anew out of court, or might obtain a personal attendance at the trial." *Sturm v. Atlantic Mutual Ins. Co.*, 63 N. Y. 77, 87, opinion by Folger, J.; citing *Kimball v. Davis*, 19 Wend. (N. Y.) 437, 25 Wend. (N. Y.) 259; *Zellweger v. Caffé*, 5 Duer (N. Y.), 87, 100; *Rust v. Eckler*, 41 N. Y. 488; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267. Where no motion to suppress depositions has been made, they may be used at the trial, although the personal attendance of the witness can be secured. *Phenix v. Baldwin*, 14 Wend. (N. Y.) 62. In such a case, the most that can be said in favor of the motion to suppress them is, that it addresses itself to the *discretion* of the court and cannot be claimed as a matter of right. *Hedges v. Williams*, 33 Hun (N. Y.), 546 (decided under § 910 of the New York Code of Civil Procedure; But see *Storer's N. TRIALS*—41.

Y. Ann. Code 1902, § 910); *Meyer v. Rothe*, 13 D. C. App. 97; *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928; *Cayonette v. Brewing Co.*, 136 Wis. 634, 118 N. W. 204. Thus where objection was to the form of the notice to take the deposition. *Ivey v. Cotton Mills*, 143 N. C. 189, 55 S. E. 613. An objection to a deposition of "no legal, sufficient, necessary and competent foundation," raises no question as to formalities in execution or return of a deposition. *Krane v. Redman*, 134 Iowa, 629, 112 N. W. 91.

⁸⁷ *Hebbard v. Haughian*, 70 N. Y. 54.

⁸⁸ *Crowell v. Western R. Bk.*, 3 Ohio, 409; quoted with approval in *Lee v. Stowe*, 57 Tex. 444, 451; *Purnell v. Gabdy*, 46 Tex. 198.

⁸⁹ *Commercial Bank v. Union Bank*, 11 N. Y. 203, 210; *Jarvis v. Andrews*, 80 Ark. 277, 96 S. W. 1064; *St. v. Simmons*, 74 Kan. 799, 88 Pac. 57.

⁹⁰ *Glenn v. Clore*, 42 Ind. 60, 63.

to have been produced; and that the better practice is for the reading to proceed, and, upon proof that the testimony was illegal, to move to withdraw it from the jury,⁹¹—a conclusion which is doubtful.⁹² There is a difference of opinion upon the question whether a party who offers a deposition in evidence, must *read the whole of it*, or whether he is at liberty to read *only such parts* as he may judge favorable to his case; allowing his opponent to read the remainder as his own evidence, if he shall see fit. The former view is taken in Pennsylvania⁹³ and in Missouri;⁹⁴ while the latter rule has been favored in New York.⁹⁵

§ 702. **Error to admit Depositions de bene esse when witness is Present in Court.**—Under section 865, Rev. St. U. S., providing that “unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause,” the admission of the deposition, taken *de bene esse*, of a witness who was shown to the court to be present in court, ready and able to testify if the case was called, before the reading of the deposition was begun, is error.⁹⁶ This is in conformity with previous rulings of the same court. In one case it was said by Marshall, C. J., that the deposition taken under the statute, *de bene esse*, “can only be read when the witness himself is unattainable.”⁹⁷ In another case it was said, in reference to this provision, that “the act declares expressly that, unless the same (that is, the disability) shall be made to appear on the trial, such deposition shall not be admitted or used in the cause. This in-

⁹¹ Crenshaw v. Jackson, 6 Ga. 509.

⁹² Post, §§ 717, 723.

⁹³ Southwark Ins. Co. v. Knight, 6 Whart. (Pa.) 327. Compare Miles v. Stevens, 3 Pa. St. 21.

⁹⁴ Hill v. Sturgeon, 28 Mo. 329; Cook v. Harrington, 31 Mo. App. 199; Hunter v. Johnson, 119 Mo. App. 487, 94 S. W. 311; Wilkley v. Clarke, 107 Iowa, 451, 78 N. W. 470.

⁹⁵ Gellatly v. Lowery, 6 Bosw. (N. Y.) 113; Edmonstone v. Hartshorn, 19 N. Y. 9; Forrest v. Forrest, 6 Duer (N. Y.) 102. But see Whitlock v. Fidelity & Cas. Co., 47

N. Y. Supp. 331, 21 App. Div. 124. Some states rule that part of a deposition may be read if it embrace all on a particular subject. See Hamilton-Brown Shoe Co. v. Milliken, 62 Neb. 116, 86 N. W. 913.

⁹⁶ Whitford v. County of Clark, 7 S. C. 306; reversing 13 Fed. 837.

⁹⁷ The Samuel, 1 Wheat. (U. S.) 15. If opposing party sits by and makes no objection to deposition being read, he is estopped from claiming that no showing was made as to this. Columbus Ry. Co. v. Patterson, 143 Fed. 245, 73 C. C. A. 603.

hibition does not extend to the deposition of a witness living a greater distance from the place of trial than one hundred miles, he being considered permanently beyond a compulsory attendance. The deposition in such case may not always be absolute, for the party against whom it is to be used may prove that the witness has removed within the reach of a *subpœna* after the deposition was taken; and, if that fact was known to the party, he would be bound to procure his personal attendance. The *onus*, however, of proving this would rest upon the party opposing the admission of the deposition in evidence.⁹⁸ "It thus appears," said Waite, C. J., commenting on the foregoing decisions, "to have been established at a very early date that depositions taken *de bene esse* could not be used in any case at the trial, if the presence of the witness himself was actually attainable, and the party offering the deposition knew it, or ought to have known it. If the witness lives more than one hundred miles from the place of trial, no *subpœna* need be issued to secure his compulsory attendance. So, too, if he lived more than one hundred miles away when his deposition was taken, it will be presumed that he continued to live there at the time of the trial, and no further proof on that subject need be furnished by the party offering the deposition, unless this presumption shall be overcome by proof from the other side. But if it be overcome, and the party has knowledge of his power to get the witness in time to enable him to secure attendance at the trial, he must do so, and the depositions will be excluded."⁹⁹

§ 703. **What the Record must Show.**—Moreover, in order to save for review the overruling of an objection to evidence, the bill of exceptions must show that the objection was made *at the time* when the evidence was offered,¹ otherwise the objection will be presumed

⁹⁸ *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 617. See also *Harris v. Wall*, 7 How. (U. S.) 693; *Rutherford v. Geddes*, 4 Wall. (U. S.) 224.

⁹⁹ *Whitford v. County of Clark*, 7 Sup. Ct. Rep. 306, 307. The rulings in the circuit courts of the United States seem to have been uniformly the same way. *Lessee of Penns v. Ingraham*, 2 Wash. C. C. (U. S.) 487 (decided in 1811); *Lessee of Brown v. Galloway*, Pet. C. C. (U. S.) 294 (decided in 1816); *Pettibone v. Derringer*, 4 Wash. C.

C. (U. S.) 219 (decided in 1818); *Russell v. Ashley*, Hemp. (U. S.) 549; *Weed v. Armstrong*, 6 McLean (U. S.), 44. Where the question is whether a witness whose deposition *de bene esse* has been taken, is physically able to attend at the trial, the testimony of a non-expert may be heard as to the *declarations* of the witness touching his physical condition. *McArthur v. Soule*, 5 Hun (N. Y.), 63.

¹ *Hannibal etc. R. Co. v. Moore*, 37 Mo. 338, 341; *Cullinan v. Horan*, 116 App. Div. 711, 102 N. Y. S. 132.

to have been waived. It must disclose what the witness stated, and what the testimony was which was objected to, or a reviewing court will not interfere.² This question was discussed with much particularity in what seems to have been a well considered case in the Supreme Court of the territory of Arizona, in an opinion given by Dunne, C. J. The court ruled: Where a party objecting is overruled, and he appeals, he must show by the record: 1. What the question was and what answer was given to it, or what the evidence was which was introduced against his objection. "This," said Dunne, C. J., "is important because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he was injured, because that would often be impossible; but he must show that evidence was admitted against his valid objection, which, it may be, has injured him; for the object of granting a review by this court is not to determine the abstract questions as to whether the judge below ruled correctly or not, but to give relief in case a party may have been injured by an erroneous ruling. 2. He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. 3. He must show what kind of an objection was made, and, to avail him here, he must show that the objection, as made, was good. Then it is for the other party to see that the statement made contains a showing sufficient to sustain the admission of the evidence as against the objection made. The amount of showing the latter party must make, depends upon the nature of the objection. If the party objecting interposes merely a general objection, all that is necessary is to show enough to obviate the general objection. If the objection is specific, all that is necessary is to show enough to obviate the specific objection as made. Beyond this we cannot in reason require him to go. He should defend himself against the particular attack made; but we cannot ask him to fortify himself against all possible attacks which might have been made."³

And that a ruling was had or insisted on. *Phillips v. Hazen*, 132 Iowa 628, 109 N. W. 1096. If a question be objected to immediately after answer is given and the court without objection considers it, so also will the appellate court. *Sneed v. Maryville etc. Co.*, 149 Cal.

704, 87 Pac. 376. To improper remarks by the trial judge objection and exception must be made at the time. *Dreyfus v. St. L. & Sub. Ry. Co.*, 124 Mo. App. 585, 102 S. W. 53.

² *Jones v. Trustees*, 1 Ind. 109.

³ *Rush v. French*, 1 Ariz. T. 99, 121.

§ 704. [Continued.] Where the Objection was sustained.—“In the second case,” said Dunne, C. J., “where the party objecting was sustained, and the other side appeals and asks to have the ruling declared erroneous, the party appealing must see that the record shows: 1. What question he asked, or what evidence he sought to introduce. 2. Sufficient of the other evidence to illustrate the admissibility of that offered. 3. That the evidence so offered was excluded. 4. That there was reasonable ground to presume that he may have been injured by such exclusion. The other party must see that the record shows good grounds for the exclusion.”⁴ To render an exception available in the Supreme Court of the United States, it must affirmatively appear that the ruling excepted to affected, or might have affected, the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, put to a witness on the taking of his deposition, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material.⁵ Where the incompetency of the evidence results in consequence of some *other evidence* in the case, then in order to have the question of its competency reviewed, *all the evidence* must be *preserved* in the record; but in other cases this is unnecessary.⁶

§ 705. Whether necessary to repeat Objections.—There is authority to the effect that, where a specific objection has been made and overruled, it is not necessary, in order to save the rights of the party, to repeat his objections to subsequent tenders of the same kind of evidence. Thus, it has been ruled that where a certain question is objected to by counsel on the specific ground that it is not proper on cross-examination, and a second question calling for the further elaboration of the subject-matter of the first is objected to, although the specification that it was not proper on cross-examination was not repeated, it may fairly be regarded as implied that it was intended to object to the second question on the same ground which was taken to the first question.⁷

⁴ Rush v. French, 1 Ariz. T. 99, 122.

⁵ Railroad Co. v. Smith, 21 Wall. (U. S.) 256; Packet Co. v. Clough, 20 Wall. (U. S.) 528; Shauer v. Allerton, 151 U. S. 607.

⁶ McClellan v. Bond, 92 Ind. 424;

Johnson v. Wiley, 74 Ind. 233; Shimer v. Butler University, 87 Ind. 218; Pavey v. Winthrope, 87 Ind. 379; Ind. B. & W. Ry. Co. v. Cook, 102 Ind. 133, 26 N. E. 203.

⁷ Stephens v. Brown, 12 Bradw. (Ill.) 619; Louisville & N. R. Co. v.

§ 706. Of Waivers and Estoppels in Respect of Objections to Evidence.—An error in admitting evidence is *cured* by the act of the opposing party in putting witnesses on the stand to prove the facts sought to be proved by the evidence admitted; this upon the plain principle that a party cannot complain of *his own error*.⁸ Where evidence offered by one party is rejected by the court, and, after all the evidence is in, a written *admission* is filed by the other party, conceding the facts which the party tendering the evidence offered to prove by it, and a correct instruction is given by the court applicable to such facts, the error in rejecting the evidence is *cured*.⁹ The party who has questioned his own witness upon a given subject, cannot object to the *cross-examination* of the witness on the same subject, or claim the exclusion of the answers of the witness contradicting his statements upon the examination-in-chief.¹⁰ The objection that an answer is *not responsive* to the question put to the witness is one which does not concern the other party, if the answer is relevant to the issues. The party examining a witness may sometimes object to volunteered and irresponsive statements made by a witness aside from his questions; but if he is willing to accept the answer, and if it is one which he would have a right to elicit, the opposite party cannot complain.¹¹ There are cases, however, where the *deposition* of a witness is taken on settled interrogatories, where an answer not called for may be objected to by either party for *surprise*; inasmuch as, if the questions had been so put in writing as to call for it, other interrogatories might have been framed accordingly, which might have led to explanation.¹² A party is so far *estopped by his own testimony*, that the court will not allow public time to be consumed in disproving a fact which the party himself has admitted when testifying as a witness.¹³ It has been held that, where a witness gives testimony upon the plaintiff's direct

Williamson, 29 Ky. Law Rep. 1165, 96 S. W. 1130.

⁸ Gale v. Shillock, 4 Dak. 182, 29 N. W. 661; Salt Lake City v. Smith, 104 Fed. 457, 43 C. C. A. 637. In Lloyd v. Simons, 90 Minn. 237, 95 N. W. 903, it was said, that this was a harmless error, the court not treating the question from the standpoint of waiver. So if error is cured by cross-examination bringing out same testimony. Finnegan

v. Waterhouse (R. I.), 67 Atl. 427.

⁹ Liston v. Central Iowa R. Co., 70 Iowa, 714, 29 N. W. 445.

¹⁰ Artz v. Chicago etc. R. Co., 44 Iowa, 284.

¹¹ Hamilton v. People, 29 Mich. 173, 184.

¹² Ibid.; Greenman v. O'Connor, 25 Mich. 30.

¹³ Hinkson v. Morrison, 47 Iowa 167.

examination, and in reference to a matter about which no inquiry has been made by the defendant, the plaintiff cannot be allowed to call witnesses to contradict him.¹⁴

§ 707. **Errors without Prejudice.**—An error of the court in *excluding* the evidence of a witness does not injure a party, if the witness is afterwards permitted to testify fully in respect of the matter excluded.¹⁵ The *admission of incompetent testimony* will not, in many cases, avail to work a reversal of a judgment, as, for instance, where such testimony relates to a question which is not in dispute, and consequently could have had no influence on the result, or where the finding must have been the same on the evidence had the incompetent evidence been excluded.¹⁶ A party cannot complain that the opposite party *holds him to the effect of his own evidence*. When, therefore, a party called out the fact that a certain bond was in existence, he could not complain that the other party produced the instrument to confirm the fact.¹⁷ Where a question propounded by the prosecution in a criminal case was subsequently *withdrawn*, the refusal of the court to allow the answer to be recorded, was not such abuse of discretion as to require a new trial.¹⁸ The overruling of an objection to an illegal question becomes harmless to the objecting party, where the witness answers,

¹⁴ Trustees v. Brooklyn Fire Ins. Co., 23 How. Pr. (N. Y.) 448.

¹⁵ Branson v. Caruthers, 49 Cal. 374; Kessler v. Pearsons, 126 Ga. 725, 55 S. E. 963; Holcomb-Lobb Co. v. Hauffman, 29 Ky. Law Rep. 1006, 96 S. W. 813; Flannagan v. Fabens, 77 Neb. 705, 110 N. W. 655; Strickland v. Phillips, 75 S. C. 264, 55 S. E. 453; Imlow v. Bybee, 122 Mo. App. 475, 99 S. W. 785; Kohl v. Bradley Clark & Co., 130 Wis. 301, 110 N. W. 265.

¹⁶ Forbing v. Weber, 99 Ind. 588; Aufdencamp v. Smith, 96 Ind. 328; Terre Haute etc. R. Co. v. Pierce, 95 Ind. 496; Rhoads v. Jones, 92 Ind. 328; Citizens' Bank v. Adams, 91 Ind. 280, 288; Bush v. Seaton, 4 Ind. 522; Manchester v. Doddridge,

3 Ind. 360; Parker v. St., 8 Blackf. (Ind.), 292; Summerford v. Davenport, 126 Ga. 153, 54 S. E. 1025; Grey v. Callen, 133 Iowa, 363, 110 N. W. 603; Lamar v. Telegraph Co., 75 S. C. 129, 55 S. E. 134; Davis v. Oregon etc. R. Co., 31 Utah, 307, 88 Pac. 2; McKenzie v. Boutwell & Varnum, 79 Vt. 383, 65 Atl. 99; Southern R. Co. v. Morris, 143 Ala. 628, 42 South. 17.

¹⁷ Filmore v. Union Pacific R. Co., 2 Wyo. 94. And where there was cross-examination as to assessed value for taxation, that the official assessment was shown. Helm Fire Ins. Co., 132 Iowa, 177, 109 N. W. 605. See also Auternoltz v. R. Co., 193 Mass. 542, 79 N. E. 789.

¹⁸ Carter v. St., 56 Ga. 463.

either that he knows nothing about the matter, or where his answer is favorable to the objector.¹⁹

§ 708. When error not Cured by Subsequent Evidence to the same Effect.—The error of admitting incompetent evidence is in most cases available error, although the evidence is merely *cumulative*. Thus, where the unsworn declarations of a person are admitted, this will be error, although the person is subsequently called as a witness and testifies to the same facts; but whether the error will be sufficiently prejudicial in its character to work a reversal, will depend upon the nature and surroundings of the case.²⁰ As a general rule the admission of improper evidence, over a specific objection, will work a reversal, although the evidence was merely *cumulative*.²¹

§ 709. Objections must be renewed in Motion for New Trial.—In some jurisdictions the rule is that objections to evidence, and other objections made at the trial must, in order to be available on appeal or error, be renewed by the objector in his motion for a new trial.²² In Indiana, in order to present the question of the rulings

¹⁹ *Nailor v. Williams*, 8 Wall. (U. S.) 107; *Lovell v. Davis*, 101 U. S. 541.

²⁰ In *Anderson v. Rome etc. R. Co.*, 54 N. Y. 334, the declarations of a person were put in evidence, and he was afterwards called as a witness and gave evidence to the same facts. It was held that the error of allowing his unsworn declarations to be rehearsed before the jury, was of a character so prejudicial that it was not cured. Compare *Warrell v. Parmlee*, 1 N. Y. 519.

²¹ *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612. This seems not true anywhere but in New York, if it may even be said to be the rule there, but incompetent evidence is harmless where the same facts are shown by proper evidence. See *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297; *Walnut Ridge M. Co.*

v. Cohn, 79 Ark. 338, 96 S. W. 413; *Hinkle v. Smith & Son*, 127 Ga. 437, 56 S. E. 464; *Boyle v. Robinson*, 129 Wis. 567, 109 N. W. 623. Thus if parol evidence is erroneously omitted, the error is cured by the subsequent introduction of the writing. *Dorough v. Harrington & Son*, 150 Ala. 667, 42 South. 997. And where an incompetent witness testifies and one competent afterwards testifies to the same matters. *Milton v. Stone Co.*, 99 Minn. 439, 109 N. W. 999; *Yarborough v. Banking etc. Co.*, 142 N. C. 377, 55 S. E. 296.

²² *Lake Erie etc. R. Co. v. Parker*, 94 Ind. 91; *McGee v. Robbins*, 58 Ind. 463; *Cobb v. Krutz*, 40 Ind. 323; *McKinney v. Shaw etc. Co.*, 51 Ind. 219; *McTier v. Crosby*, 120 Ga. 878, 48 S. E. 355; *Continental Cas. Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824.

of the court in admitting or rejecting evidence for re-examination on a motion for new trial, the motion must *point out* the evidence so admitted or excluded. A *general complaint* that the court erred in admitting illegal, incompetent and irrelevant evidence, or in refusing to admit legal, proper and relevant evidence, does not direct the mind of the court to the errors complained of, and such a motion is properly overruled for that reason alone.²³

§ 710. Court excluding Illegal Evidence of its own Motion.—

It is said in *Georgia* that, where evidence is admitted without objection, if the court rule it out, it is *error*.²⁴ Contrary to this, it was held in *Missouri* that the rule that the court did not err in admitting evidence where the objection to it was not specific, did not apply in *criminal cases*, since it is the duty of the court to see that innocent men are not convicted. The rule has been disaffirmed in that state and criminal cases stand on the same footing as civil cases. No error for the admission of evidence will be considered on review where no proper objection has been interposed.²⁵

§ 711. Prosecuting Attorneys not to object in Doubtful Cases.—

The Supreme Court of California has offered these sound observations for the guidance of judges and prosecuting attorneys in criminal trials: "In consideration of the number of appeals brought to the court in criminal cases, upon technical points, having for the most part no necessary connection with the merits, we feel warranted in making some suggestions, an attention to which we are persuaded will lead to a more speedy and satisfactory enforcement of criminal justice. In capital cases almost every case is appealed. We do not complain of this, even when the grounds of appeal do not present a plausible reason for the reversal of the judgment; since a natural sense of responsibility in the counsel to whose hands the life of a fellow being is confided, may well influence him to exhaust every resource to save his client from the last penalty of the law. But still it is important that the laws should be enforced, so as to render as certain as possible the conviction of those guilty of their infraction. With every disposition on the part of the judges

²³ *Harvey v. Osborn*, 55 Ind. 535, 549; *Ohio etc. R. Co. v. Hemberger*, 43 Ind. 462; *Sherlock v. Alling*, 44 Ind. 184; *Meek v. Keene*, 47 Ind. 77; *Conrad v. Hansen*, 171 Ind. 43, 85 N. E. 710.

²⁴ *Barker v. Blount*, 63 Ga. 423, 427.

²⁵ *St. v. O'Connor*, 65 Mo. 374; *St. v. McCollum*, 119 Mo. 469, 24 S. W. 1021; *St. v. Myers*, 198 Mo. 225, 94 S. W. 242.

to do this, the effort frequently fails, because something is done or omitted which contravenes some arbitrary or technical right of the prisoner. Courts have no power in criminal cases to affirm a judgment merely because the judges are persuaded that, upon the merits of the case, the judgment is right. If any error intervenes in the proceeding, it is presumed to be injurious to the prisoner, and generally he is entitled to a reversal of the judgment; for it is his constitutional privilege to stand upon his legal rights and to be tried according to law. And yet it very often happens that the matter of exception taken by him serves no other purpose than to defeat justice. For example, a question proper in itself is asked a witness, and the court refuses to allow the answer; if answered, the reply would probably be worth little or nothing to the defendant; yet for this error we would be bound to reverse a judgment which would have been the same whether the questions were answered or not; for, though we might *surmise*, we would not *know* the effect of the denial of this legal right upon the jury, who are the sole judges of the facts. And many other illustrations might be given. As no man ought to be convicted unless on a full exposure of the merits of the case if he is really guilty, it would seem that little or nothing is gained by interposing technical objections to keep a knowledge of the whole case on its legal merits from the jury. Questions as to the admissibility of evidence frequently arise, and in the hurry of a *nisi prius* trial, the best judge may err, especially when suddenly called to pass upon them without the aid of books or argument. These constitute the usual grounds of reversal. Whenever there is any doubt of the question, or rather whenever the evidence proposed by the defense is not plainly inadmissible, it is better to let it go in; since, in nine cases out of ten, a single equivocal fact, of doubtful bearing upon the case, would have no effect upon the judgment of the jurors, who are usually disposed to pass and do pass upon the general merits. Not unfrequently the offer to make the proof and the exclusion of it have about the same effect on the minds of the jury—though it should not—as if the proof were introduced. If the course here suggested were pursued by the prosecuting attorneys, we are convinced that the number of convictions would not be less than at present, while the number of appeals, or at least the number of those successfully prosecuted would be greatly diminished.”²⁸

²⁸ People v. Williams, 18 Cal. 187, 193; repeated in People v. Devine, 44 Cal. 452, 460.

§ 712. **Arguing the Objection.**—The *refusal* of the trial court to hear argument of counsel, as to the admissibility of evidence, is not of itself error;²⁷ though cases might arise where it would be such an abuse of discretion as would work a reversal of the judgment. It is ruled that, when a tender of testimony is made, the court may, in its discretion, hear the arguments for and against its admission, openly *in the presence of the jury*, or privately in the absence of the jury; and that, after the testimony has been admitted, no exception lies, upon the ground that such discussions took place in the hearing of the jury.²⁸

§ 713. **Effect of Examination of a Party Before Trial.**—The New York Code of Civil Procedure, in force in 1876, provided that a party to an action might be examined at the instance of the adverse party under the same rules of examination as any other witness.²⁹ It further provided that the examination might be had before the trial. Under these sections of the Code, it has been held that a party may be examined by his opponent before issue joined,³⁰ and before complaint served.³¹ These examinations are had for the purpose of preparing the examining party's case for trial, and it is held that such an examination precludes the further examination of the party at the trial on the same subject matter, unless some reason or excuse is shown, such as the omission by inadvertence to ask some questions or to prove some facts.³²

ARTICLE III.—STRIKING OUT AND WITHDRAWING.

SECTION

715. Power to Strike Out.

716. Motion to Strike Out.

717. Striking Out where Offer to Connect not Fulfilled.

718. Motion to Strike out Answer.

719. Motion to Strike Out all the Testimony of a Witness.

720. Striking out Plaintiff's Evidence at the Close of his Case.

721. [Continued.] Right to Open and Close on such a Motion.

722. Right to Withdraw Evidence.

723. Error of Admitting Incompetent Testimony Cured by Subsequently Withdrawing it.

²⁷ Olive v. St., 11 Neb. 3, 7 N. W. 444.

²⁸ St. v. Wood, 53 N. H. 484.

²⁹ New York Code Civ. Proc., § 390.

³⁰ *McVickar v. Greenleaf*, 4 Rob. N. Y. 657.

³¹ *Havemeyer v. Ingersoll*, 12 Abb. Prac. N. S. 301.

³² *Wilmont v. Miserole*, 40 N. Y. Sup. (8 Jones & Sp.) 327. Compare *Clark v. Vorce*, 15 Wend. 193.

§ 715. **Power to Strike out.**—The court has, at any stage of the trial, the *discretionary* power to exclude evidence improperly admitted, or admitted subject to exceptions. If its admissibility depends upon outside or collateral facts, there can be no reason why the court should not hear them without delay.³³ It is proper to exercise this power where incompetent evidence is admitted under a *mistake of fact*, which mistake is shown by subsequent evidence.³⁴ This power may be exercised *at any time* before the cause is finally submitted to the jury.³⁵

§ 716. **Motion to Strike out.**—When testimony is admitted without objection, and afterwards appears to be inadmissible, the proper course is to ask the court to instruct the jury to disregard it. It is too late to except to the admission of it, and if the exception is overruled, to assign the ruling for error.³⁶ But in such a case the motion to strike out is not a matter of right, but addresses itself to the discretion of the court.³⁷ It is scarcely necessary to say that it will be error for the court to take the inconsistent position of refusing to allow the objecting party to offer contradictory evidence, and at the same time of refusing to strike out the testimony, on the ground that it is irrelevant.³⁸ If it is prejudicial, the objecting party has the right either to have it stricken out, or to rebut it,³⁹ so as to remove its prejudicial effect from the minds of the jurors. Testimony will not be stricken out on the ground that the question to which it is a response was *leading*, if no objection on such ground was made to the question, and if such a motion is sustained, the ruling will be error, provided the testimony stricken out was relevant and material to the issue.⁴⁰ Where a motion is made to strike out testimony and the adverse party consents that the motion may

³³ *Maurice v. Worden*, 54 Md. 233, 251; *Montfort v. Rowland*, 38 N. J. Eq. 181; *Parker v. Smith*, 4 Cal. 105.

³⁴ *People v. McMahon*, 2 Park. Cr. (N. Y.) 663.

³⁵ *Judge v. Stone*, 44 N. H. 593; *Selkirk v. Cobb*, 13 Gray (Mass.), 313.

³⁶ *Gilmore v. Pittsburg etc. R. Co.*, 104 Pa. St. 275; *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 South. 808. If competent as to one only the motion should

be to strike out as to the other defendants or restrict it. *Tyner v. Barnes*, 141 N. C. 110, 54 S. E. 1008.

³⁷ *Gawtry v. Doane*, 51 N. Y. 84, 90. It ought to be made before the witness leaves the stand. *Toledo, St. L. & W. R. Co. v. Stevenson*, 122 Ill. App. 654.

³⁸ *Gilbert v. Cherry*, 57 Ga. 128.

³⁹ *Ante*, § 483.

⁴⁰ *Williams v. Grand Rapids*, 53 Mich. 271, 18 N. W. 811.

be sustained, after which the moving party changes his mind and *withdraws the motion*, but the court nevertheless, upon the request of the adverse party, strikes out the testimony,—the party making the motion cannot complain of the action of the court, and the original admission of the testimony ceases to be available error.⁴¹

§ 717. **Striking out where Offer to Connect not Fulfilled.**—Where evidence is introduced, accompanied by the assurance of counsel, that it will be followed up by proof of other facts, material and competent, which will render its admission proper, the judge properly admits it. But if this assurance is not fulfilled, it will be the duty of the court, upon application of the opposing counsel, to direct the jury not to regard it.⁴² But where the judge admits evidence which is in the character of a link in a chain of facts necessary to make out the case of the proponent, the mere fact that the other links are not supplied will not support an *exception to its admission*; since if it were otherwise, it would result in the principle that evidence is erroneously admitted because ultimately insufficient.⁴³

§ 718. **Motion to Strike out Answer.**—It will often happen that, although the question may be proper, the answer will be improper, not being responsive to the question. In such a case, objection to the answer must be taken by moving to strike it out.⁴⁴ So, where a witness is asked a question, and, instead of answering in a respon-

⁴¹ Louisville etc. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389.

⁴² Blackburn v. Beall, 28 Md. 208; Forsythe v. Ganson, 5 Wend. (N. Y.) 558; Dillin v. People, 8 Mich. 357.

⁴³ Labron v. Woran, 1 Hill (N. Y.), 91; Flint & W. Mfg. Co. v. Beckett, 167 Ind. 491, 79 N. E. 503. If there is no motion to strike out no error can be claimed. Remington M. Co. v. Candy Co. (Del.), 66 Atl. 465; Putnam v. Harris, 193 Mass. 58, 78 N. E. 747.

⁴⁴ Farmers' Bank v. Cowan, 3 Abb. App. Dec. (N. Y.) 88, 90; Roquest v. Boutin, 14 La. Ann. 44. Compare Reddington v. Gilman, 1 Bosw. (N. Y.) 235; Roberts v.

Johnson, 37 N. Y. Super. 157; Gould v. Day, 94 U. S. 405, 414; Gibson v. Hatchett, 24 Ala. 201; McCabe v. Brayton, 38 N. Y. 196; Spaulding v. Hallubeck, 35 N. Y. 204; Patton v. Sanborn, 133 Iowa, 650, 110 N. W. 1032; Putnam v. Harris, 193 Mass. 58, 78 N. E. 747; Shaw v. N. Y. El. R. Co., 187 N. Y. 186, 79 N. E. 984; Birmingham R. M. Co. v. Rockford, 143 Ala. 115, 42 South. 96; Ross v. Ross, 140 Iowa, 51, 117 N. W. 1105. If the question called for incompetent evidence, and after answer the question is withdrawn because of objection, motion to strike out should be made. Van Cleve v. R. Co., 124 Mo. App. 224, 101 S. W. 632.

sive manner, gives an expression of his *opinion*, this may be properly stricken out on motion.⁴⁵ But where the question foreshadows the answer, and the question is not objected to, any further objection is *waived*.⁴⁶ Thereafter the refusal of the court to strike out the evidence on motion, cannot be assigned for error.⁴⁷ The reason is, that a party ought not to be allowed to sit by, during the reception of incompetent evidence, without objecting thereto, taking his chances of any advantage to be derived therefrom, and afterwards, when he finds such evidence prejudicial to him, to require the same to be stricken out.⁴⁸ Whether, under such circumstances the court will sustain a motion to strike out, becomes a matter of *discretion*.⁴⁹ Thus, it has been held that if a party, with full knowledge of the *incompetency of a witness*, fails to object to him when he is called, but allows him to be sworn and examined without objection, he thereby loses his right to object to his evidence; yet the court may, of its own motion, if it appears that the evidence is opposed to the policy of the law and dangerous to the administration of justice, suppress it.⁵⁰ The party moving to strike out the answer of a witness to a question must *specify his objections* to the answer, with as much particularity as is required in an objection to a question.⁵¹

§ 719. Motion to Strike out all the Testimony of a Witness.—

Less harm is generally done by admitting incompetent evidence, than by excluding evidence which is competent. Where the judge remains *in doubt*, he should, therefore, incline rather to *admit* than to *reject* the evidence which is challenged. It is, therefore, a sound rule that a motion to strike out evidence because it is irrelevant and immaterial, ought not to be granted, unless the evidence is clearly

⁴⁵ *Ryan v. People*, 19 Hun (N. Y.), 188. If it develops on cross-examination that what witness testified to was hearsay, motion should be made. *Defguard v. R. Co.*, 74 N. J. 805, 67 Atl. 609.

⁴⁶ *Levin v. Russell*, 42 N. Y. 251, 256; *Boone v. Ridgway*, 29 N. J. Eq. 543; *Donelson v. Taylor*, 8 Pick. (Mass.) 391; *Mohawk Bank v. Atwater*, 2 Paige (N. Y.), 60; *Greenl. Ev.*, § 421; *Seerie v. Brewer*, 40 Colo. 299, 90 Pac. 508.

⁴⁷ *Brockett v. New Jersey Steamboat Co.*, 18 Fed. 156; *Lee v. Unkeper*, 77 S. C. 460, 58 S. E. 343.

⁴⁸ *Levin v. Russell*, *supra*.

⁴⁹ *Pontius v. People*, 82 N. Y. 340, 347; *Marks v. King*, 64 N. Y. 628; *Platner v. Platner*, 78 N. Y. 90; *Monfort v. Rowland*, 38 N. J. Eq. 181; *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362.

⁵⁰ *Monfort v. Rowland*, *supra*.

⁵¹ *Sill v. Reese*, 47 Cal. 294.

of that character.⁵² Where competent testimony has been given by a witness, a motion to strike out all his testimony should be overruled, although some of it may be incompetent. It is the duty of the party to select the incompetent from the competent testimony, and to point out in his motion the specific testimony objected to, as well as to indicate the character of his objections.⁵³ "This," said Elliott, J., "is not a mere arbitrary technical rule, but is founded on solid principle and essential to the fair administration of justice. It is in harmony with the well settled rule of practice, everywhere obtaining, that the motion of the party must point out the specific testimony objected to, and indicate the character of the objections; and it is also in harmony with the familiar rule that, if a demurrer is addressed to an entire pleading, it must be overruled, although the pleading may be bad in form."⁵⁴ A motion to strike out all the testimony of a witness is properly overruled where it appears that some of the testimony was elicited by the questions of the party making the motion.⁵⁵

§ 720. Striking out Plaintiff's Evidence at the Close of his Case.—In Missouri the court cannot, at the close of the plaintiff's case, strike out his testimony on the ground that it is insufficient to make out his case. If it is not sufficient to make out his case, the court may instruct the jury to find for the defendant; but if it tends in any degree to substantiate the allegations of his petition, it must go to the jury, who are the exclusive judges of its weight.⁵⁶

⁵² *Chester v. Bakersfield Town Hall Assn.*, 64 Cal. 42, 27 Pac. 1104. Refusing to strike out *impeaching evidence*. *Hovey v. Lane*, 52 Ind. 49.

⁵³ *Louisville etc. R. Co. v. Falvey*, 104 Ind. 410, 416, 3 N. E. 389, 4 N. E. 908; *Wolfe v. Pugh*, 101 Ind. 293; *Elliott v. Russell*, 92 Ind. 526; *Cuthrell v. Cuthrell*, 101 Ind. 375; *St. v. Hymer*, 15 Nev. 49; *Keys v. Winnsboro Granite Co.*, 76 S. C. 284, 56 S. E. 949; *Cudahy Packing Co. v. Hays*, 74 Kan. 124, 85 Pac. 811; *Schultz v. Ford Bros.*, 133 Iowa, 402, 109 N. W. 614.

⁵⁴ *Louisville etc. R. Co. v. Falvey*, 104 Ind. 410, 416, 3 N. E. 389, 4 N. E. 908.

⁵⁵ *McCarty v. Waterman*, 96 Ind. 594; *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 South. 808. This principle was applied to the giving of hearsay evidence on the direct examination and the same thing being drawn out in cross-examination. *McWilliams v. Lake Shore etc. R. Co.*, 146 Mich. 216, 109 N. W. 272.

⁵⁶ *McFarland v. Bellows*, 49 Mo. 311. The procedure in New Jersey is to move for a directed verdict, and, if no reason is given for the motion, error cannot be claimed on refusal. *Wood v. Public Serv. Corp. of N. J.*, 74 N. J. L. 51, 64 Atl. 980.

§ 721. [Continued.] **Right to Open and Close on such a Motion.**—A rule of court providing that “on trials of fact the plaintiff shall have the opening and conclusion,” does not apply to a case where, on a motion by the defendant for the exclusion of evidence, he offers to introduce evidence exclusively for the court, for the purpose of enabling it to determine whether the evidence sought to be excluded is such a privileged paper as should exclude it altogether from the consideration of the jury.⁵⁷

§ 722. **Right to Withdraw Evidence.**—A party having once introduced evidence, cannot of right withdraw it, on finding that it does not answer his purpose. “Before the evidence is given, it is within the control of the party. Once given, it belongs to the cause, and is the common property of all the parties.”⁵⁸ But where a party has tendered evidence, and it has been admitted against the objection of the opponent, the court may, in its *discretion*, allow him to withdraw it before the case goes to the jury. It is proper in most cases for the court to allow the party thus to correct the supposed error into which he has fallen, and not to run the risk of its working a reversal of the judgment which he may obtain.⁵⁹ In most cases the opposite party could not ground an exception upon the ruling of the court in permitting the withdrawal of evidence under such circumstances;⁶⁰ since it would not be prejudicial to him,—though cases might occur where it would work injury and prejudice, as shown in the next section.

§ 723. **Whether Error of Admitting Incompetent Testimony Cured by Withdrawing it.**—There are numerous holdings to the effect that error in admitting incompetent testimony is cured by subsequently withdrawing it from the consideration of the jury, by directing them not to regard it;⁶¹ and there is equally good author-

⁵⁷ Maurice v. Worden, 54 Md. 233, 251.

⁵⁸ Decker v. Bryant, 7 Barb. (N. Y.) 183, 189; Clinton v. Rowland, 24 Barb. (N. Y.) 634.

⁵⁹ Providence etc. Co. v. Martin, 32 Md. 310, 316; Boone v. Purnell, 28 Md. 607, 630; Boyd v. St., 17 Ga. 194; Davenport v. Harris, 27 Ga. 68; Gray v. Gray, 3 Litt. (Ky.) 465.

⁶⁰ As was suggested in Boone v. Purnell, *supra*.

⁶¹ Tullidge v. Wade, 3 Wils. 18; Com. v. Shepherd, 6 Binn. (Pa.) 282; Umangst v. Kraemer, 8 Watts & S. 391; Minns v. St., 16 Ohio St. 221; Hamblett v. Hamblett, 6 N. H. 333; Pavey v. Burch, 3 Mo. 447; Beck v. Cole, 16 Wis. 95; Hawes v. Gustin, 2 Allen (Mass.), 402; Smith v. Whitman, 6 Allen (Mass.), 562; Postal Tel. C. Co. v. Likes, 225 Ill.

ity to the contrary.⁶² But there is another class of cases which hold that, where the evidence is of a character clearly prejudicial to the opposing party, the prejudice may not be cured by withdrawing it, but the improper admission of it is ground of reversing the judgment. The same principle must apply, where evidence which is illegally admitted is subsequently withdrawn by the act of the party. Whether the withdrawing of it will cure the error of admitting it, will depend upon its character and prejudicial tendency. *Prima facie*, it will. "The question," said Durfee, C. J., in discussing this point, "is, did the withdrawal take the testimony out of the case? If it did, it is to be considered as if it had never been admitted. We think the withdrawal, being by consent of court, is to be regarded as the act of the court, and that, in contemplation of law, it purged the case absolutely of the testimony." The conclusion was that, while it would rest within the *discretion* of the trial court to grant a new trial for the admission of illegal testimony subsequently withdrawn by counsel,—yet a judgment could not be reversed on exceptions for this reason.⁶³ The Court of Appeals of New York took a different view of the question. After repeated objections to illegal questions had been made and overruled, and the answers of the witness had been given, the party tendering the evidence proposed to have it stricken out. The opposing party declined to accept this proposition, and elected to retain his exception. The court made no ruling, and gave no instruction to the jury on the subject. The former rulings, the exceptions thereto, and the objectionable testimony, all remained in the case. It was said by the reviewing court: "The defendant's counsel had the legal right, after the evidence had been admitted in spite of his repeated objections, to insist upon his exception; and it was not his duty to waive

249, 80 N. E. 136; Louisville & N. R. Co. v. Lucas-Admr., 30 Ky. Law Rep. 359, 98 S. W. 304; Galveston H. & S. A. R. Co. v. Stay (Tex. Civ. App.), 99 S. W. 135. In Iowa it is said that this is "*generally*" so. Craft v. Ry. Co., 134 Iowa, 411, 109 N. W. 723. The general instructions at the close of the evidence may also accomplish the same result. Ward Fur. Mfg. Co. v. Isbell & Co. (Ark.), 99 S. W. 845; Standley v. Ry. Co., 121 Mo.

App. 537, 97 S. W. 244. If their tenor is such as to withdraw the evidence absolutely from consideration. Jones v. Cooley Lake Club, 122 Mo. App. 113, 98 S. W. 82.

⁶² Ante, § 351; Erben v. Lorrillard, 19 N. Y. 302; O'Sullivan v. Roberts, 39 N. Y. 360.

⁶³ St. v. Towle, 13 R. I. 661. See also Davis v. Pennsylvania R. Co., 215 Pa. 581, 64 Atl. 774; Viles v. Traction & Power Co., 79 Vt. 311, 65 Atl. 104.

it, as he would have done by accepting the proposal of the plaintiff's counsel. So far as the jury might be influenced by the incompetent evidence, the mischief was already done, and would not have been repaired by the agreement of counsel to strike it out. The answer of the witness was strictly responsive to the question objected to, and the plaintiff's counsel had no right to have it stricken out. * * * The offer of the plaintiff's counsel, if explicit, would not have caused the jury to overlook this evidence when they came to consider the case, and it is impossible to say that it did not have some influence upon them." The court therefore held that the error of admitting incompetent evidence is not cured *by the offer* of the counsel tendering it to have it stricken out.⁶⁴

⁶⁴ Furst v. Second Avenue R. Co., 72 N. Y. 542.

CHAPTER XXVI.

ON THE PRODUCTION AND USE OF BOOKS AND PAPERS.

ARTICLE I.—DISCOVERY AND INSPECTION.

ARTICLE II.—NOTICE TO PRODUCE AND SECONDARY EVIDENCE.

ARTICLE III.—USE OF BOOKS AND PAPERS AT THE TRIAL.

ARTICLE I.—DISCOVERY AND INSPECTION.

SECTION

730. Subpœna *Duces Tecum* a Substitute for Other Methods.

731. Statutes Compelling Production and Inspection of Books and Papers.

732. The Limit of Bill of Discovery as Regards Nature of Documents Referred to.

733. Extent to which Jurisdiction has been Affected by these Statutes.

734. Whether Production may be Compelled before Trial.

735. Statutes which expressly Mention Inspection and Copy.

736. Limit of Inspection of Documents in Adversary's Possession.

737. Use of Statute in Actions to Recover Penalty.

738. Delay in Applying for Inspection.

739. Production of Books and Papers by the United States.

740. What the Application must Show.

741. May be Made before Trial.

§ 730. *Subpoena Duces Tecum* a Substitute for other Methods.—As already sufficiently explained, a trial had according to the ancient common law, proceeded on the conception that it was a species of combat between two subjects, rather than an inquisition by the sovereign, upon the complaint of one of them against the other, for the purposes of justice. A party was, therefore, entitled to all the advantage, in respect of disclosing the truth, which possession and secrecy could give him. He could not testify for himself; he was not obliged to testify for his adversary, nor to furnish evidence against himself. The court of chancery broke into this barbarous rule by the introduction of the bill of discovery; upon the exhibition of which its subpœna was issued, followed, if necessary, by other compulsory process, bringing the defendant into

court, and searching his conscience by means of interrogatories, which he was compelled to answer on oath. No such power existed in the courts of law; or, if it existed, it was but feebly exercised, and only in a few special cases;¹ so that, for a great period, the bill of discovery in equity, in aid of an action at law, was the only means afforded by the remedial procedure in England, by which a party could compel his adversary to make disclosures of material facts which were locked up in his breast alone. These facts might be matters within his exclusive knowledge, or evidence of them might be furnished by means of books or papers which were in his exclusive possession. To compel him to disclose the contents of such books or papers, where he was privileged against making such disclosure, the common-law courts early resorted to the writ of subpoena *duces tecum*, which has been defined to be "a process by which a court, at the instance of a suitor, commands a person, who has in his possession or control some document or paper that is pertinent to the issues of the pending controversy, to produce it for use at the trial."² This writ extended no further than to compel the production of books and papers, the existence and character of which were *already known* to the party seeking to use them as evidence; so that, as already seen,³ it was necessary that it should describe the books or papers required to be produced, with a considerable degree of

¹ The English courts of law have *sometimes* exercised a power analogous to that of chancery, of compelling an absent party to produce documents for inspection (*Morrow v. Saunders*, 1 Brod. & Bing. 318; *Blakey v. Porter*, 1 Taunt. 384; *Bateman v. Philip*, 4 Taunt. 157), even before the passage of the statute conferring such power upon the courts of law. And the same power was sparingly exercised in New York, in cases at law, prior to the Revised Statutes. *Jackson v. Jones*, 3 Cow. (N. Y.) 17; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 245, note *a*; *People v. Vail*, 2 Cow. (N. Y.) 623. Cases where such relief was refused. *Denslow v. Fowler*, 2 Cow. (N. Y.) 592; *Willis v. Bailey*, 19 Johns. (N. Y.) 268; *May v. Gwynne*,

4 Barn. & Ald. 301. Discovery in equity: *Lane v. Stebbins*, 9 Paige (N. Y.), 622. It was held that the Supreme Court would order a defendant to allow the plaintiff to take a copy of a paper in his possession, on which the suit was founded, though the plaintiff once had a *counterpart* which was lost; and that it was not necessary to show that the paper was delivered to the defendant to hold as trustee of the plaintiff. It was said that the Supreme Court would grant this rule, as to such a paper in all cases where chancery would entertain a bill of discovery. *Wallis v. Murray*, 4 Cow. (N. Y.) 399.

² *Rollins, Surrogate*, in *Hoyt v. Jackson*, 3 Dem. (N. Y.) at p. 390.

³ *Ante*, § 175.

accuracy.⁴ Beginning with the Judiciary Act of 1789, as we shall presently see,⁵ statutes have been passed in many American jurisdictions, extending to courts of law the power which had been hitherto possessed by courts of chancery, of compelling discovery by parties. These statutes seem to have left the subpoena *duces tecum* untouched in its former efficacy.⁶ This efficacy has been greatly enlarged by other statutes enabling parties to testify as witnesses; so that now a party can generally, by means of this writ, compel his adversary to bring into court, for the purpose of being used as evidence on a trial, any books or documents which contain matter material to the issues, subject to his *privilege*, which has been already discussed.⁷

§ 731. **Statutes Compelling Production and Inspection of Books and Papers.**—By the judiciary act of 1789, in Section 15, Congress extended to courts of law the power to compel the production by parties of books and writings “under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in chancery.”⁸ This provision antedated a similar enactment in England sixty-two years ago,⁹ and it has been followed generally by statute in the various states. Considering such statutes along with those abolishing the disability of parties in suits to testify and to be subject to the exigency of a *subpœna duces tecum*, as an ordinary witness, we shall see that the ancient bill of discovery has been, to a very great extent, superseded.

⁴ It has been lately held that the agent of a *telegraph company* is not in *contempt* for refusing to obey such a writ, which commands him to search for and produce all messages from and to a large number of persons therein named, between specified dates. It must identify the particular message required. *Ex parte Jaynes*, 70 Cal. 638.

⁵ Next section.

⁶ *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249.

⁷ Ante, ch. 12.

⁸ R. S. U. S., § 724.

⁹ Stat. 14 & 15 Vict. c. 99 § 66. The English statute provided specifically for application by either

party to “compel the opposite party to allow the party making the application to inspect” * * * and, if necessary, to take examined copies * * * in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity.” Later English statutes enlarged this statute so as to make the process coextensive with that of a bill of chancery, the amendment being if opposite party did not have custody or control any other party might be compelled to make discovery etc. See St. 17 & 18 Vict. ch. 125, § 50.

§ 732. **The Limit of Bill of Discovery as Regards Nature of Documents Referred to.**—As the federal statute and others either expressly or by implication refer to proceedings in chancery, it is important, for an understanding of their scope, to make brief reference to the nature or class of documents of which discovery and inspection, and production at the trial of a case, could be enforced by bill of discovery. Where a bill of discovery was simply in aid of an action at law it extended merely to compelling disclosure by an adversary, notwithstanding his testimonial incapacity, to the extent that this was necessary for the support of the action or defense of the complainant in the bill,¹⁰ and not to any discovery or disclosure of the evidence in support of the action or defense of his adversary.¹¹ This rule was applied to documents, as well as to testimony, of the adverse party, inspection and production being compelled as to those in the possession of adversary, which were serviceable in support of demandant's case, and denied as to all others.¹² It does not concern our purpose to refer to details incident to the practice, the tediousness and expense of which, necessitating assistance of a common law court to dispose effectually of a matter within its proper cognizance, brought these statutes into existence. Most probably the principle of the right to a jury trial had much to do with their enactment.

§ 733. **Extent to which Jurisdiction has been Affected by these Statutes.**—It has been ruled by one of the federal Circuit Courts of Appeals, that the federal statute "goes no further than to apply to actions at law the remedy which in equity is afforded by a bill of discovery."¹³ More recently, also, it was decided by others of these courts, that a court of equity was without jurisdiction of a suit for discovery in which the final relief sought was the enforcement of a purely legal demand.¹⁴ Similar holding has been found in state

¹⁰ Wigram on Discovery, § 31, 1853 Com. Law Prac., Commissioner Second Report, 35 (Eng.), where the principle is stated and reasons given for statutory remedy. Utah Constr. Co. v. Montana R. Co., 145 Fed. 981; Sunset Tel. etc. Co. v. City of Eureka, 122 Fed. 960.

¹¹ Wigram on Discovery, § 32; Re Strachan, 1 Ch. 439, 459; Volusia County Bank v. Bigelow, 45 Fla.

638, 33 South. 704; Storm v. U. S., 94 U. S. 76; Marriott v. Chamberlain, L. R. 17 Q. B. 154, 163.

¹² Bolton v. Liverpool, 1 Myl. & K. 88; Langdell, Eq. Pleadings, §§ 161-171.

¹³ Owyhee L. A. I. Co. v. Tautplans, 109 Fed. 547, 48 C. C. A. 535.

¹⁴ U. S. v. Bitter Root Development Co., 133 Fed. 274, 66 C. C. A. 652; Safford v. Ensign Mfg. Co.,

adjudication.¹⁵ In New Hampshire the court speaks of the statutes removing disability of parties to testify and the taking of testimony before trial and other statutes providing for inspection of documents and places, and concludes that, as the particular discovery sought in the case at bar was not among the things enumerated and was of the nature of things to which bill of discovery applied, for that reason, a court of equity had jurisdiction, though the final relief was merely the enforcement of a purely legal right.¹⁶ In Rhode Island jurisdiction in equity was ruled to exist, because the statute of that state only applied to a cause already commenced.¹⁷ These cases proceed upon the principle of general recognition, that equity jurisdiction is to be invoked only when there is no adequate remedy at law, and that it is applicable where mere auxiliary remedies in a common law action would operate to the abolishing of a well recognized head of equity jurisdiction. In Alabama, however, it has been held, that the statutory provisions abolishing inability of parties to testify, providing for interrogatories to opposing parties and requiring the production of writings give cumulative remedies and do not interfere with or abridge the jurisdiction of courts of equity in matters of discovery.¹⁸ But whether the Alabama court be right, or those which believe that the statutory procedure, speedy and less expensive, was to be a substitute for bill of discovery when in aid merely of enforcement of a right of action at law may not be pertinent in a question of the construction of such statutes. Perhaps also, the Alabama Court might concede, that a bill for mere discovery in aid of a pending action could not now be maintained, because the statute might be exclusive, and not cumulative, to this extent. If the statute is a substituted procedure, however, its scope may be thought more clearly apparent, than if it be considered a cumulative remedy.

§ 734. Whether Production may be Compelled before Trial.—
When it is remembered that these statutes generally antedate or

120 Fed. 480, 56 C. C. A. 630. See also *Brown v. McDonald*, 130 Fed. 964.

¹⁵ *De Bevoisse v. H. & W. Co.*, 67 N. J. Eq. 472, 58 Atl. 91; *Swedish-Am. Tel. Co. v. Fidelity & Cas. Co.*, 208 Ill. 562, 70 N. E. 768; *Baylis v. Bullock E. M. Co.*, 59 App. Div. 576, 69 N. Y. S. 693.

¹⁶ *Reynolds v. Sulphite Co.*, 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949.

¹⁷ *Clark v. Locomotive Works*, 24 R. I. 307, 53 Atl. 47.

¹⁸ *Nixon v. Clear Creek Lumber Co.*, 150 Ala. 602, 43 South. 805, 9 L. R. A. (N. S.) 1255.

precede those which do away with disqualification of parties as witnesses, it is easily understood how such an one, as is the federal statute, merely providing for parties being required "to produce books or writings" might be thought to refer only to production at or upon the trial. But the courts deeming the statutory procedure a substitute for bill of discovery seemed to consider, that it was intended to be as complete as to things it enumerated as was that it was designed to supersede. Therefore, it has been held, over and again, that "produced" "under circumstances" as by a bill of discovery meant produced for inspection, and having been produced impounded for trial of the cause.¹⁹ It seemed to be thought, however, that the *chief* purpose was to nullify the privilege of refusing to produce at trial.²⁰

§ 735. Statutes which expressly Mention Inspection and Copy.—These are found in varying terms and running *pari passu* with those which provide for the taking of depositions before trial. There can be as to such no difference of view regarding their general purpose, i. e. to enable parties to guard against surprise and prepare for trial. The principal question which is still, and may be long, agitated is the extent to which a demandant should be allowed to go in inspection of books and papers in the possession or under the control of his adversary, a question which will be treated hereinafter.²¹ Other than the obvious purpose above stated, it is found, either as expressly provided for or as within statutory purpose, that it is allowed to resort to statutes for inspection of books and papers or for taking depositions or both so as to enable parties to prepare their pleadings,²² or amend same.²³ Other than upon the question

¹⁹ Kirkpatrick v. Mfg. Co., 61 Fed. 66; Gray v. Schneider, 119 Fed. 474; Cameron Lumber Co. v. Droney, 132 Fed. 304; Bloede Co. v. Bancroft Co., 98 Fed. 175. This line of decision has lately been disagreed with by one of the Courts of Appeal in Pennsylvania. See Cassatt v. Coal & Coke Co., 150 Fed. 32, which held that bill of discovery was the only means to obtain inspection before trial. See also Raub v. Van Horn, 133 Pa. 573, 19 Atl. 704. Contra, Swedish-Am. Tel. Co. v. Fidelity & Cas. Co., 203 Ill. 562, 70 N. E. 768.

²⁰ St. v. Boetz, 86 Wis. 29, 56 N. W. 329. See American Banana Co. v. United Fruit Co., 153 Fed. 943, where it was ruled that production in advance of trial ought only to be required when the ends of justice can be properly subserved in no other way. Cassatt v. Coal Co., supra, held in effect that production at trial was the only thing it contemplated.

²¹ See §§ 736, et seq.

²² Ballenberg v. Wahn, 103 App. Div. 34, 92 N. Y. S. 830; London Guarantee & Acc. Co. v. Robnert, 146 Mich. 497, 109 N. W. 1049. In

of the extent inspection may be permitted to go decision upon these statutes has merely local interest in the states respectively.

§ 736. **Limit of Inspection of Documents in Adversary's Possession.**—There seems to run through the cases the theory or idea, that the courts should put a curb upon the exercise of the right of inspection, so as to prevent either unwarranted annoyance of an adversary party,²⁴ a violation of the principle of unreasonable search and seizure,²⁵ or a prying into evidence in the hope of discovering something of direct benefit to movant or of weakness in the case of his opponent. At the same time, however, the principle of inspection only of those papers, which are in support of movant's action or defense, as where bill of discovery is resorted to, may not be strictly observed.²⁶ Thus in New York it has been held, in a case where an assignee of a non-negotiable chose in action sued and defendant pleaded a release in writing by assignor, and a check given in payment therefor, that an order for inspection of these writings should be made.²⁷ The existence of a relationship between the parties whereby, as in the case of master and servant, the accounts between the two are kept by the former, was held to make the books of the former examinable by the latter as to a counterclaim pleaded by him in an action to recover for services upon an alleged wrongful discharge.²⁸ In some jurisdictions the rule of limiting inspection to what goes to support movant's case is adhered to.²⁹ In Montana it was held that, if the trial court makes

Louisiana where the statute is apparently broader than the federal statute, it has been held that the court has power to grant, but applicant is not entitled of right to examine defendant's books to enable him to make allegations sufficient to sustain his action. His ground of attack should be sufficiently explicit to enable him to compel production at trial. *Lombard v. Citizens' Bank*, 107 La. 183, 31 South. 654.

²³ *Harris v. Richardson*, 92 Minn. 353, 100 N. W. 92.

²⁴ *Snow Church & Co. v. Surety Co.*, 80 App. Div. 40, 80 N. Y. S.

512; *London Guarantee & Acc. Co. v. Rohnert*, 146 Mich. 477, 109 N. W. 1049.

²⁵ *Swedish-Am. Tel. Co. v. Fidelity & Cas. Co.*, 208 Ill. 562, 70 N. E. 768.

²⁶ *Wynn v. Taylor*, 109 Ill. App. 603; *Geligsberg v. Scheff*, 79 App. Div. 626, 80 N. Y. S. 154.

²⁷ See also *De Koven v. Ziegfeld*, 101 N. Y. S. 586, 52 Misc. Rep. 93.

²⁸ *Edmonds v. Attucks Music Co.*, 117 App. Div. 486, 102 N. Y. S. 636. See also *Natl. Distilling Co. v. Van Emden*, 120 App. Div. 746, 105 N. Y. S. 657.

²⁹ *St. v. District Court*, 27 Mont.

an order for inspection without a proper showing, or to embrace papers which can contain no evidence relevant to the issue, or which does not put a limit of time upon the inspection, is such a transcending of jurisdiction as will be corrected by certiorari.³⁰ Generally it may be said that application for inspection must present facts upon which the judge may predicate his belief that the movant is entitled thereto to prepare his case for trial and his mere conclusion or belief on this subject is insufficient to invoke the court's discretion in making an order therefor.³¹

§ 737. Use of Statute in Actions to Recover Penalty.—It has been held, upon the principle that chancery practice by bill of discovery did not compel inspection where it was sought to recover a penalty and that a party is privileged against furnishing evidence that would incriminate him, that the statutory procedure could not be resorted to in *qui tam* and other actions partaking of such nature.³² If, however, prosecution is barred by the statute of limitations, it has been decided, that the procedure may be invoked.³³ Also it has been ruled this is no objection unless the party sets up his privilege just as if he were being examined as a witness.³⁴ The fact that a discovery *may* establish criminal misconduct has been held, in a case of a principal suing his agent for an accounting, not to prevent an order for inspection.³⁵

§ 738. Delay in Applying for Inspection.—The discretion which is exercisable by the court has been influenced to deny application for inspection, and so according to the circumstances of a case. Thus it was held under New York statute that, where cause had been tried and was on the calendar for a second trial and marked "ready," the application was too late.³⁶ And also long delay where on resistance the opposite party agrees to produce at the trial.³⁷

441, 76 Pac. 206; *St. v. District Court*, 29 Mont. 363, 74 Pac. 1078.

³⁰ *St. v. District Court*, 27 Mont. 441, 71 Pac. 602.

³¹ *District Columbia v. Baker-smith*, 18 App. D. C. 574; *St. v. District Court*, 29 Mont. 363, 74 Pac. 1078.

³² *Newgold v. Novelty & Mfg. Co.*, 108 Fed. 341; *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 547, 35 L. Ed. 1114.

³³ *McCreary v. Ghormley*, 6 App. Div. 170, 39 N. Y. S. 1036.

³⁴ *Krauss v. Sentinel Co.*, 62 Wis. 660, 23 N. W. 12.

³⁵ *Duff v. Hutchinson*, 19 Wkly. Digest (N. Y. 1884), 20.

³⁶ *Ferguson v. O'Brien*, 97 N. Y. S. 386, 49 Misc. Rep. 450.

³⁷ *Caldwell v. Ins. Co.*, 114 App. Div. 377, 99 N. Y. S. 114.

§ 739. **Production of Books and papers by the United States.**—Although a bill of discovery will not lie against the United States, yet it has been held that, under the above statute, the United States will be compelled to produce the official weigher's returns of the weight of merchandise, on the motion of a defendant sued for the balance of duties alleged to be due thereon, the defense being that the dues were fully paid, and the motion being supported by affidavit that an inspection of copies of the returns is necessary to enable the defendant to prepare for trial.³⁸ In such an action, where it appeared that the defendants were clearly entitled to the production of the papers called for, the court ought to stay the proceedings until their production, and, in case of the refusal of the collector to exhibit them within a reasonable time, to issue a *mandamus* for their production.³⁹ Where a bill was filed in the English court of chancery by the United States, for an account of certain property of the so-called Confederate States, it was held by Lord Cairns, L. C., that, although a bill for a discovery cannot be maintained against a sovereign State, yet if a discovery becomes necessary to aid the defendants, the court may *stay the proceedings* until means of discovery should be furnished.⁴⁰

§ 740. **What the Application must Show.**—"The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery."⁴¹

§ 741. **May be made before Trial.**—Even under a holding that the papers could only be produced for the purpose of being used *at the trial*, it was ruled, on grounds of manifest convenience, that the application for an order to produce them on notice might be made before the trial.⁴² In such a case, Mr. Justice Curtis, at circuit, said: "If the notice is made before the trial, the correct practice seems to be, after the moving party has made a *prima facie* case, to

³⁸ U. S. v. Youngs, 10 Ben. (U. S.) 264; U. S. v. Hutton, 10 Ben. (U. S.) 269.

³⁹ U. S. v. Hutton, 10 Ben. (U. S.) 268. In this case there was a considerable discussion of the validity and effect of a regulation made by the collector of customs under § 251 of the Revised Statutes

of the United States, touching the inspection of books and papers in the custom house.

⁴⁰ U. S. v. Wagner, L. R. 2 Ch. 582, 595.

⁴¹ Iasigi v. Brown, 1 Curt. C. C. (U. S.) 401, 402.

⁴² Iasigi v. Brown, 1 Curt. C. C. 401.

enter an order *nisi*, leaving it for the other party to show cause at the trial. He must then come prepared to produce the paper, if he fails to show cause.”⁴³

ARTICLE II.—NOTICE TO PRODUCE AND SECONDARY EVIDENCE.

Subdivision 1.—Notice to Produce.

SECTION

- 770. Necessity of the Notice.
- 771. Notice not Complied with, lets in Secondary Evidence.
- 772. Object of requiring Notice.
- 773. Exception where the Pleadings give Notice.
- 774. Dispensed with when Paper in Court.
- 775. Notice to Produce a Notice not Necessary.
- 776. Not to Produce a Notice to an Indorser.
- 777. Exception in the Case of Recorded Deeds.
- 778. Exception where the Opposite Party has Obtained the Paper Sur-reptitiously.
- 779. Whether Notice in Writing or by Parol.
- 780. Description of the Papers in the Notice.
- 781. Notice to Agent or Attorney.
- 782. Length of Time of Notice.
- 783. Instances where Length of Time was held Sufficient.
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- 785. Notice applies to any Subsequent Trial.
- 786. Evidence of the Possession of the Documents.
- 787. Evidence to Excuse their Production.
- 788. Where the Document is held by a Third Party.
- 789. Party failing to Produce cannot meet Secondary Proof with like Proof.
- 790. [Continued.] A Contrary View.
- 791. After Paper Produced, Secondary Evidence not Admissible.
- 792. What Secondary Evidence may be given.
- 793. Answer to Notice not Evidence.
- 794. Presumption of Contents in Case of Failure to Produce.
- 795. Evidence of Attempts to Destroy or Fabricate Evidence.
- 796. Secondary Evidence as to Incidental and Collateral Papers.

§ 770. **Necessity of the Notice.**—Where a written instrument is in the possession of the opposite party and is material to the issues, secondary evidence of its contents is not in general admissible, unless a seasonable notice to produce it upon the trial, has been served upon such party or his counsel, and not complied with.⁴⁴

⁴³ Ibid.

⁴⁴ Grimes v. Fall, 15 Cal. 63; Farmers' etc. Bank v. Lonergan, 21 Mo. 46; Williams v. Benton, 12 La.

Ann. 91; Anderson Bridge Co. v. Applegate, 13 Ind. 399; Potier v. Barclay, 15 Ala. 439; U. S. v. Winchester, 2 McLean (U. S.), 135;

And it is error to allow a *copy* to be given in evidence, without proof of a previous notice to produce the original.⁴⁵ Except as hereafter stated, preliminary notice to produce the instrument, before resorting to inferior evidence of its contents, is indispensable. "Inconvenience or absence from the State is not an excuse for omitting this notice; the exception would be where the party himself could not be found after diligent inquiry. Then the law would treat the instrument as lost. Other exceptions are, where the action is brought for the instrument itself, when proof of notice is not necessary. The action for the instrument is a demand for the production of it."⁴⁶ Roundly stated, the rule is that, in order to lay a foundation for secondary evidence, it must be shown that the original writing is *lost or destroyed by time, mistake or accident*, or is *in the hands of the adverse party*, who has had due notice to produce it on the trial.⁴⁷ The rule is the same in *criminal* as well as in *civil* cases.⁴⁸ A demand before suit brought does not take the place of a notice to produce it for evidential purposes upon the trial.⁴⁹

§ 771. Notice not Complied with lets in Secondary Evidence.—

Conversely, if a seasonable notice to produce has been given and disregarded, *parol evidence* of the contents of the paper will be

Fuller v. Hoyt, 14 Tex. 49; Murchison v. McLeod, 2 Jones L. (N. C.) 239; Watson v. Roode, 31 Neb. 264, 46 N. W. 491; Texas Cent. R. Co. v. Fowler, (Tex. Civ. App.), 102 S. W. 732; Shine v. Culver, 42 Wash. 484, 85 Pac. 271.

⁴⁵ Richards v. Richards, 37 Pa. St. 228; Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613; Chicago W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38.

⁴⁶ Carland v. Cunningham, 37 Pa. St. 228, 232, opinion by Thompson, J. M., K. & T. R. Co. v. Elliott, 2 Ind. T. 407, 51 S. W. 1068. It has been ruled both for and against the proposition of notice being required where the document is subject to the privilege against self-incrimination. For, see Bate v. Kinney, 1 Cr. M. & R. 38. Against, St. v. McCauley, 17 Wash. 88, 49 Pac.

221; McKnight v. U. S., 122 Fed. 926.

⁴⁷ Anderson Bridge Co. v. Applegate, 13 Ind. 339.

⁴⁸ U. S. v. Winchester, 2 McLean (U. S.), 135.

⁴⁹ Fuller v. Hoyt, 14 Tex. 49. It has been held that a party may testify orally as to the amount due him, from a written account of a sale shown him, made by the defendant as his factor, without giving the plaintiff notice to produce it,—the theory of the court being that, as the account of the sale was made by a third party person, to wit, an auctioneer, it was not such an instrument as must be produced in evidence. First National Bank v. Decatur, 50 Ill. 321. Compare Weaver v. Crocker, 49 Ill. 461, where a somewhat similar ruling was made. But the soundness of these holdings seems doubtful.

heard, or a *copy* of it will be admitted in evidence, on proof that it is a copy.⁵⁰ Where one party gives to the other notice to produce certain instruments of writing known to be in his possession, and the party so notified fails to produce them, it is competent to inquire, upon cross-examination of a witness for such party, what are the contents of such instruments.⁵¹

§ 772. **Object of requiring Notice to Produce.**—The object of requiring notice to produce to be given, is to prevent the party to whom the notice is directed from being taken by *surprise*.⁵²

§ 773. **Exception where the Pleadings give Notice.**—According to numerous holdings, notice to produce an original paper is not required, where the form of the action, or the pleadings are such as to give notice that its production will be necessary at the trial to contradict the evidence of the other party.⁵³ Thus, where the action is brought *for the possession of the paper itself, e. g.,* an action of

⁵⁰ McKellip v. McIlhenny, 4 Watts (Pa.), 317; Augur Steel etc. Co. v. Whittier, 117 Mass. 451; Commonwealth v. Goldstein, 114 Mass. 272; N. O. Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474, 79 S. W. 488. Where opponent exercises his privilege against self incrimination, the foundation is laid. St. v. Boomer, 103 Iowa, 106, 72 N. W. 424.

⁵¹ Pangborn v. Continental Ins. Co., 62 Mich. 638, 29 N. W. 475.

⁵² Field v. Zamansky, 9 Bradw. (Ill.) 47; Milliken v. Barr, 7 Pa. St. 23; How v. Hall, 14 East, 274. The reason has also been stated to be the giving of the opposite party opportunity to have on hand "the best evidence." Dwyer v. Collins, 7 Exch. 639. Another reason is because it assists in showing, that the demandant "has used every exertion in his power that the best evidence might be had." Abat v. Riou, 9 Mart. (La.) 465, 467. See also Com. v. Messinger, 1 Binn. 273, 274.

⁵³ Nealley v. Greenough, 25 N. H.

325; Hammon v. Hopping, 13 Wend. (N. Y.) 503; How v. Hall, 14 East, 274; Scott v. Jones, 4 Taunt. 865; Whitehead v. Scott, 1 Mood. & R. 2; Bucher v. Jarratt, 3 Bos. & Pul. 143; Jolley v. Taylor, 1 Camp. 143; People v. Holbrook, 13 Johns. (N. Y.) 90; Hardin v. Kritisinger, 17 Johns. (N. Y.) 293; Bisell v. Drake, 19 Johns. (N. Y.) 66; McClean v. Hertzog, 6 Serg. & R. (Pa.) 154; Com. v. Messinger, 1 Binn. (Pa.) 273; Lawson v. Bachman, 81 N. Y. 616; Howell v. Huyck, 2 Abb. App. Dec. (N. Y.) 423; Hooker v. Eagle Bank, 30 N. Y. 83, 86. This rule has been denied in Alabama, where it has been held that secondary evidence of the written demand and notice, given by a landlord to his tenant, which is made necessary by a statute to enable the landlord to maintain against the tenant an action of unlawful detainer, cannot be shown by secondary evidence in such an action, without a notice to produce the original. Dumas v. Hunter, 30

trover, a notice to produce it is not necessary.⁵⁴ So, in *assumpsit* against a carrier for the non-delivery of written instruments, it is not necessary to prove a notice to the defendant to produce them, before giving parol evidence of their contents.⁵⁵ So, the defendants to an action are entitled, on the trial, without notice, to the production of all papers which formed any part of the *contract sued on*.⁵⁶ So, in an action for damages for *forging a note*, evidence that the note was in the hands of the defendant, and that it was forged, is admissible, without producing the note, or giving the defendant notice in the declaration to produce it.⁵⁷ So, on the trial of an *indictment* for the *larcency of bank-notes* or other written instruments, where the stolen property is alleged to be in the possession of the accused, parol evidence may be given of their contents, without notice to the accused to produce them;⁵⁸ though there is opinion to the contrary.⁵⁹ But in the last view, where notice has been given and refused, *copies* may be given in evidence. It is no argument so say that, because the defendant was under bond to produce the originals, and thus give evidence against himself, their contents cannot be proved by copies.⁶⁰

§ 774. **Dispensed with when Papers in Court.**—According to one view, where the papers asked for are in court, in the hands of the

Ala. 75; *Dawes v. Dawes*, 116 Ill. App. 36; *City Bank v. Thorp*, 78 Conn. 211, 61 Atl. 428. Where notice of use of paper implied by the pleadings no express notice to produce is necessary. *Spencer v. Boardman*, 118 Ill. 553, 9 N. E. 330.

⁵⁴ *McClellan v. Hertzog*, 6 Serg. & R. (Pa.) 154; *People v. Holbrook*, 13 Johns. (N. Y.) 90. See also *Ross v. Bruce*, 1 Day (Conn.), 100; *Scott v. Stark*, 4 Taunt. 865; *Rose v. Lewis*, 10 Mich. 483.

⁵⁵ *Jolley v. Taylor*, 1 Camp. 143, per Lord Mansfield, C. J.

⁵⁶ *Dewitt v. Prescott*, 51 Mich. 298, 301, 16 N. W. 656; *Zipp v. Colchester*, 12 S. D. 218, 80 N. W. 367. Or intimately connected therewith, thus notice of a breach as required by the contract. *Nichols & S. Co. v. Charlebois*, 10 N. D. 446, 88 N. W.

80. Contra, as to proofs of loss in fire insurance case, *Dade v. Ins. Co.*, 54 Minn. 336, 56 N. W. 48.

⁵⁷ *Bruce v. Ross*, 1 Day (Conn.), 100.

⁵⁸ *McGinnis v. St.*, 24 Ind. 500 (overruling *Williams v. St.*, 16 Ind. 461); *Com. v. Messinger*, 1 Binn. (Pa.) 273; *St. v. Gurnee*, 14 Kan. 111, 120. And so in forgery cases *People v. Swetland*, 77 Mich. 53, 43 N. W. 779. And in prosecution for false pretences in obtaining order for money. *St. v. Wilkerson*, 98 N. C. 696, 3 S. E. 683. Contra, *St. v. Flanders*, 118 Mo. 227, 23 S. W. 1086.

⁵⁹ *Rex v. Haworth*, 4 Car. & P. 254.

⁶⁰ *Le Merchand's Case*, cited in *Leach's Cr. Cas.* 336, *n.* See other cases cited in the same note.

attorney of the opposite party, there is no necessity for a previous notice. In such a case, it was said: "No surprise or hardship could result from his being required to produce them on demand."^{60a} But, according to another view, notice to produce is necessary, even though the paper is in court at the trial. This is not required in order that, upon proof of such notice, the party having the custody of the paper may be compelled to furnish evidence against himself; but it is required to lay the foundation for the introduction of secondary evidence of the contents of the paper. "This rule," it has been observed, "is of immense importance to prevent surprise indeed, it has been held that proof that the adverse party or his attorney, has the instrument in court, does not make notice to produce it unnecessary, for the object of the notice is not only to produce the paper, but to give the party an opportunity to provide proper testimony to support or impeach it."⁶¹ But upon a motion or rule, reciting matters appearing in the *files of the court*, they may be produced without further formality.⁶²

§ 775. Notice to produce a Notice not Necessary.—"Every written notice," said Gibson, C. J., "is, for the best of all reasons, to be proved by a *duplicate original*; for if it were otherwise, the notice to produce the original could be proved only in the same way as the original notice itself, and thus a fresh necessity would be constantly arising, *ad infinitum*, to prove notice of the preceding notice."⁶³

§ 776. Not to produce a Notice to an Indorser.—Perhaps not for this reason, a written notice to an indorser of a promissory note may be proved by parol, without giving notice to parties to produce

^{60a} Field v. Zamansky, 9 Bradw. (Ill.) 479; Bickley v. Bank, 39 S. C. 281, 17 S. E. 977; Wabash R. Co. v. Johnson, 114 Ill. App. 545.

⁶¹ Milliken v. Barr, 7 Pa. St. 23, opinion by Burnside, J. As to whether notice is necessary is in discretion of trial court to say. Hanselman v. Doyle, 90 Mich. 142, 51 N. W. 195.

⁶² Souder v. Lippincott, 48 N. J. L. 437.

⁶³ Eisenhart v. Slaymaker, 14

Serg. & R. (Pa.) 153; reaffirmed in Morrow v. Com., 48 Pa. St. 305; McLenon v. R. Co., 69 Iowa, 320, 28 N. W. 619; Waterman v. Davis, 66 Vt. 83, 28 Atl. 664. The endless chain theory has been thought only to apply to notice to produce, and, therefore, some courts have held there was the same necessity of notice of other kinds of notice as of any other paper. See Home Protection Co. v. Whidden, 103 Ala. 203, 15 South. 567.

the writing; ⁶⁴ but more probably for the reason that such a notice consists of a few simple facts, the nature of which is well known.

§ 777. **Exceptions in the Case of Recorded Deeds.**—An exception to the foregoing rule is admitted in the case of recorded deeds. Here a certified copy from the record may be used, on the proper preliminary proof being made, without notice to the opposite party to produce it.⁶⁵ There are holdings to the effect that, if the deed has been recorded, a transcript from the record may be introduced, provided the party make oath that the original is not in his custody, and is beyond his control.⁶⁶

§ 778. **Exception where the Opposite Party has Obtained the Paper Surreptitiously.**—The affidavit of a party to a cause, that an original paper, of which he has had the custody, has disappeared without his consent, and has been seen in possession of the counsel of the opposite party, has been held sufficient proof to let in secondary evidence of its contents.⁶⁷

§ 779. **Whether Notice in Writing or by Parol.**—It has been said that the general rule of practice, regarding a *written notice* to produce papers, has reference only to the preliminary preparations for the trial, and that the reason of the rule does not apply to a notice given in the presence and hearing of the court, while the trial is in progress. It was therefore held that a verbal notice, given at a previous meeting before a referee, was good.⁶⁸

⁶⁴ *Eagle Bank v. Chapin*, 3 Pick. (Mass.) 180; *Central Bank v. Allen*, 16 Me. 41; *Roberts v. Bradshaw*, 1 Stark. 28; *Kine v. Beaumont*, 7 J. B. Moore, 112. To this exception there is to be added notice to quit. *Falkner v. Beers*, 2 Doug. 117.

⁶⁵ *Bowman v. Wettig*, 39 Ill. 416. The proof which was held sufficient in this case was, that the party had searched for the deed unsuccessfully, and could not produce it. But see *Bauer v. Gloss*, 244 Ill. 627. This exception is one of statute and as to conditions connected therewith the statute of any particular state

should be consulted. Unless statute specifies record of which certified copy is admissible, the general rule prevails. *Montgomery v. Air Line Ry.*, 73 S. C. 503, 53 S. E. 987.

⁶⁶ *Ferguson v. Miles*, 3 Gilm. (Ill.) 358; *Mariner v. Saunders*, 5 Glim. (Ill.) 113; *Bowman v. Wettig*, 39 Ill. 416, 422. In Missouri without the oath. *Barton v. Murrain*, 27 Mo. 235; *Avery v. Adams*, 69 Mo. 603.

⁶⁷ *Morgan v. Jones*, 24 Ga. 155; *Patterson v. Winn*, 5 Pet. 242.

⁶⁸ *Kerr v. McGuire*, 28 N. Y. 446.

§ 780. **Description of the Papers in the Notice.**—As in the case of a *subpœna duces tecum*,⁶⁹ reasonable or practical certainty in the description of the papers, the production of which is required, is generally insisted upon; since it would be unjust to let in secondary evidence of a paper, upon a notice to produce which failed to specify the character of the paper intended. It has been held that a notice to produce “all letters, papers and documents, touching or concerning the bill of exchange mentioned in the declaration in this cause, and the debt sought to be recovered,”—is too general.⁷⁰ In general, where the notice is such that the party to whom it is delivered could not mistake the paper intended, it will be held sufficient.⁷¹ It will be good, although *informal* and *inaccurate* in certain particulars,—as, for instance, as to the date of the paper,—if it fairly apprise the party what paper is to be produced.⁷² Accordingly, a notice describing a letter as inclosed in an envelope, has been held sufficient to call for both the envelope and the inclosure.⁷³ In an action against a person seeking to charge him as a partner, a notice to produce “all papers pertaining to the partnership” calls for any *deed* which the defendant may have making him a partner.⁷⁴

§ 781. **Notice to Agent or Attorney.**—Notice need not, in general, be given to the party himself; notice to his agent or attorney is sufficient,⁷⁵ even in penal actions.⁷⁶

§ 782. **Length of Time of Notice.**—“The length of time,” says Clopton, J., “for which notice should be given, depends on the attendant circumstances, and the time required to obtain the paper. The notice should be for a reasonable time—sufficiently long to enable the party to procure and produce it without undue inconvenience. If the paper is not in court, and cannot be produced without delaying the trial, notice should be given prior to the trial; but when the paper is in court, and in the power of the party to produce immediately, notice at the trial is sufficient.”⁷⁷

⁶⁹ Ante, § 175.

⁷⁰ *France v. Lucy*, Ry. & M. 341.

⁷¹ *Graham v. Oldis*, 1 Fost. & Fin. 262; *McDowell v. Ins. Co.*, 164 Mass. 444, 41 N. E. 665. Even though its character be misdescribed, as calling a title bond a “deed.” *Lockhart v. Camfield*, 48 Miss. 471.

⁷² *Frank v. Manny*, 2 Daly (N. Y.) 92.

⁷³ *U. S. v. Duff*, 6 Fed. 45.

⁷⁴ *Jones v. Parker*, 20 N. H. 31.

⁷⁵ *Attorney-Gen. v. Le Merchant*, 2 T. R. 203 n.; ante, § 190. As to agent this depends on the facts. *Lathrop v. Mitchell*, 47 Ga. 610.

⁷⁶ *Gates v. Winter*, 3 T. R. 306.

⁷⁷ *Littleton v. Clayton*, 77 Ala. 571, 574, 575. “Due notice,” under the *North Carolina statute*, means

§ 783. Instances where Length of Time was held Sufficient.—

It is said by Russell: "In *town cases*, service of notice on the attorney, on the evening before the trial, is in general sufficient."⁷⁸ When, therefore, notice to produce a letter was served upon the defendant's attorney on the afternoon of the day before the trial, at twenty minutes before five o'clock, and he had his office in the same town and near the place of trial, it was held that the length of time was sufficient.⁷⁹ A notice given on the *preceding evening* was held sufficient, where the counting house of the party was very near the court house.⁸⁰ Where both parties lived in London, a notice served on defendant's attorney at *seven o'clock* on the evening of the day before the trial, was held not too late.⁸¹ Where one of the parties lived in the assize town, and the plaintiff's attorney served the defendant's attorney in the assize town, on the commission day, with notice to produce a paper, and paid the expense of going to fetch it, and the defendant's attorney said that that was of no use, as the paper was not in existence,⁸²—it was held that the plaintiff might give secondary evidence of its contents, as the statements of the defendant's attorney that it was not in existence obviated any objection to the lateness of the service of the notice to produce.

§ 784. Instances where Length of Time was held Insufficient.—

Unless under special circumstances, a notice to parties is insufficient which barely allows time to procure them by *telegraphic communication* with clients.⁸³ Notice given to a party *during the trial* is not sufficient, unless it appear to the satisfaction of the court, that the paper is *in court at the time* and in possession of the party, or, if elsewhere, that it would be of easy access.⁸⁴ Where the trial was

sufficient time to enable the party to have the document present when called for. *McDonald v. Carson*, 95 N. C. 378; *St. v. Swift*, 57 Conn. 508, 18 Atl. 664. The length of time is in trial courts' discretion. *Brock v. Ins. Co.*, 106 Iowa, 30, 75 N. W. 683.

⁷⁸ 2 Russ. on Crimes, 743.

⁷⁹ *U. S. v. Duff*, 6 Fed. 45.

⁸⁰ *Shreve v. Dulaney*, 1 Cranch C. (U. S.) 499.

⁸¹ *Leaf v. Butt*, 1 Car. & M. 451.

⁸² *Foster v. Pointer*, 9 Car. & P. 718.

⁸³ *Dewitt v. Prescott*, 51 Mich. 298, 16 N. W. 656.

⁸⁴ *Atwell v. Miller*, 6 Md. 11; *Beard v. Southern R. Co.*, 143 N. C. 137, 55 S. E. 505. If trial is sufficiently protracted for party notified to produce, and party offered to strike out if document is produced, the refusal by the court to strike out will not be deemed error. *Sheldon Canal Co. v. Miller*, 40 Tex. Civ. App. 460, 90 S. W. 206.

at the Middlesex sittings (in London), and the plaintiff resided in London, notice served upon him at *half past eight o'clock on the evening before the trial*, was too late.⁸⁵ So, where the notice was served on the plaintiff's attorney at a *quarter before nine* on the night before the trial, it was held that it was too late.⁸⁶ A notice to produce deeds was served on the defendant's attorney in *Essex* on *Saturday*, the commission day of the assizes being *Monday*. The attorney went to *London* and fetched them. A notice was served on the commission day evening, to produce another deed. The attorney stated that he had been to town and fetched the deeds, and that, if the plaintiff would pay the expense of sending for this from town, where it was, it should be had. The plaintiff did not offer to pay such expense, and the trial was had on *Thursday*. It was held by Lord Tenterden, C. J., that, under these circumstances, the plaintiff was not entitled to give secondary evidence of the last mentioned deed.⁸⁷ Where the notice was given *the day previous* to the trial, to produce a paper which was eighty miles distant, in the trial of another person, the reviewing court refused to take judicial notice of facts which would imply that the paper could not be obtained, so as to exclude secondary evidence,⁸⁸—in other words would not, upon these facts, say that the trial court erred in admitting such evidence. A notice given *several days* before the term at which the cause was tried, was deemed *prima facie* sufficient, although the party refusing the notice resided without the State,—the court reasoning that, if he was willing to produce it, but unable to do so, because of the shortness of the notice, he should have applied for a continuance.⁸⁹

§ 785. **Notice applies to any Subsequent Trial.**—Where a paper is produced at one trial, it should remain on file, unless leave is granted to withdraw it for special reasons, so that it may be used at another trial in case a new trial is awarded. "If a party is notified that a paper is wanted at one trial, it is, or should be known by such party that, if there be a new trial, the paper will be wanted again."⁹⁰ On this principle, as already seen,⁹¹ an admission made

⁸⁵ *Lawrence v. Clark*, 14 Mees. & W. 249. See also *Worth v. Norton*, 60 S. C. 293, 38 S. E. 605; *Mortlock v. Williams*, 76 Mich. 568, 43 N. W. 592.

⁸⁶ *Holt v. Meirs*, 9 Car. & P. 191.

⁸⁷ *Curtis v. Spitty*, 3 Barn. & Ald. 182.

⁸⁸ *Cody v. Hough*, 20 Ill. 43.

⁸⁹ *Jefford v. Ringgold*, 6 Ala. 544.

⁹⁰ *Rawson v. Knight*, 73 Me. 343.

⁹¹ *Ante*, § 193.

at the first trial of a cause, if reduced to writing, or incorporated into the record, will be binding upon the party making it, at another trial, unless the trial judge, in the exercise of his discretion, thinks proper to relieve him from it;⁹² and the power of the trial judge to grant this relief may be doubted. Upon the same analogy, where notice is given to produce a paper at a trial, that is a sufficient notice to produce the same paper at any subsequent trial of the same cause.⁹³ If given before a justice of the peace, it is available on a trial in a higher court, to which the cause has been appealed.⁹⁴

§ 786. **Evidence of the Possession of the Documents.**—The party giving the notice is bound to prove the books or documents to be in the hands of the opposite party, or under his power or control, before secondary evidence of their contents will be received. He must prove this by *competent evidence*. He cannot prove it by the *admissions of other persons*, whose admissions are not binding upon the party.⁹⁵ But cogent evidence is not required. Where, after notice to produce, *bare evidence* is given that the document is in the possession of the party receiving the notice, if it is not produced, secondary evidence of its contents will be heard.⁹⁶ It is sufficient evidence to let in secondary proof of the contents of a written instrument, that it was *last seen* in the possession of the party invited to produce it.⁹⁷ Evidence that the document is *in the hands of the agent of the party* notified to produce it,—*e. g.*, where the defendant is a ship-owner, and the document is in the hands of the captain,—is sufficient to let in secondary evidence of its content, if it is not produced.⁹⁸

⁹² Holley v. Young, 68 Me. 215.

⁹³ Rawson v. Knight, 73 Me. 340. This decision turned on the words of the Maine statute which said: "produce at the trial."

⁹⁴ Read v. Moore, 19 Johns. (N. Y.) 337.

⁹⁵ Birkbeck v. Tucker, 2 Hall (N. Y.), 121; Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. If the document is not one expected to be in opponent's possession he need not be notified to produce it. Cooley v. Collins, 186 Mass. 507, 71 N. E. 979. Or party denies in his pleading he has possession. Safe De-

posit & Tr. Co., 98 Md. 22, 55 Atl. 1023.

⁹⁶ Robb v. Starkey, 2 Car. & K. 143; Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253; Sup. Council A. L. H. v. Champe, 127 Fed. 541. In Missouri it was held that possession was not sufficiently shown by a custom of stenographer to mail all letters, though the party remembers to have signed and given the stenographer the particular letter. Liles v. Liles, 183 Mo. 326, 81 S. W. 1101.

⁹⁷ Norton v. Heyward, 20 Me 359; International H. Co. v. Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93.

⁹⁸ Baldney v. Ritchie, 1 Stark. 333.

§ 787. **Evidence to Excuse their Production.**—The party notified to produce the document, may produce evidence showing that it is *lawfully out of his possession*, whereupon the judge will decide whether secondary evidence of its contents can be admitted,—the question being exclusively within his cognizance.⁹⁹

§ 788. [Continued.] **Where the Document is held by a third party.**—“In order to let in secondary evidence, the instrument need not be in the actual possession of the party; it is enough if it be in his power, which it would be if in the hands of a party in whom it would be wrongful not to give up possession to him. But he must have such a right to it as would entitle him, not merely to inspect, but to retain.”¹ It was accordingly held that, where a document was in the hands of one who occupied the position of a *stake-holder* between the party invited to produce it and a third person, secondary evidence of its contents would not be admitted.² But where the writing is in the possession of a third person, who resides *out of the jurisdiction* of the court, and does not appear to be in the possession of the opposite party, secondary evidence of it will be let in without a notice to produce it.³

§ 789. **Party Failing to Produce, cannot rebut Secondary Proof with Like Proof.**—The party who refuses to produce documentary evidence, when required by an order of the court, cannot, because of his contumacy, be allowed to rebut secondary proof of its contents.⁴

⁹⁹ Harvey v. Michell, 2 Mood. & R. 366; ante, §§ 318 et seq. This is a question of law, unless in deciding it the court would, in effect, decide the very issue. Avery v. Stewart, 134 N. C. 287, 46 S. E. 519.

¹ Parry v. May, 1* Mood. & R. 279, 280, opinion by Littledale, J. Before the offeror may introduce secondary evidence he must show the third party in possession is out of jurisdiction and instrument in his possession is beyond control of offeror. Pringley v. Guss, 16 Okl. 82, 86 Pac. 292.

² Parry v. May, 1 Mood. & R. 279, opinion by Littledale, J. See also

Newell v. Clapp, 97 Wis. 104, 72 N. W. 367.

³ Shepard v. Giddings, 22 Conn. 282; Hoyle v. Mann, 144 Ala. 516, 41 South. 835; Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786. Some of the courts require that some step should have been taken. Waite v. High, 96 Iowa, 742, 65 N. W. 397; Phillips v. Ben. Soc., 120 Mich. 142, 79 N. W. 1. The rule does not require notice of production of a posted notice against trespassing. Harper v. St., 109 Ala. 28, 19 South. 857.

⁴ Bogart v. Brown, 5 Pick. (Mass.) 18; Platt v. Platt, 58 N. Y. 646,

§ 790. [Continued.] **A Contrary View.**—The contrary has been held in Michigan, and in a case where there was merely a notice to produce but no order of court. Notice to produce a paper having been given and not complied with, an alleged copy was offered in evidence, and received against objection. Thereafter, the objecting party offered to prove that this copy was not a copy of any paper which he had ever assisted in making, or which had been in his possession. This evidence was ruled out, and it was held error. The court did not perceive any sound reason why the document itself should be excluded, if he had it, and said: “There is no authority for such exclusion, where it relates to his own case, even where not produced when called for by his adversary.” The court also denied this doctrine of estoppel, as one not calculated to promote justice, and observed further: “If such rule could ever have been proper, there can be no reason for it now, when parties are competent witnesses, and can be compelled, by *subpoena duces tecum*, to bring into court any paper in their hands, which their adversaries have a right to inspect and prove.”⁵ But it would nevertheless seem that where a party refuses, after proper notice, to produce a paper, it would be a mere trifling with justice to allow him to introduce it, after thus driving his adversary to experiment with secondary proof.

§ 791. **After Paper produced, Secondary Evidence not Admissible.**—After a paper is produced in compliance with the notice, if the producing party offers to verify it by his oath, the other party cannot refuse to use it, and cannot be allowed to introduce a *copy* in the first instance, on the allegation that the paper produced is not genuine; although he may show wherein it is erroneous or defective after he once introduces it. “It seems to us,” said Mr. Justice Miller, “that the court was right in refusing to *admit in the first instance* what was conceded to be a copy, when that which was at least *prima facie* the original was in court, to answer the notice of the party desiring to use the copy. How far the plaintiff could have been permitted to show a variance of the defendant’s paper from the genuine, after it was once introduced, we need not inquire. But a copy could not be introduced until what seemed to be the original had been before the court and become the subject of inspection by

649; Doon v. Donaher, 113 Mass. 151; Barnes v. Lynch, 9 Okl. 11, 59 Pac. 995; Powell v. Pearlstine, 43 S. C. 403, 21 S. E. 328.

⁵ Molton v. Mason, 21 Mich. 364, 370, opinion by Campbell, J.

the jury.”⁶ The propriety of this holding is very doubtful. Upon what principle does the mere production of a paper, in response to a notice, *authenticate it* as the paper called for in the notice? Why should the fact that his adversary is willing to verify the paper with his oath, make it incumbent on him to accept that oath and make the paper his evidence; or be estopped from proving the fact? Why should a party be required to put in evidence a paper the authenticity of which he denies, merely because the other party has seen fit to produce it in response to a notice, it may be to produce something else? If he should put it in, as above suggested, upon what principle could he thereafter deny its authenticity? The true rule is that evidence of the contents of a writing which is merely *substitutionary*, cannot be given where the writing is in court or capable of being produced; but the rule can have no just application where the *identity* of the writing which is in court, with the writing whose contents it is sought to prove, is unsettled or in dispute.

§ 792. **What Secondary Evidence may be Given.**—The refusal of the party to produce the paper upon notice, does not dispense with the *best evidence* of the contents of the paper, which is attainable in the absence of the paper itself, nor does it allow its substance to be made out by anything less than *satisfactory evidence* of all that is essential.⁷

§ 793. **Answer to Notice not Evidence.**—Before the passage of modern statutes a court of law did not have *power to compel* the party to produce the paper. It was, therefore, not incumbent on him to produce it, or to give any reason why he would not. It was held to follow from this, that any answer which he might make to such a notice was irrelevant, and consequently inadmissible as evidence.⁸

§ 794. **Presumption of Contents in Case of Failure to Produce.**—Where the party contumaciously fails to produce a document after notice,—or, having the power to decline producing it, elects to exercise this power,—everything touching the contents of the document and its execution will be presumed against him, which the case fairly admits of, under the operation of the maxim *contra spoliatores om-*

⁶ *Stitt v. Huidekopers*, 17 Wall. (U. S.) 385, 397.

⁸ *Reid v. Colcork*, 1 Nott & McC. (S. C.) 604.

⁷ *Molton v. Mason*, 21 Mich. 364.

nia præsumentur.⁹ This is a branch of the doctrine of presumptions which it is not intended to go into here.

§ 795. **Evidence of Attempts to Destroy or Fabricate Evidence.**—Evidence of attempts, by the opposite party or by one authorized by him, to destroy, fabricate, or suppress evidence, may be shown,—such acts being in the nature of an admission that the party has no sufficient case unless aided by suppressing or fabricating evidence.¹⁰

§ 796. **Secondary Evidence as to Incidental and Collateral Papers.**—Where a paper relates to an incidental and collateral matter, drawn out to test the temper and credibility of the witness, and in no wise affects the merits of the controversy between the parties, the witness may, without error, be asked to *state its substance*.¹¹ Thus, it was held allowable to ask a witness of the opponent, who had said that he had seen and copied a paper in reference to the expenses of the suit, subscribed by various persons, what were the contents of the paper,—the purpose of the question being to show that the witnesses of the opponent were in a combination to defeat the plaintiff and to share the expenses of the opponent. In such a case, it is not necessary to lay a foundation, by calling on the opponent to produce the paper.¹² On the other hand, it has been ruled that a party may object, though his witness does not, to a question propounded to the witness on cross-examination, as to whether the latter had made certain statements in an affidavit not produced,—the reasoning being that the affidavit was the best evidence.¹³

Subdivision 2.—Secondary Evidence of lost Instruments.

SECTION

799. Preliminary.

800. Secondary Evidence of Lost Instruments.

801. Voluntary Destruction.

⁹ See *Benjamin v. Ellinger*, 80 Ky. 472.

¹⁰ *Lyons v. Lawrence*, 12 Bradw. (Ill.) 531; *Chicago City R. Co. v. McMahon*, 103 Ill. 485; ante, § 453; *St. v. Marsh*, 70 Vt. 288, 40 Atl. 836.

¹¹ *Klein v. Russell*, 19 Wall.

(U. S.) 433, 463; *Smith v. Bank*, 171 Mass. 178, 50 N. E. 545; *Ledford v. Emerson*, 138 N. C. 502, 51 S. E. 42.

¹² *Klein v. Russell*, supra.

¹³ *Newcomb v. Griswold*, 24 N. Y. 298, 301 (*Smith, J.*, dissenting).

- 802. Foundation to let in Secondary Evidence.
- 803. Special Count not Necessary.
- 804. Question Decided by the Judge.
- 805. Under what Rules of Evidence.
- 806. His Decision not Reviewable.
- 807. Person last known to have been in Possession must be Examined.
- 808. Certainty of Evidence to Prove Contents.
- 809. Stringency of the Rule, when Relaxed.
- 810. Lost Depositions.

§ 799. **Preliminary.**—It is not within the plan of this work to enter into a full investigation of the subject of lost documents, of the methods of supplying them, and of secondary evidence of their contents; but a slight digression will be made for the purpose of suggesting some outline views on the subject, referring the reader for fuller treatment to the standard works on evidence.

§ 800. **Secondary Evidence of Lost Instruments.**—A party who intends to use a written instrument in evidence must produce the original, if in his possession; but if it is in the possession of the other party, who refuses to produce it after notice, or if the original is lost or destroyed,—secondary evidence, the same being the best which the nature of the case allows, will be admitted. The party in such a case may read a *counterpart*; or if there is no counterpart, an *examined copy*; or if there is no such copy, he may give *parol evidence* of its contents. Where a writing has been voluntarily destroyed, for fraudulent purposes, or to create an excuse for its non-production, secondary evidence of its contents, by the party so destroying it, is not admissible. But where the destruction or loss, although voluntary, happens through mistake or accident, such evidence will be admitted.¹⁴

§ 801. **Voluntary Destruction.**—From the preceding, it follows that, where the proof is that the party deliberately and voluntarily

¹⁴ *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483; *Jackson v. Frier*, 16 Johns. (N. Y.) 192. That secondary evidence of the contents of written instruments is admissible, wherever it appears that the original is destroyed or lost by accident, without fault of the party, was also ruled in *Renner v. Bank of Columbia*, 9

Wheat. (U. S.) 581; *Wright v. St.*, 88 Md. 436, 41 Atl. 795; *Shrimpton v. Netzorg*, 104 Mich. 225, 62 N. W. 343. If the "destruction was not to produce a wrong or injury to the opposite party or create an excuse for non-production," evidence of contents is admissible. *Mason v. Libbey*, 90 N. Y. 683.

burned the instrument sued on, and there is nothing to account or afford any explanation of the act, consistent with an honest or justifiable purpose, he will not be allowed to introduce secondary evidence of its contents.¹⁵

§ 802. **Foundation to let in Secondary Evidence.**—A party alleging the loss of a material paper must, in order to lay a foundation for introducing secondary evidence of its contents, show that he has, in good faith and to a reasonable degree, exhausted all the sources of information and means of discovery which the nature of the case would suggest, which are accessible to him.¹⁶

§ 803. **Special Count not Necessary.**—Contrary to the English practice, it seems to be the practice in this country, that a special count in the declaration or complaint is not necessary, in order to let in proof that the instrument sued on has been lost; since this would shut the door against secondary evidence in all cases where the instrument happens to become lost after the declaration is filed.¹⁷

§ 804. **Question decided by the Judge.**—The evidence of the loss of a written instrument, adduced to lay the foundation for introduction of secondary evidence of its execution and contents, is addressed solely to the judge, who is to determine it exclusively, without the intervention of the jury.¹⁸

§ 805. **Under what Rules of Evidence.**—Evidence adduced upon this question is not governed by the ordinary rules of evidence.

¹⁵ *Blade v. Noland*, 12 Wend. (N. Y.) 173; *People v. Lange*, 90 Mich. 454, 51 N. W. 534.

¹⁶ *Kearney v. New York*, 92 N. Y. 617; *Simpson v. Dall*, 3 Wall. (U. S.) 460, 475. Wrongful detention in another State not sufficient to let in evidence of contents of a negotiable paper, under the New York Statute relating to lost instruments. *Van Alstyne v. Commercial Bank*, 4 Abb. App. Dec. (N. Y.) 449. Contra, evidence that the possessor of the note is out of the State lets in secondary evidence of its contents. *Bronson v. Tuthill*, 1 Abb. App. Dec. (N. Y.) 206; *Smith v.*

Brown, 151 Mass. 338, 24 N. E. 31; *Longstreth v. Korb*, 64 N. J. L. 112, 44 Atl. 934; *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918. It has been held there must be a "special search." *Leesville v. Iron Works*, 75 S. C. 342, 55 S. E. 768. It is not necessary for search to have been made in every possible place, where witness testifies he searched where the paper was last seen. *Saunders v. Plumbing Co.*, 148 Ala. 519, 41 South. 982.

¹⁷ *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 597.

¹⁸ *Jackson v. Frier*, 16 Johns. (N. Y.) 192; *Davis v. Montgomery*,

Thus where, under the old law, a witness was incompetent by reason of *interest*, he was not incompetent to speak upon this preliminary question. For a like reason, a party was not incompetent.¹⁹

§ 806. **His Decision not Reviewable.**—Whether a foundation has been laid, sufficient to let in secondary evidence of the contents of an instrument alleged to be lost, is a preliminary question of fact for the decision of the trial judge, the determination of which is not reviewable on error or appeal, unless the evidence of loss was so clear and conclusive that it was error of law to find against it.²⁰

§ 807. **Person last known to have been in Possession must be Examined.**—The person last known to have been in possession of the paper must be examined as a witness to prove its loss, even where he is out of the jurisdiction,—in which latter case, his deposition must be procured if practicable, or some good excuse given for not procuring it.²¹

205 Mo. 271, 103 S. W. 979; Patter-
son v. Drake 126 Ga. 478, 55 S. E.
175.

¹⁹ Jackson v. Frier, 16 Johns.
(N. Y.) 192; Clark v. Hornbeck, 17
N. J. Eq. 430. Also the showing of
search, as being reasonable or in
good faith, may often involve the
admission of hearsay evidence,
e. g., inquiry and reply in the course
of search. Smith v. Smith, 10 Ir.
R. 273, 276, 280. An opponent's ad-
mission is satisfactory proof of loss.
Pentecost v. St., 107 Ala. 81, 18
South. 146.

²⁰ Kearney v. New York, 92 N. Y.
617, 620; ante, §§ 318, 324; Gorges
v. Hertz, 150 Pa. 538, 24 Atl.
756; Cooley v. Collins, 186 Mass.
507, 71 N. E. 979; Liles v. Liles,
183 Mo. 326, 81 S. W. 1101. The
tedious recital of facts and cir-
cumstances and the frequent re-
versals show that discretion of trial
courts in this matter is not so much
yielded to as might be supposed in

respect to a rule as broad as is re-
cognized.

²¹ Kearney v. New York, 92 N. Y.
617, 621; Deaver v. Rice, 2 Ired. L.
(N. C.) 280; Dickinson v. Breeden,
25 Ill. 186; Bunch v. Hurst, 3 Des.
Eq. (S. C.) 273; Turner v. Yates,
16 How. (U. S.) 14; Parkins v. Cob-
bet, 1 Car. & P. 282; Howe v. Flem-
ing, 123 Ind. 263, 24 N. E. 238;
Burkhart v. Loughridge, 30 Ky.
Law Rep. 303, 98 S. W. 291. But if
others know of the loss of paper
they may testify to the fact. Liles
v. Liles, 183 Mo. 326, 81 S. W. 1101.
This is more a rule than an abso-
lute test under all circumstances.
Foster v. St., 88 Ala. 182, 7 South.
185. Thus where such an one pro-
duced a paper claimed to be the con-
tract, in his testimony for defend-
ant, and plaintiff denied that it was
the contract, plaintiff's failure to
call him as a witness was no reason
for excluding recollection testimony
as to its contents. Stark v. Burke,
131 Iowa, 684, 109 N. W. 206.

§ 808. **Certainty of Evidence to prove Contents.**—Parol evidence to prove the contents of a lost instrument should show that it was duly executed as required by law, and should substantially disclose its contents. The testimony of a witness who has simply heard it read, and who can give but a small portion of its contents, is insufficient.²² In the case of a *lost note*, it is not necessary that its contents should be proved by a *notarial copy*. All this is required is that it should be proved by the *best evidence*, which the party has it in his power to produce, which must, at all events, be such as to leave no reasonable doubt as to the substantial parts of the paper.²³

§ 809. **Stringency of the Rule, when Relaxed.**—The stringency of the rule requiring search for documents and proof of their loss, before letting in secondary evidence of their contents, is *proportioned to their character and value*. Slight proof of such loss is sufficient, where the documents, from their nature, would have only a transitory value, and where no reasons exist for preserving them. Accordingly, it has been held that a deposition will not be rejected because the witness speaks of papers not produced, if it appear that they were received a long time before the deposition was taken, and

²² *Edwards v. Noyes*, 65 N. Y. 125; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803; *Franks v. Matson*, 211 Ill. 338, 71 N. E. 1011. Where secondary evidence does not establish due execution, e. g., by one only of several signers of a deed, it is to be rejected. *Neely v. Carter*, 96 Ga. 197, 23 S. E. 313. To testify that a quitclaim deed was "similar" to a lost deed was held insufficient. *South Chicago B. Co. v. Taylor*, 205 Ill. 132, 68 N. E. 732. One may testify "to words or substance of the words" but not to the "sense of the deed." *Holmes v. Deppert*, 122 Mich. 275, 80 N. W. 1094. An alleged "substantial copy" of an original is not admissible. *Ivey v. Cotton Mills*, 143 N. C. 189, 55 S. E. 613. The correctness of memoranda as secondary evidence may be shown by comparison in usual course of business. *Rathborne v. Hatch*, 90

App. Div. 151, 85 N. Y. S. 768, 181 N. Y. 520, 73 N. E. 1131.

²³ *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 597; *Edwards v. Rives*, 35 Fla. 89, 17 South. 416; *The Juno*, 41 Ct. Cl. 106. In some jurisdictions copies have been ruled as having a preference over recollection testimony. Thus a sworn or certified copy of an insurance application filed in a foreign country. *Phillips v. Ben. Soc.*, 125 Mich. 186, 84 N. W. 57. A facsimile press copy of a letter. *Stevenson v. Hoy*, 43 Pa. 191. Witness "may read a counterpart, or if there is no counterpart, and examined copy, or if there should not be an examined copy, he may give parol evidence of its contents." *Riggs v. Tayloe*, 9 Wheat. 483, 486. A certified copy of a lodge by-law has been preferred to oral testimony. *Lloyd v. Supreme Lodge*, 98 Fed. 66, 38 C. C. A.

are such as would probably not be preserved for so long, or are not in the power of the witness or the party.²⁴ It has been so held concerning *family letters* received by the witness in a foreign country.²⁵

§ 810. **Lost Depositions.**—Applying the rule stated in the last chapter, that objections must specifically state the ground of objection relied on, we find that it was held that, where an original deposition regularly taken, sealed up, transmitted, opened, and filed in the case, was lost, and a copy, taken under the direction of the clerk of the court and sworn to as a true copy, was offered in evidence in its place, an objection to the copy “on the ground that it was not the original,”—was too indefinite to let in argument that the witness was alive, that the lost deposition could only be supplied by the same witness, and that secondary evidence was inadmissible to prove the contents of the first deposition.²⁶

654. The federal Supreme Court has said: “This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence. *Cornett v. Williams*, 20 Wall. 226, 246.

²⁴ *Tilghman v. Fisher*, 9 Watts (Pa.) 441. And so where it is shown to be a custom or rule in business to destroy papers after a certain lapse of time. See *Western U. T. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

²⁵ *Am. Life Ins. Co. v. Rosenagle*, 77 Pa. St. 507, 513. The doctrine of this case qualifies the following doubtful text of Greenleaf: “If a witness, being examined in a foreign country upon interrogatories sent out with a commission for that purpose, should, in one of his answers, state the contents of a letter which is not produced, that part of

the deposition will be suppressed, notwithstanding, he being out of the jurisdiction, there may be no means of compelling him to produce the letter.” 1 Greenl. Ev., § 88. This statement of Greenleaf is based on the authority of an English nisi prius decision in which Tindal, C. J., said: “I think it would be a most inconvenient and a most dangerous rule to hold, that it should rest in the option of the party examined, whether he will produce the document or not. We have no power to compel the witness to give any evidence at all, but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence.” *Steinkeller v. Newton*, 9 Carr. & P. 313.

²⁶ *Burton v. Driggs*, 20 Wall. (U. S.) 125, 133.

ARTICLE III.—USE OF BOOKS AND PAPERS AT THE TRIAL.

SECTION

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843. Objections to Documentary Evidence must be Specific.

§ 815. **Party not Bound to put in Evidence all Papers Produced on his Notice.**—A party is not bound to put in evidence all the papers produced in response to his notice.—especially where papers

are produced not named therein. This is illustrated by a ruling in an action on a policy of insurance. The plaintiffs, in order to prove the death of the insured, and a compliance with the conditions of the policy as to proof of loss, called upon the defendant company to produce "all proofs of the death" of the insured. The defendant produced a package containing those proofs, which the plaintiff had furnished it, and also several other papers. It was held that the plaintiff was not bound to offer any evidence beyond the papers thus produced, but might select only those which he had furnished to the defendant, and that it was error to reject those which he offered because he did not offer all.²⁷

§ 816. But they May be put in Evidence by the Party producing them.—It was ruled by Lord Kenyon that, where a notice has been given to produce books, if the party giving the notice calls for them and exhibits them, this fact does not make them evidence for the party whose books they are; but it is only a matter of observation to the jury, in behalf of such party, that the entries are in his favor;²⁸ but if the party calling for them thereafter declines to use them in evidence, they may be put in evidence by the party producing them, provided they are material and relevant to the issues,²⁹ and this, although they were called for under a misapprehension of their contents, provided there is no doubt as to their identity. "A party cannot," said Bigelow, J., "require his adversary to produce a document, and, after inspecting it, insist on excluding it from the case altogether. Such a course of proceeding would give one party an unfair advantage over the other. He would gain the privilege of looking into the private documents of the other party, without any corresponding obligation or risk on his own part. It is, therefore, generally deemed a just and wise rule that, in such cases, the paper called for and produced, after it has been seen and examined by the party calling for it, becomes competent evidence in the case for both parties."³⁰ It is manifest that this rule would be of little

²⁷ *Heaffer v. New Era Life Ins. Co.*, 101 Pa. St. 178.

²⁸ *Sayer v. Kitchen*, 1 Esp. 210.

²⁹ *Hoyt v. Jackson*, 3 Dem. (N. Y.) 388.

³⁰ Citing 1 Greenl. Ev., § 563. By Denman, L. C. J., it was held that, if the demanding party "looks at (inspects) the book, he will be

bound to put it in as his evidence." His counsel replied: "Certainly, I am fully aware of that." And then the Lord Chief Justice said: "I have mentioned this because it has been supposed by some, that an opposite counsel may look at the papers or books called for under a notice to produce and then not use them."

use, if the paper can be excluded on the allegation that the party calling for it mistook the nature of its contents. Generally, the party seeking for it acts on the supposition that it contains matter favorable to his side of the case. He, therefore, assumes the risk of making it evidence; and cannot be heard to say, after he has ascertained its contents by inspection, that he intended to call for a different paper, or, in other words, that its contents were not such as he expected. If there is no doubt as to the identity of the document, the party who produces it has the right to insist on its being read to the jury; and the court cannot, in the exercise of their discretion, deny him this privilege.”³¹

§ 817. [Continued.] Illustration.—During the progress of a cause before a surrogate in New York, contesting a will, a subpoena *duccs tecum* was issued at the request of the contestant, and was served on Mr. Conkling, former counsel of the contestant, requiring him to produce certain papers therein described. In obedience to the subpoena, Mr. Conkling attended in court, and requested to be sworn as a witness, and, on being sworn, produced to the surrogate the papers described in the subpoena, and, taking the court’s direc-

See *Calvert v. Flower*, 7 C. & P. 386, as supporting this rule. See English cases *Wharam v. Routledge*, 5 Esp. 235; *Wilson v. Bowie*, 1 C. & P. 8. It has been said it was a rule invented by Lord Ellenborough who decided the former of the two last-named cases. The earlier English rule seems to have been that, if the demandant “made use” of some part of a document called for, the other party could use the remainder. *Sayer v. Kitchen*, 1 Esp. 209. But later it was held, in the Parnell Commission Proceedings, that the demandant “Having called for it (the document) does not alter the matter at all. You produce it; if they do not put it in, you are not on that account entitled to put it in.” *Times’ Rep.* (1888) part 26, p. 169. In the United States the cases are not in harmony and in some jurisdictions the matter is provided for by statute. Thus by 15 L. R. A. 138). The English doc-

statute in California, Idaho, Iowa, Montana, Nebraska, Oregon and Utah, and by rulings in Connecticut (*Laufer v. Traction Co.*, 68 Conn. 475, 37 Atl. 379), New Hampshire (*Austin v. Thompson*, 45 N. H. 113), New York (*Carradine v. Hotchkiss*, 120 N. Y. 608; *Smith v. Reutz*, 131 N. Y. 169, 30 N. E. 54, trine as formerly recognized has been repudiated and the calling party is under no obligation to put the document in evidence. The earlier English rule has received recognition, to the extent that calling for and *inspecting* make the papers evidence, in some of the states. *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Blake v. Russ*, 33 Me. 360; *Long v. Drew*, 114 Mass. 77; *Edison E. L. Co. v. U. S. Elec. L. Co.*, 45 Fed. 55; *Austin v. Secrest*, 91 N. C. 214.

³¹ *Clark v. Fletcher*, 1 Allen (Mass.), 53, 57.

tion, delivered them to the surrogate. Before resting his case, the contestant's counsel moved that the papers deposited with the court by Mr. Conkling, "be placed in the custody of counsel for contestant." The court said: "For the present, I deny your motion." Thereupon Mr. Evarts, of counsel for proponents, asked the court to put at their disposition, for use as evidence in the cause, the papers produced under the subpoena issued by the other side. This was resisted on the ground of privilege. The court ruled, substantially, that the privilege was the privilege of the party, and not the privilege of his attorney; that the privilege had not been waived by the act of Mr. Conkling in delivering the papers to the surrogate; that such of the papers, as had not been offered in evidence by the contestant, remained subject to his control; and directed the official stenographer to return to Mr. Conkling such of the papers, produced by him, as had not been offered in evidence.³²

§ 818. **Tender of Documentary Evidence, how made.**—It has been ruled that, where documentary evidence is offered, each piece should be presented by itself to the presiding judge; exhibited, if desired, to the opposing counsel; identified by the court stenographer with suitable marks; and, if objected to, its genuineness established by the testimony. Where a *bundle of papers* was offered in evidence, described as "invoices of goods, notes and drafts paid," and an objection was raised to the reception of any *bundles*, it was held, on the most obvious grounds, that it was rightly sustained.³³ It is said to be ordinarily proper for a trial court to permit documents to be *offered* in evidence *provisionally*, and afterwards to *instruct* the jury as to their effect.³⁴

§ 819. **Reading the Paper.**—Where a written instrument is offered in evidence, it is discretionary with the judge to read the paper himself, so as to keep its contents from the jury until it is admitted, or to direct counsel to read it.³⁵

§ 820. **Proof of Execution.**—Where the party offering a written instrument, makes out a *prima facie* case of its execution, the other party, it has been held, should not be allowed to introduce counter

³² Hoyt v. Jackson, 3 Denio (N. Y.), 388.

³³ Virgie v. Stetson, 73 Me. 452, 461; Appeal of Barber, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

³⁴ Smith v. Shattuck, 12 Ore. 362, 7 Pac. 335.

³⁵ Brill v. Flagler, 23 Wend. (N. Y.) 354; Currier v. Richardson, 63 Vt. 617, 22 Atl. 625.

³⁶ Verzan v. McGregor, 23 Cal. 339; First Nat. Bank v. Erickson, 20 Neb. 580, 31 N. W. 387.

evidence, before the instrument is read to the jury.³⁶ But this ruling does not seem to be sound. The established rule seems to be that, when objection is made to the admissibility of a paper offered in evidence, upon a ground which calls for the testimony of witnesses, it is proper for the court, before permitting the paper to be read to the jury, to allow the objecting party to cross-examine the witness producing it, and to receive other evidence upon the question, in order to decide whether or not it is admissible.³⁷ Documents cannot be authenticated by the testimony of witnesses as to their identity, unless the opposite party has had an opportunity to inspect them and to cross-examine the witnesses.³⁸

³⁷ *Trussell v. Scarlet*, 18 Fed. 214. In a note to this case by Dr. Wharton, it is said that this view is in harmony with many rulings on the subject of admissibility. He said: "When the admissibility of either a witness or a document is in question, the party opposing the admissibility is entitled as a preliminary test, to cross examine on this specific issue the witnesses on whose testimony the admissibility depends. No document or witness,—such is the fundamental principle,—is self-proving. We must fall back, as a basis logically necessary in all cases, on parol proof; and this proof only is effective when exposed to the criticism of cross-examination. This is illustrated by the old practice of examination on voir dire. When a witness, in old times, as to whose competency there was any question, was called, he was sworn, not 'to tell the truth, the whole truth, and nothing but the truth,' but 'true answers to make to such questions as should be put to him.' These questions related solely to his competency; and the burden of this preliminary examination fell upon the party objecting to competency. In fact, the old practice was, that when there was an objection to competency, for the

objecting counsel to ask for the administering of the voir dire oath, which was granted as a matter of course. The objecting counsel then proceeded to inquire as to the witness' interest in the case, or other ground of incompetency; the party sustaining the admissibility being then entitled to examine in reply. The same distinction is taken with regard to the proof of lost documents. A witness called to prove the contents of a lost document, after his examination, by the party calling him on the subject of the loss, and of his knowledge of the document, is open to cross-examination by the opposing counsel; and it is not until the witness has been thus fully probed, and his knowledge on this specific issue drawn out, that the document is received in evidence." (Citing *Fisher v. Samuda*, 1 Camp. 190, 193; *Clark v. Houghton*, 12 Gray (Mass.), 38; *Richardson v. Robbins*, 124 Mass. 105; *Coxe v. England*, 65 Pa. St. 212; *Rankin v. Crow*, 19 Ill. 626.)

³⁸ *De Witt v. Prescott*, 51 Mich. 298, 300, 16 N. W. 656. As it seems merely an incidental circumstance that the proving witness would be testifying to contents, he being called mainly to lay the foundation for the admissibility of the docu-

§ 821. [Continued.] **Illustrations.**—While one of the plaintiff's witnesses was on the stand, the defendants, during cross-examination, undertook to prove by him the identity of certain documents, which counsel for plaintiff was not allowed to see, but which were afterwards read as having been proved. This was held erroneous. Campbell, J., said: "There is no case where a witness proving an instrument should not be subject to immediate cross-examination, which could never be effective without the view of the document itself, not only to guard against forgery or substitution, but also to inform parties what issues were likely to arise concerning genuineness, or any other fact which is material. Our rules in equity cases have done away with proof of instruments at the hearing, for the reason that there was always danger of surprise and imposition. But there was never any practice which deprived parties of the right to inspect and cross-examine in season."³⁹

§ 822. [Continued.] **When Proof of Execution Dispensed with.**—Where a *verbal contract* refers to a *written instrument*, not as a contract, but as containing some of the terms of the verbal contract, it is not necessary, in order to admit the writing in evidence, for the purpose of establishing the contract, to prove its execution; it is enough that it is identified.⁴⁰ So, one writing may be so acknowledged by another, that proof of the latter will carry with it the authentication of the former, rendering it unnecessary to do more than identify the former, in order to its admission in evidence.⁴¹ The production of a paper under notice, by the opposite party, dispenses with the necessity of proof of the fact which makes it operative, where it appears that the party producing it claims any

ment, the rule seems well recognized, that counsel for opposing party have the right to see the document in advance of its being offered as evidence so he can cross-examine, because its genuineness is finally a question for the jury. *Woodward v. Keck* (Tex. Civ. App.), 97 S. W. 852 (not reported in state reports). There are statutes providing for the offer as evidence while the witness is on the stand, and these conclusively imply that is for the benefit of the opposite party. See Ark. Stat. 1894, § 2966; Cal. C. C. P., § 2054; Idaho Rev. St. 6085. It would seem to be an

unnecessary thing for the court to rule on admissibility, until the witness who is to prove it is through testifying, and unfair to say he could not be cross-examined, when the jury is finally to speak on genuineness.

³⁹ *Dewitt v. Prescott*, 51 Mich. 298, 300, 16 N. W. 656.

⁴⁰ *Smith v. New York Central R. Co.*, 4 Abb. App. Dec. (N. Y.) 262; *Steiner v. Tranum*, 98 Ala. 315, 13 South, 365.

⁴¹ *Clarke v. Mix*, 15 Conn. 153; *Owsley v. Bowles* Admr., 30 Ky. Law Rep. 1016, 99 S. W. 1157.

benefit under it.⁴² Thus, where a *deed* is produced by the opposite party on notice, it has been held unnecessary to prove its *delivery*.⁴³ Where the instrument is the *foundation of the action*, and its genuineness is *not denied on oath*, statutes exist in many jurisdictions, dispensing with proof of its execution.⁴⁴ The statutes relating to registration do not contemplate the recording of the duplicate *impression of seal*. It is, therefore, no objection to the admission in evidence of the *certified copy of a recorded deed*, that a *copy of the impression of the official seal* of the officer, who took the acknowledgment of the grantor, does not appear on it, if it be stated in the body of the certified act of acknowledgment, that it was certified under such official seal.⁴⁵

§ 823. [Continued.] Admission of Document carries with it Proof of Signature and Indorsement.—So, where written instruments are received in evidence without objection, the signatures of all persons who are properly parties thereto, are considered as admitted.⁴⁶ This is nothing but a branch of the broader rule that, where an instrument of writing is received in evidence without objection, proof of its execution is waived.⁴⁷ Where an instrument is offered in evidence and not objected to, any indorsement upon it is considered as proved.⁴⁸

§ 824. [Continued.] Objection for Want of Proof by Subscribing Witnesses.—This objection must be made when the paper is offered, or it will be deemed waived.⁴⁹ Where a party calls his adversary, or permits him to be called, to prove the instrument, this dispenses with proof by the subscribing witness.⁵⁰

⁴² *Pearce v. Hooper*, 3 Taunt. 60, opinion by Lord Mansfield, C. J.; *Smith v. Gale*, 144 U. S. 560, 36 L. Ed. 521.

⁴³ *Campbell v. Roberts*, 66 Ga. 733; *Izlar v. Hartley*, 24 S. C. 382.

⁴⁴ *Leary v. Meyer*, 78 Ind. 393; *Strange v. Barrow*, 65 Ga. 23; *Templin v. Rothweiler*, 56 Iowa, 259, 9 N. W. 207.

⁴⁵ *Griffin v. Sheffield*, 38 Miss. 359.

⁴⁶ *Maxwell v. Kennedy*, 10 La. Ann. 798. If the offering party examines witness as to identity and contents of books without objection, this puts them in evidence. *Jones v. Buddington*, 35 Fla. 121, 17

South. 399. And so, where both parties treat statements in a document as evidence, this even obviates formal offer in evidence. *Zieverink v. Kampe*, 50 Ohio St. 208, 34 N. E. 250.

⁴⁷ *Tyler v. Marcelin*, 8 La. Ann. 312; *McCamant v. Roberts*, 80 Tex. 316, 15 S. W. 580; *Geo. Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167.

⁴⁸ *Bell v. Keefe*, 12 La. Ann. 340; *Maxwell v. Kennedy*, 10 La. Ann. 798; *Shain v. Sullivan*, 108 Cal. 208, 39 Pac. 606.

⁴⁹ *Rayburn v. Mason Lumber Co.*, 57 Mich. 273, 23 N. W. 811.

⁵⁰ *Ibid.*; *Garrett v. Hanshue*, 53

§ 825. [Continued.] **Authentication of Documents in a Deposition.**—Upon the taking of a deposition, documents which are merely produced and identified before the commissioner and returned by him as exhibits to his deposition, are not considered as having been proved. Such identification is not enough to admit them as evidence at the trial, but their genuineness must be established by witnesses who are subject to cross-examination.⁵¹ The distinction between proving the authenticity of a document and merely identifying it, is one which should be constantly borne in mind. "If the *proof of authenticity* is to be by the deposing witness, there must be *opportunity of cross-examination* on the point, and the document be submitted to the cross-examining counsel, and annexed to the deposition, unless a case excusing this is shown, and a copy is supplied. If the paper is merely to be *identified*, submission to adverse counsel is not matter of right, and annexation to the deposition not essential."⁵² If the witness is to be examined as to the genuineness of an instrument, the *original* of it must, of course, be exhibited to the witness and returned, attached to the interrogatories by the commissioner.⁵³ This is a very important rule, in order to prevent deception. Unless the paper be particularly described, *identified* by the commissioner *with marks*, and annexed to the deposition as returned by him, the deposition, so far as it relates to the paper, cannot be read in evidence.⁵⁴ A paper which is *pinned to a deposition*, not referred to in it, and which contains no evidence that it has been attached thereto by the officer taking the deposition, is not sufficiently identified as an exhibit to be admitted in evidence.⁵⁵ But a deposition ought not to be suppressed, on the ground that the witness referred to certain deeds which were not set out as ex-

Ohio St. 482, 42 N. E. 256. And a party is not in the power of attester if he denies execution. Morton v. Heidorn, 135 Mo. 608, 37 S. W. 504; Webster v. Vorty, 194 Ill. 408, 62 N. E. 907.

⁵¹ Kelley v. Weber, 9 Abb. N. C. (N. Y.) 62.

⁵² Note by Mr. Austin Abbott in 9 Abb. N. C. (N. Y.) at page 65; citing Weeks on Dep. 358-361.

⁵³ Weidner v. Conner, 9 Pa. St. 78.

⁵⁴ Petrikin v. Collmer, 7 Watts & S. (Pa.) 392; Dodge v. Israel, 4 Wash. C. C. (U. S.) 323. See

Swisher v. Swisher, Wright (Ohio), 755. But it has been held that, where a witness was examined on interrogatories as to identity and contents of certain books referred to in the interrogatories as exhibits and they were identified according to exhibit marks on them, they will be considered in evidence before the master, though not so marked by him. Jones v. Buddington, 35 Fla. 121, 17 South. 399.

⁵⁵ Susquehanna etc. R. Co. v. Quick, 61 Pa. St. 328, 339.

hibits, when it appears that the deeds are not under the control of the witness, are not the foundation of the action, and that there is no dispute as to their contents.⁵⁶ It has been held no objection to a deposition that the bill of items of the plaintiff's account annexed thereto, and sworn to by the deponent, is in the handwriting of the plaintiff's attorney; nor that such bill is described in the deposition as "marked A," when it is not so marked,—there being no other account annexed.⁵⁷ It seems that, where the instrument has been identified by the commissioner, by sufficient marks, it is not a fatal objection that it was not *physically attached* to the deposition, provided it was enclosed under seal, in the same package with the deposition, and thus returned by the commissioner.⁵⁸ Moreover, it has been said that, where papers alleged to have been exhibited to the witness at the giving of his deposition, are not sufficiently identified by the officer, they may be identified by parol evidence.⁵⁹

§ 826. [Continued.] Exhibits, where there are Different sets of Interrogatories.—Where there are different sets of interrogatories, drawn for the purpose of taking the depositions of different witnesses, it is not, in the nature of things, possible that the same exhibit should accompany each. In such a case, it has been held sufficient that it be attached to one set of the interrogatories, and referred to by proper descriptions in the others; and it has been held that, if so referred to, and properly identified by the witness, and certified by the commissioner, this will be sufficient.⁶⁰

§ 827. Right of Inspection.—There is a confusion in the judicial holdings as to whether the opposite party has the right to inspect a document which is produced and proved, before it is formally offered in evidence. According to one view, a party has no right to the inspection of papers which are proved by a witness on the stand, unless they are offered in evidence,—although the act of producing the papers and proving them may be a species of forensic thimble-rigging, devised to prejudice the jury.⁶¹ Under this view, the mere fact that the signature to a paper is verified by a witness

⁵⁶ Lyon v. Barrows, 13 Iowa, 428.

⁵⁷ Marvin v. Raygan, 12 Cush. (Mass.) 132.

⁵⁸ Humphries v. Dawson, 38 Ala. 199.

⁵⁹ Dailey v. Green, 15 Pa. St. 118, 127.

⁶⁰ Moberly v. Leopahrt, 51 Ala. 587; on former appeal, where the same point was considered, 47 Ala. 257.

⁶¹ Houser v. St., 93 Ind. 228.

in court, does not entitle the opposite party to inspect the paper, or to cross-examine the witness upon it, until the paper has been put in evidence; although it is irregular for the counsel to ask a witness any question concerning the document which he does not intend to offer in evidence.⁶² Nor are the English holdings quite uniform on this question. It was ruled by Mr. Chief Justice Erle at *nisi prius*, that the mere fact that counsel, in cross-examining a witness, puts a document into the witness' hand, and asks him whether it is in his handwriting, does not entitle the opposite counsel to see the document.⁶³ On the contrary, it was ruled by the Court of Common Pleas that when, on cross-examination of a witness for the plaintiff, the defendant's counsel puts a document into his hands, and proves out of his mouth that it is *in the plaintiff's handwriting*, the plaintiff's counsel has a right to see it at once, for the purpose of identifying it and re-examining the witness upon it;⁶⁴ and it was conceded by Mr. Chief Justice Erle, in the case first cited, that the opposite counsel has the right to inspect it before the cross-examining counsel proceeds to found any question upon it.⁶⁵ But, where a witness, on cross-examination, proves the handwriting of the opposite party to a paper, the counsel for the party has no right to see such paper, to enable him to found an examination upon it, as to whether it was really the writing of his client or not.⁶⁶ The rule, as laid down by Lord Denman, C. J., is that if the cross-examining counsel puts a paper into the witness' hand and questions him upon it, *and anything comes of those questions*, the counsel for the opposite party has the right to see the paper, and to re-examine the witness in respect of it; but if the cross-examination, founded on the paper, entirely fails, and nothing comes of it, the opposite counsel has no right to see the paper.⁶⁷ Where a witness uses a document for the purpose of *refreshing his memory*, it is the right of the opposing counsel to inspect the document; but this right may be *limited to that portion* of the document which has been thus used by the witness. Thus, it was ruled by Vice-Chancellor Malins, that on the cross-examination of a witness, the cross-examining counsel is not entitled to inspect the whole of a diary used by the witness

⁶² *Styles v. Allen*, 5 Allen (Mass.), 320.

⁶³ *Cope v. Thames Dock Co.*, 2 Car. & K. 757.

⁶⁴ *Peck v. Peck*, 21 Law Times (N. S.) 670, 18 Week. Rep. 295.

⁶⁵ *Cope v. Thames Dock Co.*, supra.

⁶⁶ *Russell v. Rider*, 6 Car. & P. 416.

⁶⁷ *Reg. v. Duncombe*, 8 Car. & P. 369.

to assist his memory, but only such portions of it as refer to the subject-matter of the suit.⁶⁸

§ 828. [Continued.] **Illustration.**—In a bastardy proceeding the prosecuting attorney handed to the relatrix, who was testifying as a witness, two letters, and asked her if she knew the handwriting. The defendant's counsel objected to the question, and demanded an inspection of the letters. The court overruled the objection, and refused the defendant an inspection of the letters at that time. The relatrix then testified that the letters were written by the defendant. The prosecuting attorney then, in answer to a question by the court, stated that he intended to offer the letters in evidence. They were then, by order of the court, delivered to the defendant for inspection. Nevertheless, the prosecuting attorney did not offer them in evidence. It was held that in this there was no error sufficient to reverse a judgment. The court, speaking through Hammond, J., said: "In the conduct of a trial, there are many trifling occurrences, bearing favorably or unfavorably upon the one or the other of the parties, which are difficult for the trial court, and beyond the power of this court to correct. Fortunately, however, for litigants, the ingenuity of counsel upon the one side, is usually counterbalanced by the tact of counsel on the other, so that the substantial rights of parties are generally preserved. It is only where there has been manifest injustice occasioned by a proceeding, in which the power of the trial court for correction has not been properly used, that this court may intervene by reversal."⁶⁹

§ 829. [Continued.] **Where Document is Produced on Notice.**—A party who gives notice to produce a paper in evidence, must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law, and obtain from his adversary the inspection of any paper or document he may choose to demand. It has been reasoned that notice to produce a paper requires it to be produced in evidence, and, when once called for and produced, it is in evidence, as it could not be called for on any other terms.⁷⁰ This is illustrated by a case where the defendants gave notice to the plaintiffs to produce a letter, on the trial, which, when it came on, they refused to do, unless the defendants would

⁶⁸ *Burgess v. Bennett*, 20 Week. Rep. 720; ante, § 402, subsec. 2.

⁷⁰ *Lawrence v. Van Horne*, 1 Caines (N. Y.), 276, 285.

⁶⁹ *Houser v. St.*, 93 Ind. 228, 230.

engage to read it in evidence. This they declined acceding to, without being first permitted to inspect it, and, on this being denied, the trial court ruled that the inspection could not be demanded, except on the terms which the plaintiff wished to impose. It was held that this ruling was correct.⁷¹ Where a witness, in obedience to a subpoena *duces tecum*, attends in court, and, after being sworn, produces papers which he thereupon places in the custody of the court.—either party thereafter has the same right, which he had when the witness was present, to insist that the papers shall be placed at his disposal for use as evidence in the cause.⁷²

§ 830. **Right to Seal up Pages which are not Pertinent.**—It is said by Dr. Greenleaf: “Where books are to be produced, the defendant will have leave to seal up and conceal all such parts of them as, according to his affidavit, previously made and filed, do not relate to the matters in question.”⁷³ It is the uniform practice of courts to permit a party producing his books to seal up those pages which do not relate to the subject of the litigation.⁷⁴ Upon a like principle, it has been held proper for the court to make an order placing the books which contain the accounts which are pertinent to the issue, in the possession of the clerk of the court, limiting the inspection to certain pages containing the pertinent accounts, and giving the defendant liberty to seal up the remaining parts; which order further recited that, it appearing that the journal entries were so intermingled with other matters as that inspection of them would expose such outside matters, the defendant might present in court a *verbatim* copy of all the journal entries relating to matters between the parties, giving the page where entered, such copy to be verified by affidavit and the certificate of the clerk of the court, upon an actual examination and comparison, provided the plaintiff should so require. It was held that this was proper.⁷⁵

§ 831. **Cross-examining as to Contents of Written Documents.**—
(1.) *Document must be produced.*—As a general rule, a witness cannot, upon cross-examination, even for the purpose of discredit-

⁷¹ Ibid.

⁷² Hoyt v. Jackson, 3 Dem. (N. Y.) 388.

⁷³ 3 Greenl. Ev., § 301.

⁷⁴ Dias v. Merle, 1 Paige (N. Y.) 494; Gerard v. Penswick, 1 Swanst.

533; Pyncheon v. Day, 118 Ill. 9, 15. The fact of an account book being in evidence does not make its entire contents admissible. Peck v. Pierce, 63 Conn. 310, 28 Atl. 524.

⁷⁵ Pyncheon v. Day, 118 Ill. 9.

ing him, be asked as to the contents of a written paper which is neither produced, nor its absence accounted for.⁷⁶ Thus, a witness cannot be cross-examined as to what he swore to in an affidavit, unless the affidavit is produced.⁷⁷ It has been held that a witness cannot be asked on cross-examination, he not having been interrogated as to the point on direct examination, whether his name was not written in the book of a certain association.⁷⁸ But it has been held that a witness, on cross-examination, may admit not having mentioned a fact on a former examination, although that examination is in writing and not produced.⁷⁹ So it has been ruled that, in order to explain or contradict a statement made by a party as to an alteration in a will under which he claims, the probate of the will is not sufficient evidence, but the original document itself should be put in the hands of the witness.⁸⁰

(2.) *Aliter where the Witness is a Party.*—But the foregoing rule does not apply where the witness on cross-examination is the opposite party to the action. Thus, a party may be cross-examined as to the contents of an affidavit which is not put in,⁸¹ or as to whether he has read a letter of a certain date, and in certain terms.⁸² It was also ruled by the same learned judge⁸³ that the rules of a society to which the defendant belonged, proved by the cross-examination of one of the witnesses, are evidence against him.⁸⁴ So, it has

⁷⁶ Macdonnell v. Evans, 11 C. B. 930, 21 L. J. C. P. 141, 16 Jur. 103. It has been ruled at nisi prius, that the defendant cannot, in the course of the plaintiff's evidence, cross-examine the plaintiff's witnesses as to the contents of written documents, although notice has been given to the plaintiff to produce them, and he refuses to produce them at that stage of the cause. Sideways v. Dyson, 2 Stark. 49; Graham v. Dyster, 2 Stark. 21; O'Riley v. Clampt, 53 Minn. 539, 55 N. W. 740. If one uses a paper to refresh his memory but it is not put in evidence, court may refuse to require him, on cross-examination, to read parts therefrom. Chattanooga R. & C. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853.

⁷⁷ Sainthill v. Bound, 4 Esp. 74. But he may be asked, without the affidavit being produced, whether he swore its contents were true. Harris v. Terry, 98 N. C. 131, 3 S. E. 745.

⁷⁸ Darby v. Ouseley, 1 Hurl. & N. 1, 2 Jur. (N. S.) 497, 25 L. J. Exch. 227.

⁷⁹ Ridley v. Gyde, 1 Mood. & Rob. 197.

⁸⁰ Brown v. Hughes, 1 Fost. & Fin. 299, per Channell, B.

⁸¹ Sladden v. Sergeant, 1 Fost. & Fin. 322.

⁸² Ireland v. Stiff, 1 Fost. & Fin. 340.

⁸³ Willes, J.

⁸⁴ Minns v. Smith, 1 Fost. & Fin. 318.

been ruled that a party to an action, called as a witness in his own behalf, may be asked, on cross-examination, as to the contents of a letter which he has written, without producing the letter.

(3.) *When the Document itself Evidence.*—When a book is put into the hands of a witness to *refresh his recollection*, and questions are asked upon it on cross-examination, the book is not thereby made *evidence*, for the party producing it, though it may be such for the cross-examining party.⁸⁵ Where a document is put into the hands of a witness for the purpose of founding the cross-examination upon it, it does not thereby become evidence for the party whose witness is thus cross-examined.⁸⁶ A good illustration of this is found in a case where the defendant's counsel, on cross-examination of the plaintiff, read a letter from him, which, in effect, overthrew his case, and then submitted that there was no evidence for the jury; but the court held that, as this letter was the defendant's and not the plaintiff's evidence, it could not be looked to as a part of the plaintiff's case in determining this question.⁸⁷

(4.) *Witness asked whether Representation in Writing or Parol.*—In view of the foregoing rules, and in view of the further rule that the contents of a writing which can be produced are not provable by parol, when a witness is asked on cross-examination whether he has made representations of a particular nature, if he answers in the affirmative, he should next be asked whether he made the representation by parol or in writing.⁸⁸

§ 832. **Cross-examining Witness as to the Contents of Letter claimed to have been written by him.**—It is said by Prof. Greenleaf: "The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it; for the contents of every written paper, according to the ordinary and well established rules of evidence,

⁸⁵ *Payne v. Ibbotson*, 27 L. J. Exch. 341. See ante, § 402, subsec. 4; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *Baum v. Reay*, 96 Cal. 462, 29 Pac. 117.

⁸⁶ *Collier v. Nokes*, 2 Car. & Kir. 1012.

⁸⁷ *Rawlings v. Chandler*, 9 Exch. 687.

⁸⁸ *The Queen's Case*, 2 Brod. & Bing. 284, 292.

are to be proved by the paper itself, and that alone, if in existence. But it is not required that the whole paper be shown to the witness. Two or three lines only of a letter may be exhibited to him, and he may be asked whether he wrote the part exhibited. If he denies, or does not admit, that he wrote that part, he cannot be examined as to the contents of such letter, for the reason already given; nor is the opposite counsel entitled in that case to look at the paper. And if he admits the letter to be his writing, he cannot be asked whether statements, such as counsel may suggest, are contained in it; but the whole letter must be read as the only competent evidence of that fact.”⁸⁹

§ 833. [Continued.] Illustration of a Violation of this Rule.— In a case in Iowa, in the course of the cross-examination of the plaintiff, her attention was called to certain letters said to have been written and signed by her. As to one of those letters she was asked: “Examine that writing and signature, and see if it is your writing or not.” Thereupon her counsel requested “that the witness have the privilege of examining the contents of the letter, before being required to answer if it was her signature.” This request was refused, and the plaintiff excepted. The witness answered that she would not be positive that the signatures to the letters were her signatures. She stated that she thought at one time that the signature to one of the letters was her signature. Thereupon counsel for defendant proceeded to read certain clauses of the letters, and asked the witness if she had written them. Questions like the following were put to her: “Did you, in the same letter, say to him: ‘Do not let them draw anything out of you that will conflict with the statement I give you;’ ‘No one to love them, no one to caress them,’—Did you write that?” The counsel for the plaintiff protested against this mode of examining the witness, for the reason that the letters were the best evidences of their contents, and that the witness should not be compelled to give her recollection of what she had written when the letters which she had written were in court. The court overruled the objection and permitted the counsel to proceed, and the witness answered all the interrogatories to the effect that she did not remember. It was held that in so ruling the court erred. The course of examination was a plain vio-

⁸⁹ 1 Greenl. Ev., § 463; quoted with approval in *Glenn v. Gleason*, 61 Iowa, 28, 34, 15 N. W. 659.

lation of the rules above drawn from the text of Prof. Greenleaf. The course pursued tended to embarrass and confuse the witness and prejudice her in the minds of the jury, and the error was not cured by the fact that the letters were subsequently read in evidence.⁹⁰

§ 834. **Use of Document for one Purpose does not make it Evidence for all Purposes.**—The fact that a party uses a document, *e. g.*, an account book, for the purpose of fixing the date, does not make it competent evidence against him for all purposes.⁹¹

§ 835. **Whole of a Correspondence.**—By analogy to a rule already stated in respect of conversations,⁹² if a portion of a correspondence is given in evidence, the other party is entitled to call for the remaining portion of it.⁹³ The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder, as tends to explain or qualify what has been received, and that is to be deemed a qualification which rebuts and destroys the inference to be derived from, or the use to be made of the portion put in evidence.⁹⁴ A party may give in evidence against his adversary any letter of his, containing admissions material to the issue, without putting in the whole of the correspondence between them. If the letter, which he puts in evidence, shows that it is *in reply to another letter*, he may doubtless put that letter in evidence also, as tending to explain the former.⁹⁵ But he is not bound to do so; he may leave it to his ad-

⁹⁰ Glenn v. Gleason, 61 Iowa, 28, 33, 15 N. W. 659.

⁹¹ Abbott v. Pearson, 130 Mass. 191. Compare Shaw v. Stone, 1 Cush. (Mass.) 228.

⁹² Ante, § 412.

⁹³ Livermore v. St. John, 4 Rob. (N. Y.) 12; Jones v. Grantham, 80 Ga. 472, 5 S. E. 764.

⁹⁴ Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274, 284; Gildersleeve v. London, 73 N. Y. 609 (applying the rule in the construction of a pleading). Compare Rouse v. Whited, 25 N. Y. 170; The Queen's Case, 2 Brod. & Bing. 297, 298; Prince v. Samo, 7 Ad. & El. 627. In

Rouse v. Whited, *supra*, the question, as it relates to conversations, is examined at length and the conclusion is reached that where one party puts a *part* of a conversation in evidence, this does not entitle the other party to demand the *whole conversation*, but only so much of it as is *relevant to the issues*. Approving Prince v. Samo, *supra*, and denying on this point the Queen's Case, *supra*. See also Forrest v. Forrest, 6 Duer (N. Y.), 126, 127; Koyer v. White 6 Tex. Civ. App. 381, 25 S. W. 46; Crawford v. Roney, 126 Ga. 763, 55 S. E. 499.

versary, on cross-examination or otherwise, to offer any competent evidence of the rest of the correspondence which he desires.⁹⁶ In considering this question it was said by Mr. Chief Justice Gray: "When a particular communication, which refers to a previous one, is not introduced as containing the terms of a contract, we see no more reason for obliging the party offering it to put in the previous communication also, when the communications are written, than when they are oral. In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may, if he pleases, introduce the first also; and if he does not, the other party may. The actual custody of the papers does not affect the question which party shall introduce them, but only the steps to be taken to compel their production."⁹⁷ In another American jurisdiction an opposing view has been expressed, that the party seeking to avail himself of the letter of his adversary as evidence, is bound to call for and put in evidence the letter to which it is a reply, as a part of his own evidence,—the court saying: "However ingenious and plausible the reason assigned in the English authorities, it seems to us, the general principle adopted by the American authors on evidence, that the whole admission must be taken together, generally requires the prior letter to be produced or accounted for, before the answer can be properly admitted in evidence; though we do not decide it to be always the rule, and without exception; for the character of the letter and the case may make the production of the first unnecessary. The rule in chancery that a party against whom an answer is produced may claim to have the whole bill, as well as the answer read as part of his adversary's case, upon the same ground that where one proves *answers* in conversation against a party, he may insist on having the *question* to which he made the replies, put in evidence,

⁹⁶ *Trichet v. Hamilton Ins. Co.*, 14 Gray (Mass.), 456.

⁹⁷ *Stone v. Sanborn*, 104 Mass. 319, 324; *Barrymore v. Taylor*, 1 Esp. 326; *De Medina v. Owen*, 3 Car. & K. 626. Contrary to the above *Pollock, C. B.*, ruled in *Walson v. Moore*, 1 Car. & K. 626, that the party offering the reply in evidence should put in both letters or neither; but this was supposed by

Mr. Chief Justice Gray to be nothing more than an exercise of *discretion* as to the *order of proof*. *Stone v. Sanborn*, *supra*. In *Crery v. Pollard*, 14 Allen (Mass.), 284, the reply was held admissible, as evidence of notice to the party to whom it was addressed, without producing the letter to which it was a reply.

⁹⁷ *Stone v. Sanborn*, 104 Mass. 319, 325.

is, we think, a forcible illustration and correct application of the principle."⁹⁸

§ 836. **Assailing the Integrity of one's own Documentary Evidence.**—After introducing a document in evidence, without any qualification, the party introducing it cannot be permitted to impeach its integrity, or assail the correctness of its statements.⁹⁹

§ 837. **Effect of putting in Evidence Affidavit of Opposing Party.**—A party is not bound by all the statements contained in the affidavit of his opponent, although he himself puts it in evidence for a particular purpose; but he may contradict that portion of it which works against him. Such would be the rule if he were to put his opponent upon the stand; he would not be estopped by his testimony, but would be at liberty to show the facts to be contrary thereto.¹ But a party cannot get in his own affidavit, by putting in evidence the affidavit of his opponent, in which his own affidavit is referred to and contradicted.²

§ 838. **Telegraphic Dispatches.**—The telegraphic message which is *sent* and not the one which is *received* and transcribed at the other end of the line, is the original. The latter is a copy, and carries with it none of the qualities of primary evidence.³ Where

⁹⁸ *Simmons v. Haas*, 56 Md. 153, 162; citing 1 Greenl. Ev., § 201, note 1.

⁹⁹ *Maclin v. Insurance Co.*, 33 La. Ann. 801.

¹ *Mather v. Parsons*, 32 Hun (N. Y.), 339, 344. Compare *Hunt v. Fish*, 4 Barb. (N. Y.) 324; ante, § 515.

² *Degraff v. Hovey*, 16 Abb. Pr. (N. Y.) 120. In this case it is erroneously said that, after putting in his opponent's affidavit he *could not contradict it*, having made it his own testimony. See ante, § 515. As to the *conclusiveness* of an affidavit used in judicial proceedings, see *Maybee v. Sniffen*, 2 E. D. Smith (N. Y.), 1.

³ *Matteson v. Noyes*, 25 Ill. 591; *Riordan v. Guggerty*, 74 Iowa, 688,

39 N. W. 107. This question is according to the question of substantive law involved. If one sues a telegraph company for a delayed delivery, the dispatch delivered is that to which the issue refers. *Western U. T. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639. So where plaintiff sued defendant for services, telegram of defendant received by plaintiff. *Anhauser-Busch B. Assn. v. Hutmacher*, 127 Ill. 652, 21 N. E. 626. In Massachusetts it is said the addressee's dispatch is the original unless a rule of law makes the sender's dispatch binding. *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 107. In South Dakota it has been held addressee's copy could be admitted upon showing telegraph company's rules required destruction

it is material to prove the sending and delivery of a telegraphic message, the usual course is to show the delivery of the original message at the office from which it was to be telegraphed, and then to show that it was transmitted and delivered at the place of its destination. But even where the original is produced, its authenticity must be established, either by proof of the handwriting, or by other evidence of its genuineness. It has been held that proof of the destruction of all the messages sent from the sending office, on the day on which the particular message was sent, is sufficient foundation to let in secondary evidence of its contents. But this secondary evidence can only be admitted, on proof that the copy offered is a correct transcript of the message actually authorized by the party sought to be affected by its contents.⁴

§ 839. **Dispatch received not Evidence of Dispatch sent.**—The fact that a telegraphic dispatch was *delivered* to a man on a certain day at a distant place, is not proved by producing what purports to be a telegraphic *reply* signed by him, received at the sending office, very soon after on the same day, and addressed to the sender of the former dispatch;⁵ for, although men, in the ordinary affairs of life, constantly act upon such evidence, yet it was said that the only way to prove such a message in a court of law, is to summon both the intermediate agents or bearers of the message,—that is, the agent of the telegraph company receiving and transmitting the message, and the agent at the end of the transit, receiving and delivering it,—and by them proving its transmission and delivery. Anything short of this would be to rely upon hearsay evidence of the loosest character.⁶

§ 840. **Book Entries on Proof that they were truly made.**—Upon a principle very closely allied to that which permits the use by witnesses of memoranda to refresh their memories,⁷ is a principle which admits the contents of books of accounts, upon proof

of originals after six months. *Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151.

⁴ *Smith v. Easton*, 54 Md. 138, 145; *Drexel v. True*, 74 Fed. 12, 20 C. C. A. 265.

⁵ *Howley v. Whipple*, 48 N. H. 487. But a letter from sender repeating the telegram will suffice, it being a

reply telegram to a letter. *Thorp v. Philbin*, 15 Daly, 155, 3 N. Y. S. 939. See also for foundation of letter, *Peycke v. Shinn*, 76 Neb. 364, 107 N. W. 386; *Purinton v. Purinton*, 101 Me. 250, 63 Atl. 925.

⁶ *Howley v. Whipple*, *supra*.

⁷ *Ante*, §§ 398, *et seq.*

that the books were truly kept and the entries truly made, although the witness so deposing cannot testify, by reason of the lapse of time, to the truth of the particular entries. Originally, it seems, such entries were only admissible after the *death* of the person whose books they were.⁸ Other circumstances, such as *insanity* or *absence* beyond the jurisdiction, have been regarded as tantamount to death.⁹ In such cases the books are admitted on proof of the handwriting of the party. But where the party is *alive*, produced as a witness, and is not able to recollect the fact recorded in the books, independently of the entry, after referring to it, the principle has been extended so as to admit the writing in evidence, upon preliminary proof of the single additional fact that it was truly made.¹⁰

• § 841. **Use of the Instrument which is the Foundation of the Action.**—While the defendant, in an action brought upon a written instrument, is entitled to crave oyer of it under the common-law practice, or to an inspection of it under statutes, he cannot claim the right to have it delivered to him for the purpose of being annexed to a commission to take depositions, in order that it may be inspected by his witnesses, who reside out of the State. There is no precedent for thus placing the instrument which is the foundation of the action, and which belongs to the plaintiff, within the power of the defendant.¹¹ Witnesses may be examined on a commission as to an original paper, by annexing a copy to the interrogatories, for the purpose of reference, description and identification, and by producing the original on the examination of the witness for inspection and identification. It is not necessary that the

⁸ Price v. Earl of Torrington, 1 Sm. L. Cas. (6 Am. ed.) 390; Doe v. Turford, 3 Barn. & Ad. 898; Pool v. Dicus, 1 Bing. N. C. 649; Welsh v. Barrett, 15 Mass. 380; Brewster v. Doane, 2 Hill (N. Y.), 537; Nicholas v. Webb, 8 Wheat. (U. S.) 326.

⁹ Chicago etc. R. Co. v. Ingersoll, 65 Ill. 399.

¹⁰ 1 Greenl. Ev., § 115, note 4, § 120, note 2; Merrill v. Ithaca etc. R. Co., 16 Wend. 587; Bank of Monroe v. Culver, 2 Hill (N. Y.), 532; Cole v. Jessup, 10 N. Y. 96; Bunker v. Shed, 8 Metc. (Mass.) 150; Farmers' etc. Bank v. Boraef,

1 Rawle (Pa.), 152; Smith v. Lane, 12 Serg. & R. 84; Redden v. Spruance, 4 Har. (Del.) 265, 269; Bulard v. Wilson, 5 Mart. (N. s.) (La.) 196, 3 Cond. 505; Spann v. Baltzell, 1 Fla. 302, 321; Underwood v. Parrott, 2 Tex. 168, 176; Humphreys v. Spear, 15 Ill. 275; Lawrence v. Stiles, 16 Bradw. (Ill.) 489; Miller v. Shay, 145 Mass. 163, 13 N. E. 468; Chicago Lumbering Co. v. Hewitt, 64 Fed. 314, 12 C. C. A. 129; Keith v. Wells, 14 Colo. 321, 23 Pac. 991.

¹¹ Butler v. Lee, 19 How. Pr. (N. Y.) 383, 32 Barb. (N. Y.) 75.

original be annexed to the interrogatories. "A party is never called upon to risk the loss of valuable original papers, by annexing them to a commission to be transmitted to a distant State or country for execution." ¹²

§ 842. Duplicate Evidence of Indebtedness.—It seems that, where the evidence of an indebtedness is in duplicate, so that an action can be supported upon either instrument, it is not necessary to sue upon both, but an action upon one will be a bar to an action upon the other; and hence that, in an action upon one, it will not be necessary to introduce the other in evidence. ¹³

§ 843. Objections to Documentary Evidence must be Specific.—It is but a specification under the rule ¹⁴ already stated, to say that, when a document is offered in evidence and objected to, the objection must distinctly state the grounds on which the objector chooses to stand. The reason is that the opposite party may have opportunity of curing the defect, if there be one. ¹⁵

¹² *Commercial Bank v. Union Bank*, 11 N. Y. 203, 209.

¹³ See *Skinner v. Skinner*, 77 Mo. 148, 155.

¹⁴ *Ante*, § 693.

¹⁵ *Garner v. St.*, 5 Lea (Tenn.), 213, 218; *Hunt v. U. S.*, 61 Fed. 795, 10 C. C. A. 74; *Weber v. Mick*, 131 Ill. 520, 23 N. E. 646; *Newton v. Tyner*, 128 Ind. 466, 28 N. E. 59.

CHAPTER XXVII.
OF NATURAL EVIDENCE.

ARTICLE I.—INSPECTION OF PERSONS AND THINGS IN COURT: TRIAL
BY INSPECTION.

ARTICLE II.—VIEW OF PLACES AND THINGS OUT OF COURT.

ARTICLE I.—INSPECTION OF PERSONS AND THINGS IN COURT: TRIAL
BY INSPECTION.

SECTION

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- 872. When Court will not assume Labor of Examining Natural Evidence.

§ 850. In What Cases formerly Permitted.—*Trial by inspection* or examination was an ancient and well recognized mode of determining *collateral questions* which arose in legal proceedings, and was frequently resorted to for the purpose of determining the *chief issue* in an action at law, in which last case the inspection was by the judge or judges, who thereupon proceeded to give their judgment

without the intervention of a jury. This mode of trial seems to have been thus used where the question of *non-age* was in dispute, as in the case of a suit to reverse a fine for the non-age of the cognizor.¹ It was also resorted to to determine questions of *personal identity*,—as where it was pleaded in abatement that the plaintiff was dead and that the pretended plaintiff was simulating a deceased person;² in cases of *idiocy*, where the lord chancellor determined the question by an inspection of the person of the alleged idiot;³ on an *appeal of mayhem*, where the issue joined was mayhem or no mayhem, in which case the decision was by the court on inspection;⁴ in actions of *trespass for mayhem*,⁵ or for an *atrocious battery*,⁶—in which cases the judges would, upon an inspection, *increase the damages* at their discretion,—a practice which has gone wholly out of use in modern times, though it is common for courts to require a *remittitur* of damages as a ground for refusing a *new trial*.

§ 851. **In what Cases still Commonly Granted.**—In modern procedure, this mode of trial is regularly resorted to in the following cases:—

1. In criminal trials, where the defendant, a female, having been tried and found guilty, pleads her *pregnancy* in stay of execution.⁷

2. In cases in *chancery*, where an inspection became necessary in order to determine whether an heir presumptive or a devisee for life, in tail or in fee, should be admitted to the enjoyment of an estate.⁸

¹ 3 Bla. Com. 332; 9 Co. Rep. 31.

² 3 Bla. Com. 332; 9 Co. Rep. 30.

³ 3 Bla. Com. 332; 9 Co. Rep. 31.

⁴ 3 Bla. Com. 332; 2 Roll. Abr. 578. It should be added that appeals of mayhem were abolished by statute. 59 Geo. III., ch. 46.

⁵ 3 Bla. Com. 332; 1 Sid. 108.

⁶ 3 Bla. Com. 332; Hardi. 408.

⁷ Reg. v. Baynton, 17 How. St. Tr. 589, 631. Compare Reg. v. Hunt, 2 Cox C. C. 261. See 2 Hawk. P. C., ch. 51, § 10; Bish. Crim. Proc., § 1323; 1 Chit. Crim. L. 759, 761; 3 Inst. 17; 1 Hale P. C. 368; 2 Hale P. C. 407, 413. In recent times this has been regarded, it would seem, ground for an application to the home secretary, in England, for a

respite of the sentence. Reg. v. Hunt, supra. The plea of pregnancy merely operates to *delay* sentence; it is not a ground for a new trial, since it does not touch the question of guilt or innocence. Holman v. St., 13 Ark. 105, 111. As to the meaning of the term "quick with child," which commonly arises in such cases, see Bish. Stat. Crim. § 45; Rex v. Phillips, 3 Camp. 73, 76; Com. v. Reid, 1 Pa. Leg. Gaz. Rep. 182; Reg. v. Wycherley, 8 Carr. & P. 262; St. v. Cooper, 22 N. J. L. 52, 57; Rex v. Russell, 1 Mood. C. C. 356, 360; St. v. Smith, 32 Me. 369; St. v. Emerich, 13 Mo. App. 492.

⁸ 1 Bla. Com. 456; Lord Belmore

3. In proceedings for *divorce* or nullity of marriage, on the ground of impotency or sexual incapacity.⁹

4. In proceedings to lay out *roads* and to assess damages, where land is taken for public uses; in the former of which cases a jury of view is ordered under statutory regulations, and in the latter it is the common practice for the jurors or commissioners to view the *locus in quo*.¹⁰

5. In criminal or civil trials where, under statutory authority, and sometimes without it, the court may order a *view* by the jury, of the place where the alleged crime was committed, or the features of which are involved in the controversy.¹¹

6. In actions for *personal injuries*, where it becomes necessary to order an examination of the body of the person injured, for the purpose of showing the extent of his injuries.¹²

7. In cases of *disputed identity*,¹³ and in other cases hereinafter explained.

8. In addition to this, it is the common practice in criminal trials to produce for the inspection of the jury, the *weapon* with which the crime was committed,¹⁴ any clothing or other articles containing *blood-stains*,¹⁵ or, in general, any material object capable of being produced in the court-room and exhibited to the jury, the

v. Anderson, 4 Bro. C. C. 90; Ex parte Aiscough, 2 P. Wms. 591.

⁹ 2 Bish. Mar. & Div., §§ 590 et seq.; Devenbrough v. Devenbrough, 5 Paige (N. Y.), 554, 557; Briggs v. Morgan, 3 Phillimore, 325, 1 Eng. Ecc. 408; 2 Hagg. Con. 324; Norton v. Seton, 3 Phillimore, 147; Shafto v. Shafto, 28 N. J. Eq. 34; Brown v. Brown, 1 Hagg. Ecc. 523, 3 Eng. Ecc. 229; Anon., Dean & S. 333; Aleson v. Aleson, 2 Lee, 576; Newell v. Newell, 9 Paige (N. Y.), 25; Anon., 35 Ala. 226; LeBarron v. Le Barron, 35 Vt. 365; Pollard v. Wybourne, 1 Hagg. Ecc. 725; Owen v. Owen, 4 Hagg. Ecc., 261; B. v. L., L. R. 1 Prob. & Div. 639; T. v. M., L. R. 1 Prob. & Div. 31; H. v. H., 3 Swab. & Tr. 517, 592, 33 L. J. (P. M. & A.) 159, and 34 L. G. (P. M. & A.) 12; Harrison v. Sparrow,

3 Curt. Ecc. 1, 7 Eng. Ecc. 357, sub nom. Harrison v. Harrison, 4 Moore P. C. 96; S. v. E., 3 Swab. & Tr. 240; M. v. B., 3 Swab. & Tr. 550; H. v. C., 1 Swab. & Tr. 605; F. v. D., 4 Swab. & Tr. 86; T. v. D., L. R. 1 Prob. & Div. 127; U. v. J., L. R. 1 Prob. & Div. 460; L. v. H., 4 Swab. & Tr. 115, 118; W. v. H., 2 Swab. & Tr. 240; Deane v. Aveling, 1 Rob. Ecc. 279; Grimbaldston v. Anderson, cited 3 Phillimore, 155, 1 Eng. Ecc. 385.

¹⁰ See the next article in this chapter.

¹¹ See the next article in this chapter.

¹² Post, §§ 858, et seq.

¹³ Post, § 857.

¹⁴ McDonel v. Stare, 90 Ind. 327.

¹⁵ Com. v. Twitchell, 1 Brewst. (Pa.) 561, 563.

physical characteristics of which speak in evidence, in connection with the oral evidence, concerning the alleged crime.¹⁶

§ 852. **In Cases of Alleged Pregnancy.**—Where it became necessary to have an inspection of the body in cases of alleged pregnancy, this inspection, according to the ancient and familiar practice, was made by a *jury of matrons*, under a writ denominated in the ancient law *de ventre inspiciendo*.¹⁷ This mode of trying the fact has been condemned by modern medical authority,¹⁸ on the most unanswerable grounds, supported by historical instances.¹⁹ It is quite too plain for argument that, in many cases, a jury of old women might not be able to distinguish a case of pregnancy from a case of dropsy, and that their conclusions would bear no comparison for accuracy or probability with the conclusions of a commission of expert surgeons. Accordingly, we find that modern statutes have, in some instances, substituted for this inadequate and insufficient mode of trial, a trial by a jury, composed, in whole or in part, of medical men.²⁰

§ 853. **Inspection of the Body in Proceeding for Divorce or Nullity of Marriage.**—Inspections of this kind are always indelicate and distressing to the feelings of the parties, and are, therefore, never ordered except when clearly necessary.²¹ Nevertheless, it is settled that the courts are not at liberty to decline to order such an inspection on the ground of indelicacy alone. "Courts of law,"

¹⁶ See, for instance, *Com. v. Brown*, 121 Mass. 69; *People v. Gonzales*, 35 N. Y. 49; *Gardner v. People*, 6 Park. Cr. R. (N. Y.) 155; *St. v. Modecal*, 68 N. C. 207; *St. v. Graham*, 74 N. C. 646; post, § 870.

¹⁷ 1 Beck, Med. Jur., ch. 6; *Cro. Eliz.* 566; *Ex parte Wallop*, 3 Bro. C. C. 90; *Ex parte Aiscough*, 2 P. Wms. 591; *Ex parte Bellett*, 1 Cox Chan. Cas. 297; *Marston v. Roe*, 8 Ad. & El. 14. The latest case in England of resort to a jury of matrons was in 1879 before Denman, J., in which he, in effect, directed them to accept the testimony of expert witnesses. 14 Law Jour. 439.

¹⁸ Beck, Med. Jur. 203, 205, et seq.; Taylor's Med. Jur. 154, et seq.

¹⁹ In *Reg. v. Wycherley*, 8 Carr. & P. 262, a jury of matrons had the good sense to ask for the assistance of a surgeon.

²⁰ 2 N. Y. Code Cr. Proc. 1897, § 500; Rev. Stat. Mo. 1909, § 5171. The mode of procedure in the case of a writ *de ventre inspiciendo*, executed by a jury of matrons, is described at length in the modern case of *Reg. v. Wycherly*, 8 Carr. & P. 262, A. D. 1838. See also *St. v. Arden*, 1 Bay (S. C.), 487; *Reg. v. Baynton*, 17 How. St. Tr. 598, 631.

²¹ 2 Bishop Mar. and Div., § 590; *Devenbagh v. Devenbagh*, 5 Paige (N. Y.), 544, 557; *Page v. Page*, 51 Mich. 88, 16 N. W. 245.

said Sir William Scott, "are not invested with the power of selection. They must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender. Here the claim is for a remedy, and the court cannot refuse to entertain it on any fastidious notions of its own."²² But an order of an inspection will never be granted unless the court is satisfied that the complaint is preferred in good faith.²³ A court will be more reluctant to order an inspection of the body of an *old person* than that of a young person; and, for equally obvious reasons, it will be more reluctant to grant an inspection of the body of a *wife* than that of a husband,²⁴ though an inspection of the wife is sometimes ordered where she herself is the complainant, since the impediment to the consummation of the marriage may exist in her, and since the fact of her virginity may be of itself evidence of his incapacity.²⁵ By the old law, an inspection would not be granted in a divorce proceeding until after a *triennial cohabitation*;²⁶ but this doctrine seems to have no place in modern divorce law.²⁷ It has been doubted, in England, whether a decree of nullity would be granted in any case without a physical examination of the defendant by scientific men; but the English courts appear to have settled upon the doctrine that such an inspection is not required in all cases; that the physical incapacity of the defendant may be proved by any attainable evidence; and that all that is required is that such incapacity be shown to exist, and that there is clearly no collusion between the parties.²⁸ In this country, the making of such an order has been regarded as *discretionary*, and hence not revisable on appeal.²⁹ While many decisions emphasize

²² Briggs v. Morgan, 3 Phillimore, 325, 328, 1 Eng. Ecc. 490; 2 Hagg. Con. 324; Anon., 89 Ala. 291, 7 South. 100.

²³ Ibid.

²⁴ Ibid.; Shafto v. Shafto, 28 N. J. Eq. 34; Brown v. Brown, 1 Hagg. Ecc. 523, 3 Eng. Ecc. 229; Anon., Dean & S. 333.

²⁵ 1 Coot. Ecc. Prac. 367; Pollard v. Wybourn, 1 Hagg. Ecc. 725; 2 Bishop, Mar. and Div. § 596.

²⁶ Aleson v. Aleson, 2 Lee, 576.

²⁷ See Bishop, Mar. and Div., §§ 585, et seq.

²⁸ Harrison v. Harrison, 4 Moore P. C. 96, 103.

²⁹ Anon., 35 Ala. 226. This was a rule of the English chancery practice, which has been adopted in some of our American divorce proceedings by analogy. The Alabama court cite, in support of this conclusion, the following: 2 Danl. Ch. Prac. 1136; Wood v. Mann, 2 Sumn. (U. S.) 316; Hammersley v. Brown, 2 Johns. Ch. (N. Y.) 428; Moody v. Payne, 3 Johns. Ch. 294; Cummings v. Gill, 6 Ala. 562; Evans v. Bolling, 5 Ala. 550; Bryant v. Peters,

the uncertain results of such inspections, even where the person inspected is the wife and the object is to ascertain whether she is *virgo intacta et apta viro*,³⁰ and it has been held that a decree of nullity will never be granted upon the evidence furnished by such an inspection alone,³¹—yet it seems to have been the opinion at one time that a decree of nullity would never be pronounced without such an inspection.³² But this conclusion seems to have been abandoned;³³ and the contrary would seem to be the better conclusion, as applicable to such procedure in this country, where the parties themselves are allowed to give evidence.

§ 854. **Order for such Inspection, how Enforced.**—If a party in such a proceeding refuses to undergo an inspection which the court has ordered, he or she may be proceeded against for contempt,³⁴ and the court may enforce the order by attaching the body of the contemning party.³⁵ In the case of the absence of the defendant, the English Court of Divorce has sometimes taken the course of suspending its decree of nullity, in order to give the petitioner an opportunity of having the defendant inspected, if he or she should afterwards be found within the jurisdiction.³⁶ In such a case, where the absent defendant was the wife, an order of the court directed that her alimony *pendente lite* should be withheld, in case she refused to appear and submit to an inspection;³⁷ and in another case it was suggested that the court might suppress the de-

3 Ala. 170; Wyatt v. Magee, 3 Ala. 94; Planters' etc. Bank v. Walker, 7 Ala. 926; McClane v. Riddle, 19 Ala. 180; Michan v. Wyatt, 21 Ala. 813; Lanier v. Driver, 24 Ala. 149; Le Barron v. Le Barron, 35 Vt. 364. The exercise of discretion to refuse is shown in the case of Kern v. Bridewell, 119 Ind. 226, 21 N. E. 664 (a slander case charging female with fornication and pregnancy) on the ground that it was not unfair to restrict defendant to other sources of proof.

³⁰ S. v. E., 3 Swab. & Tr. 240, 243; M. v. H., 3 Swab. & Tr. 517, 520; M. v. B., 3 Swab. & Tr. 550; H. v. C., 1 Swab. & Tr. 605; F. v. D., 4 Swab. & Tr. 86; T. v. D., L. R. 1 Prob. & Div. 127; U. v. J., L. R.

1 Prob. & Div. 460; L. v. H., 4 Swab. & Tr. 115, 118.

³¹ Norton v. Seton, 3 Phill. Ecc. 147, 160, 1 Eng. Ecc. 384.

³² H. v. C., 1 Swab. & Tr. 605.

³³ F. v. D., 4 Swab. & Tr. 86, 92. This decision was afterwards reversed on appeal. 34 L. J. (P. & M.) 66.

³⁴ Harrison v. Sparrow, 3 Curt. Ecc. 1, 7 Eng. Ecc. 357, sub nom. Harrison v. Harrison, 4 Moore P. C. 96.

³⁵ B. v. L., L. R. 1 Prob. & Div. 639.

³⁶ T. v. N., L. R. 1 Prob. & Div. 31. See also H. v. H., 3 Swab. & Tr. 517 and 592, 33 L. J. (P. M. & A.) 159, and 34 L. J. (P. M. & A.) 12.

³⁷ Newell v. Newell, 9 Paige, 25.

fendant's testimony in case of her refusal.³⁸ It is scarcely necessary to add that the complaining party will not be prevented from having a decree of divorce or nullity, through the misconduct of the defendant in placing himself or herself beyond the jurisdiction of the court so that an inspection cannot be had, provided it clearly appear that there is no collusion.³⁹

§ 855. **Mode of Inspection in Such Cases.**—Where, as in some American jurisdictions, divorce cases have been committed to courts of chancery, a *reference* has been ordered to a *master*, directing him to conduct such an examination and report the result thereof.⁴⁰ An *ex parte* examination by the party's own physician will not satisfy the demands of justice, but the defendant will be required to submit to an inspection by one or more respectable gentlemen of the medical profession, to be named for that purpose by the complainant with the sanction of the court.⁴¹ In another case a commissioner was appointed to take proofs, to select disinterested physicians, and through them to make such an examination.⁴² In the English Ecclesiastical Court the examination was conducted by medical inspectors, generally two physicians and a surgeon, or two surgeons and a physician, nominated by the complainant, with the privilege conceded to the adverse party of naming one or more of them.⁴³ They, of course, take an *oath*, faithfully to perform the duty required of them.⁴⁴ They certify to the court the result of their examination.⁴⁵ Their certificate merely states the *result* of their inspection, in conformity with the oath which they have taken, but does not give the *reasons* for their conclusions.⁴⁶ In this regard

³⁸ *Anon.*, 35 Ala. 226, 228.

³⁹ *Wybourn v. Wybourn*, 1 Hagg. Ecc. 725, 729, 3 Eng. Ecc. 308.

⁴⁰ *Devenbagh v. Devenbagh*, 5 Paige (N. Y.), 554, 558.

⁴¹ *Newell v. Newell*, 9 Paige, 25. See this case at length for the mode of conducting such an examination.

⁴² *Le Barron v. Le Barron*, 35 Vt. 365, 372.

⁴³ *Coot. Ecc. Prac.* 388. See also *Dean v. Aveling*, 1 Rob. Ecc. 279, where the proceedings appear in full. In more recent times the practice has been to appoint but two medical or surgical inspectors.

S. v. E., 3 Swab. & Tr. 240; *M. v. H.*, 3 Swab. & Tr. 517; *M. v. B.*, 3 Swab. & Tr. 550; *F. v. D.*, 4 Swab. & Tr. 86; *L. v. H.*, 4 Swab. & Tr. 115.

⁴⁴ 2 Bishop, Mar. & Div., § 598; *Coot. Ecc. Prac.* 389; *Browne, Div. Prac.* (4th ed.) 622, 623. The form of the oath is given in 2 Bishop, Mar. & Div., § 598.

⁴⁵ For forms of such certificates, see *L. v. H.*, 4 Swab. & Tr. 115; *W. v. H.*, 2 Swab. & Tr. 240; *S. v. E.*, 3 Swab. & Tr. 240.

⁴⁶ *Pollard v. Wybourn*, 1 Hagg. Ecc. 725, 727.

it resembles a special verdict. In addition to requiring a written certificate, delivered under the obligation of the oath which they have taken, it is the constant practice of the English Ecclesiastical courts to examine them as *witnesses*, touching the result of their inspection.⁴⁷

§ 856. **Inspection of the Child in Filiation Cases.**—In the trial of an action involving the question of the legitimacy of a child, who was alleged to be of mixed African blood, it was held proper to allow the child to be exhibited to the jury; since “when the question is whether a certain object is *black* or *white*, the best evidence of color would be the exhibition of the object to the jury. The eyes of the members of the jury must be presumed to be as good as those of medical men. Why should a jury be confined to hearing what other men think they have seen, and not be allowed to think for themselves?”⁴⁸ In a previous case in the same State, it was held no ground of new trial that the mother of the bastard child was put upon the stand having the child in her arms, and that the solicitor called the attention of the jury to the child’s features, and afterwards commented upon its appearance in his address to the jury,—the defendant having taken no objection. The court said that it had long been the practice in that State, in bastardy cases, to exhibit the child to the jury.⁴⁹ In a similar case in another jurisdiction, it was held not error to allow a bastard child about *two years old* to be exhibited to the jury, for the purpose of enabling them to determine whether there was a *family resemblance* between the child and the defendant.⁵⁰ But in another case in the same court, it was

⁴⁷ *Deane v. Aveling*, 1 Rob. Ecc. 279; *W. v. H.*, 2 Swab. & Tr. 240, 242; *S. v. E.*, 3 Swab. & Tr. 240; *M. v. H.*, 3 Swab. & Tr. 517, 520; *M. v. B.*, 3 Swab. & Tr. 550, 553.

⁴⁸ *Warlick v. White*, 76 N. C. 179. The court quoted the following passage from Horace:—

“Aut agitur res in scenis, aut acta refertur:

“Segnius irritant animos demissa per aures,

“Quam quæ sunt oculis subjecta fidelibus, et quæ

“Ipse sibi tradit spectator.—*Hor. ad Pisones.*

In Illinois the child was exhibited to show its father was an Italian, and not of negro parentage. *Morrison v. People*, 52 Ill. App. 482.

⁴⁹ *St. v. Woodruff*, 67 N. C. 89; *Crow v. Jordan*, 49 Ohio St. 655, 32 N. E. 750; *Gaunt v. St.*, 50 N. J. L. 490, 14 Atl. 600; *Overlook v. Hall*, 81 Me. 348, 17 Atl. 169.

⁵⁰ *St. v. Smith*, 54 Iowa, 104, 6 N. W. 153, 22 Alb. L. J. 43. In California it was held that photographs of putative father and child were admissible to show family resemblance, but they were deemed of little weight. In *re Jessup*, 81

held error to allow a child *three months* old to be thus exhibited.⁵¹ The distinction drawn by the court between these two cases was that, where a child has reached a considerable maturity, family resemblances will appear; whereas all extremely young babies look substantially alike.⁵²

§ 857. **On a Question of Personal Identity.**—In an English revenue case a defendant, against whom an information had been filed for importing prohibited goods, was, on his own application, brought, on a particular day, by a *habeas corpus ad testificandum*, into court, in order that he might be present at the trial, so as to avail himself of the only point of defense which he made, which was that the person who had actually committed the offense had personated him.⁵³ The report does not disclose why this extraordinary step was necessary—why the defendant would not necessarily be present at the trial without being so brought up; and why a form of the *habeas corpus* implying that he was brought up *as a witness*, should have issued, when the law rendered him incompetent to testify. The inference is that he was brought up for the purpose of inspection merely.

§ 858. **Exhibiting Injured Parts of the Human Body to the Jury.**—On the trial of actions for damages for a personal injury, where there is a question as to the character and extent of the injury, it is not error to allow the injured person to exhibit the injured portion of his body to the jury,⁵⁴ unless this would involve an indecent exposure of the person, which ought not to be permitted in

Cal. 408, 22 Pac. 742, 6 L. R. A. 594.

⁵¹ *St. v. Danforth*, 48 Iowa, 43, 30 Am. Rep. 387. See *Clark v. Bradstreet*, 80 Me. 484, 15 Atl. 56. In Massachusetts it was said child might be exhibited, whatever its age. *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871.

⁵² *Note by the printer*: The judge who made this ruling must have been an old bachelor.

⁵³ *Attorney-General v. Fadden*, 1 Price, 403. In *Smith v. King*, 62 Conn. 515, 26 Atl. 1059, a party was ordered to write his name as a

means of comparison with handwriting of the party known to his opponent.

⁵⁴ *Hiller v. Sharon Springs*, 28 Hun (N. Y.), 344; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370; *Jordan v. Bowden*, 46 N. Y. Super. 355; *Barker v. Perry*, 67 Iowa, 146, 25 N. W. 100; *Pittsburg, C., C. & St. L. Ry. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033; *Ford v. Coal Co.*, 30 Ky. Law Rep. 698, 99 S. W. 609. No examination can be made out of court in presence of jury without consent of both parties. *Fordyce v. Key*, 74 Ark. 19, 84 S. W. 797.

a judicial proceeding.⁵⁵ The objection that such an exhibition has a tendency unduly to excite the sympathies of the jurors, is not tenable.

§ 859. Compulsory Physical Examination of Plaintiff in Actions for Personal Injuries.—In modern trials of civil actions for physical injuries, the question has frequently arisen whether the court has power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection.⁵⁶ Other courts, taking the more enlightened view that the object of a judicial trial is to enable the

⁵⁵ Post, § 861. It has been held to be prejudicial error for the court to permit a dramatic exhibition as a demonstration of plaintiff's disability. *Felsch v. Babb*, 72 Neb. 736, 101 N. W. 1011.

⁵⁶ *Stuart v. Haven*, 17 Neb. 211, 214; *Sioux City etc. R. Co. v. Finlayson*, 16 Neb. 578, 588, 20 N. W. 860; *Loyd v. R. Co.*, 53 Mo. 515 (overruled it seems by *Shephard v. Mo. Pac. R. Co.*, 85 Mo. 629); *Parker v. Enslow*, 102 Ill. 272, 279 (where the point is slurred over without discussion); *Neuman v. Third Avenue R. Co.*, 50 N. Y. Super. 412; *Roberts v. Ogdensburgh etc. R. Co.*, 29 Hun (N. Y.), 154. In Texas it is ruled that the court will not compel a plaintiff, suing for personal injuries, to submit his body to examination, unless it is essential to the ends of justice. *International etc. R. Co. v. Underwood*, 64 Tex. 464; *City of Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23. The federal Supreme Court, speaking through Gray, J., urges strongly the inviolability of the person against such a pro-

cess, as never "known to the common law * * * except in a very small number of cases based upon special reasons and upon ancient practice coming down from the ruder ages, now mostly obsolete in England and never, so far as we are aware, introduced into this country." *Union Pac. R. Co. v. Botsford*, 141 U. S. 250. In Massachusetts it was held that this is a matter of statutory regulation, and courts in absence thereof cannot compel it. *Stack v. R. Co.*, 177 Mass. 155, 58 N. E. 686. See also *Penna. Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *McQuigan v. R. Co.*, 129 N. Y. 50, 29 N. E. 235; *Easler v. R. Co.*, 60 S. C. 117, 38 S. E. 258. While the federal Supreme Court held as stated in the *Botsford* Case, supra, it held later, that the New Jersey compulsory examination statute was applicable to a trial by a federal court in that state. *Camden v. S. R. Co.*, 177 U. S. 172. These views are statutory and commissions are often provided for. *Boothroyd v. Board*, 43 Colo. 428, 97 Pac. 255.

State to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of a sound *discretion*, in proper cases, upon an application seasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it.⁵⁷ Another court has held that where the plaintiff in such an action alleges that his injuries are of a permanent nature, the defendant is entitled, *as a matter of right*, to have the opinion of a surgeon, based upon a personal examination, unless there is already an abundance of expert evidence, in which case the court, in its discretion, may refuse to order an examination.⁵⁸ Another court has ruled that the trial court may require the plaintiff in such an action to submit to a medical examination and *dismiss his action*, if he refuses to comply with the order.⁵⁹ This conclusion may be placed upon the higher ground that, when a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The

⁵⁷ *White v. Milwaukee etc. R. Co.*, 61 Wis. 536, 21 N. W. 524; *Walsh v. Sayre*, 52 How. Pr. 334; *Shepherd v. Mo. P. R. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Schoeder v. Railway Co.*, 47 Iowa, 375; *Miami etc. R. Co. v. Baily*, 37 Ohio St. 104; *Atchison etc. R. Co. v. Thul*, 29 Kan. 466. See *Hatfield v. St. Paul etc. R. Co.*, 18 Am. & Eng. R. R. Cas. 292, where the authorities are collected in a note by the learned editor. *Hall v. Manson*, 99 Iowa, 698, 68 N. W. 922; *Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 652; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053; *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. D. 61, 95 N. W. 153; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 285; *Lane v. R. Co.*, 21 Wash. 119, 57 Pac. 367. In Michigan it was said it would be an abuse of discretion to order it where anæsthetics were necessary. *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616. So as to X-ray examination, until courts may judi-

cially notice it is harmless. *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14. See also *Boetler v. Ross Lumber Co.*, 103 Wis. 324, 79 N. W. 243. There are statutes in England, Canada and some of the states regulating such examinations and providing for dismissal of plaintiff's action for refusal to submit to the examination. See Stat. 60 & 61 Vict. c. 37 first sched. § 3; Stat. 31 & 32 Vict. c. 119, § 26; Ont. 54 Vict. c. 11; Fla. St. 1899, c. 4719, §§ 1 & 2; N. J. St. 1900, c. 150 § 19; N. Y. Laws 1893, ch. 721. See note on the question of power of court to compel submission to physical examination. *McQuiggan v. R. Co.*, 14 L. R. A. 466.

⁵⁸ *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *St. L. S. W. R. Co. v. Dobbins*, 60 Ark. 485, 30 S. W. 887.

⁵⁹ *Miami etc. Co. v. Baily*, 37 Ohio St. 104; *Schroeder v. R. Co.*, 47 Iowa, 375.

conception of the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such an inspection, is not higher than that of the old law, which would not even compel a party to produce a deed or private paper, in a civil case, where it was intended to be used in evidence against him,⁶⁰ a rule which the court of chancery invaded to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence.⁶¹

§ 860. **Before Trial.**—It has been held that the court has power, under the New York statute, relating to the examination of parties before trial to compel the plaintiff, in an action for damages for a physical injury, to submit to a physical examination by medical experts, where the defendant, in his application, makes the necessity of such examination appear,⁶² otherwise not;⁶³ but in later cases in the same State this has been denied.⁶⁴

§ 861. **Such Examination, how Conducted.**—It is needless to add that such an examination will not be ordered *in the presence of the jury*, where it would require an *indecent exposure* of the person;⁶⁵ and that, while the court for obvious reasons will not make an order for such an examination to be had *ex parte*, or by surgeons selected by one party alone, without an opportunity for surgeons selected by the other party to be present,—yet where the party has been examined *ex parte* without an order of the court, there is no rule of evidence which will exclude the testimony of the examining surgeons,⁶⁶ provided their testimony does not come within the rule

⁶⁰ *Haldane v. Harvey*, 4 Burr. 2489; ante, §§ 730 et seq.

⁶¹ The power to compel a physical examination of the plaintiff, in an action for personal injuries, has been likened to the power to compel the opposite party to produce books and papers. *Walsh v. Sayre*, 52 How. Pr. (N. Y.) 334.

⁶² *Shaw v. Van Rensselaer*, 60 How. Pr. (N. Y.) 143. The physical examination must always be incidental to an oral examination—statute applied. *Lyon v. R. Co.*, 142 N. Y. 298, 37 N. E. 113. If the moving papers show defendant ignorant of the facts, physical exam-

ination is ordered. *Tirpak v. Hoe*, 103 N. Y. S. 795, 53 Misc. Rep. 532.

⁶³ *Ibid.*

⁶⁴ *Neuman v. Third Avenue R. Co.*, 50 N. Y. Super. 412; *Roberts v. Ogdensburgh etc. R. Co.*, 29 Hun (N. Y.), 154; disapproving *Walsh v. Sayre*, 52 How. Pr. (N. Y.) 334; and *Shaw v. Van Rensselaer*, supra.

⁶⁵ *Brown v. Swineford*, 44 Wis. 282, 285; *King v. St.*, 100 Ala. 85, 14 South. 878.

⁶⁶ *Louisville etc. R. Co. v. Falvey*, 104 Ind. 409, 417, 3 N. E. 389, 4 N. W. 908. Where plaintiff had exhibited his injured limb to the jury

which excludes confidential communications between patient and physician.

§ 862. Compelling Plaintiff to Perform Physical Acts before Jury.—From analogy to some of the preceding holdings, it has been concluded that the trial court has power, in a proper case and under proper circumstances, to direct the plaintiff to do a physical act in the presence of the jury, which will show the character of his injuries; and it has been supposed that there may be circumstances where the defendant would have a right to such an order. At the same time, it is said that, “from the very nature of things, the propriety of such an order must usually rest largely in the *discretion* of the trial court, and it would only be in the case of a plain abuse of such discretion” that an appellate court would interfere.⁶⁸

§ 863. Instance where such an Experiment was Properly Refused.—In an action against a railway company for damages it appeared that the plaintiff, while leaving the defendant’s cars, fell or was thrown from the platform or steps of the car upon the ground, injuring the sciatic or great nerve of the thigh. The plaintiff, as a witness in her own behalf, testified that this had caused her great and constant pain, had caused the thigh to shrink, had rendered her lame, and had caused her to “limp” in walking. The counsel for the defendant thereupon requested the court to order her to walk across the court room in the presence of the jury, which the court declined to do. The reviewing court saw, under the circumstances, no abuse of discretion in refusing to comply with the request. “Such an act,” said the court, “would have furnished the jury little or no aid in determining the extent or the character of her injuries. The only fact it could, by any possibility, have determined, was, whether or not she was lame, or ‘limped,’ as she testified, in walking. But there was already ample and uncontradicted evidence of this fact. Her own evidence on the point was fully corroborated by that of three or four other witnesses, her neighbors or members of her family, who had seen her almost daily

and his own experts have testified with regard thereto, defendant was held entitled to have medical experts selected by itself make inspection thereof. *Chicago, R. I. & P. R. Co. v. Langston*, 92 Tex. 709,

50 S. W. 574; *Johnston v. Southern Pac. Co.*, 150 Cal. 535, 89 Pac. 348.

⁶⁸ *Hatfield v. St. Paul etc. R. Co.*, 33 Minn. 130, 22 N. W. 176; *Smith v. King*, 62 Conn. 515, 26 Atl. 1059.

since the accident.”⁶⁹ It may be doubted whether this was a sound conclusion. The fact that there was considerable evidence, from the plaintiff herself and her neighbors, to prove that she limped, does not make it appear why the defendant was not entitled to an exhibition of her manner of walking before the jury, for the purpose, if possible, of showing the contrary, or at least of showing the extent to which she limped. It is true that the experiment might, if fraudulently performed by her, confirm her testimony and that of her witnesses on the point; but this would seem to be no reason for refusing the experiment on the application of the defendant.

§ 864. **Experiments in Preparation for Trial or Hearing.**—A suit was instituted to restrain proceedings at law, to recover for work and labor in constructing a sewer, on the ground of fraud on the part of the defendant in equity, in improperly obtaining possession of an estimate in writing, and, by a chemical process, removing the figures indicating the price. The document in question having been deposited with the clerk of the records, in pursuance of an order of production, the plaintiff moved for liberty to subject it to *chemical tests*, for the purpose of the trial at law, upon an undertaking by the defendant to produce it to be stamped at the trial at law. The vice-chancellor, upon this undertaking being given, refused to make any order.⁷⁰ In an action against printers, for the infringement of a patent for making type by a certain combination of metals, an application, on the part of the plaintiff, not merely for an inspection of the type used by the defendants’ type-founders, but also to be permitted to take specimens thereof for the purpose of analysis, was refused; it appearing that the defendants had purchased their type, and the only ground laid for the application being that, by the analysis it would appear that the composition was similar to that of the plaintiff’s type, and amounted to an infringement of the patent. The question was decided under a statute,⁷¹ and the judges seemed to be of opinion that circumstances might arise where the power to order such an inspection would exist.⁷²

⁶⁹ *Hatfield v. St. Paul etc. R. Co.*, 33 Minn. 130, 22 N. W. 176.

⁷⁰ *Twentyman v. Barnes*, 2 De Gex & Sm. 225.

⁷¹ The Patent Law Amendment

Act, 1852, § 42; Stat. 15 & 16 Vict., c. 83, § 22.

⁷² *The Patent Type-Foundry Co. v. Lloyd*, 29 L. J. (Exch.) 207. See also *Holland v. Fox*, 3 El. & Bl. 977, decided under the same statute.

§ 865. **Compelling Inspection of Chattels.**—It has been held that, where the plaintiff, in an action for personal injuries, has been injured by a machine, the court is without power to *compel* the defendant to allow the plaintiff's attorney to inspect it, in order to assist in the cross-examination of the plaintiff by his attorney, the defendant having obtained an order for the plaintiff's examination before the trial;⁷³ and that a justice of the peace has no power, upon the trial of an action for the *breach of a warranty* in the sale of a chattel, to compel a party to produce the chattel in court for inspection, by means of a subpoena *duces tecum*, or by any other means.⁷⁴ In an action for damages for wrongfully and knowingly keeping a *fierce and mischievous dog*, which bit and wounded the plaintiff, it was held that the dog might be *allowed* to be brought into court, and he was brought into court by his keeper led by a chain, and, at the request of some of the jurors, was released in their presence and examined by them; and they seemed to be of opinion that he was not of a vicious disposition, and gave a verdict for the defendant.⁷⁵ It has been ruled that if, in an action for trespass in seizing and detaining a dog, the defendant refuses to *produce the dog upon notice*, during the examination of the plaintiff's witnesses, he will not be allowed to produce it afterwards, for the purpose of invalidating the testimony of those witnesses as to the identity of the dog.⁷⁶ This is in conformity with a principle already explained, that a party who refuses to produce a document on notice, will not be allowed afterwards to produce it, for the purpose of rebutting secondary evidence which the party requiring its production has been compelled to give of its contents.⁷⁷

⁷³ *Cooke v. Lalance etc. Co.*, 29 Hun (N. Y.), 641; *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530. Semble, as to sending veterinary surgeon to examine a horse as to soundness. *Martin v. Elliott*, 106 Mich. 130, 65 N. W. 530, Wisconsin court held inspection allowable in trial court's discretion. *Groundwater v. Washington*, 92 Wis. 56, 65 N. W. 871. In England and a few of the states of this country statutes providing for inspection of premises embrace also that of personal property. See

Stat. 17 & 18 Vict. c. 125 § 58; Fla. Rev. St. 1892, § 1082; N. J. Gen. St. Evidence, § 24; Wis. St. 1903, ch. 119.

⁷⁴ *Hunter v. Allen*, 35 Barb. (N. Y.) 42.

⁷⁵ *Line v. Taylor*, 3 Fost. & Fin. 731; trial before Erle, C. J., who said that he remembered a case in which Lord Campbell had permitted a similar inspection.

⁷⁶ *Lewis v. Hartley*, 7 Car. & P. 405.

⁷⁷ Ante, § 789.

§ 866. **Physical Examination of the Defendant in Criminal Trials.**—There is a difference of opinion upon the question whether the physical examination of the defendant in a criminal trial will not be ordered against his consent. One view is that this would violate a fundamental principle of Anglo-American jurisprudence,⁷⁸ embodied in our American constitutions, that a prisoner shall not be compelled to give evidence against himself.⁷⁹ Thus, it has been ruled that the forcible examination, under an order of the coroner, of a female prisoner, by physicians, for the purpose of obtaining evidence that she had been pregnant and had been delivered of a child within two or three weeks previous, was a violation of such a constitutional provision.⁸⁰ We find, however, that authority on this question, has not been uniform. Thus, on a criminal trial, the question of the identity of the defendant being in issue, one of the witnesses testified that he knew the defendant, and knew that he had *tattoo marks* (a female head and bust) on his right fore-arm. The court, thereupon, compelled the defendant, against his objection, to exhibit his arm, in such a manner as to show the marks to the jury. It was held that this action of the court was not a violation of the provision of the constitution of the State that no person shall be compelled, “in any criminal case, to be a witness against himself,”—and further, that the action was not erroneous or prejudicial to the defendant in a legal sense. The court construed the constitutional provision as meaning that no person shall be compelled to *testify as a witness* against himself. “To use a common phrase,” said Hawley, J., “it closes the mouth of the prisoner. A defendant in a criminal case cannot be compelled to give evidence, under oath or affirmation, or make any statement, for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but for the reason that, in the sound judgment of the men who framed the constitution, it was thought that, owing to the weakness of human nature, and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not

⁷⁸ Reg. v. Worsenham, 1 Ld. Raym. 705; Reg. v. Mead, 2 Ld. Raym. 927; Rex v. Shelley, 3 T. R. 142. Compare Haldane v. Harvey, 4 Burr. 2489.

⁷⁹ People v. McCoy, 45 How. Pr. (N. Y.) 216; St. v. Jacobs, 5 Jones L. (N. C.) 260; ante, § 292.

⁸⁰ People v. McCoy, 45 How. Pr. (N. Y.) 216.

true.”⁸¹ So, evidence of the condition of the prisoner’s hand, if material, may be rehearsed to the jury, although the evidence was obtained by compelling her, against her will, to unwrap and *exhibit her hand* at the coroner’s inquest.⁸² But with singular absurdity, it was held, on trial of an indictment against the defendant, as a free negro, for carrying weapons, that it was erroneous to allow the State to offer the defendant to the inspection of the jury, in order that they might see that he was a mulatto within the prohibited degree. He was, it seems, to sit during the trial, some where in the court room, where *the jury could not see him*.⁸³

§ 867. Compulsory Experiments by the Prisoner Disclosing Guilt.—In another case a prisoner, indicted for the larceny of growing corn, was compelled by the officer in charge, to *put his shoe in a track* found in the field, for the purpose of comparison, and the result of this comparison was detailed by the officer, as a witness on the trial. It was held that in this there was no error.⁸⁴ But on a trial in Georgia, it has been held that a witness should not be permitted to testify that he forced the defendant to put his foot into a shoe track near the scene of the burglary, and that the shoe fitted the track,—it being a violation of the constitutional guarantee that

⁸¹ *St. v. Ah Chuey*, 14 Nev. 79, 83. Generally it may be said that evidence obtained even by force or fraud and under color, though not by direct requirement, of judicial process—as of articles stolen, or showing or tending to show intent to commit particular kind of crime or that it has been committed may be given in evidence against accused, or when he was even compelled to perform physical acts outside of court, is inadmissible. See *St. v. Giroux*, 75 Kan. 695, 90 Pac. 249; *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *St. v. Edwards*, 51 W. Va. 220, 41 S. E. 429; *U. S. v. Cross*, 20 D. C. 365; *Moore v. St.*, 51 Tex. Cr. R. 468, 103 S. W. 188; *St. v. Matthews*, 64 Vt. 101, 33 Am. St. Rep. 921, 15 L. R. A. 268; *Com. v. Welch*, 163 Mass. 372, 40 N. E. 103. *Contra*: *Hughes v. St.*, 2 Ga. App. 29, 58 S. E. 390. See

also *St. v. Russell*, 83 Wis. 330, 53 N. W. 441, where prisoner’s counsel was personated over a telephone.

⁸² *St. v. Garrett*, 71 N. C. 95.

⁸³ *St. v. Jacobs*, 5 Jones L. (N. C.) 259. Upon obvious grounds, and in conformity with the maxim *nemo se ipsum accusare tenetur*, the defendant in a criminal action cannot be compelled to produce or surrender a writing, or other instrument of evidence, to be used against him. *McGinnis v. St.*, 24 Ind. 500. It is upon this ground that the courts have held, as already seen, that on an indictment for the larceny of an instrument of writing, parol evidence of its character may be given,—the defendant not being expected to deliver it in conformity with a notice. *Ibid.*; *ante*, § 773.

⁸⁴ *St. v. Graham*, 74 N. C. 646.

"no person shall be compelled to give testimony tending in any manner to criminate himself." ⁸⁵ So, where, in a case of murder the prosecution proved that *foot-prints* were found on the premises where the assassination had been perpetrated, and also that the examining magistrate had compelled the accused to *make his foot-prints in an ash-heap*, and that the foot-prints so made corresponded with those found on the premises where the homicide was committed,—it was held that the evidence was admissible, and that it was no invasion of the constitutional guaranty that "one accused of crime shall not be compelled to give evidence against himself." ⁸⁶ But where a *pan of soft mud* was brought into the court room on the trial, and the prisoner was asked, in the presence of the jury, to put his foot into it, which he declined to do, the conviction was reversed, because the court was satisfied that the jury were improperly influenced by this attempt to compel the prisoner to give evidence against himself. ⁸⁷

§ 868. **Obscene Photographs.**—On the trial of an indictment for selling an indecent and obscene photograph, it has been held that the photograph itself is a proper instrument of evidence for inspection by the jury. The court say: "As the statute has given this general definition of the character of the acts constituting the offense, it must necessarily have been designed that the drawing, picture, photograph or writing should be exhibited to and observed by the jury, for them to determine, as a matter of fact, in the exercise of their good sense and judgment, whether or not they were obscene and indecent." ⁸⁸

§ 869. **Photographic and Stereoscopic Views.**—Next to the inspection of the object itself, a photograph becomes its most accurate and convenient representation; and where an inspection of the object is proper, but impracticable, a photograph of it may be exhibited to the witnesses as an aid in identification, ⁸⁹ and may be admitted in

⁸⁵ Day v. St., 63 Ga. 667.

⁸⁶ Walker v. St., 7 Tex. App. 246, 265.

⁸⁷ Stokes v. St., 5 Baxt. (Tenn.) 619, 2 Tex. Law Journ. 243. So it has been held proper to refuse to compel defendant to submit to a measurement of his foot, where testimony was as to tracks going

to and from the scene of a burglary. Bridges v. St., 86 Miss. 377, 38 South. 679.

⁸⁸ People v. Muller, 32 Hun (N. Y.), 209. This was considered the proper course to be pursued in Reg. v. Hicklin, L. R. 3 Q. B. 360.

⁸⁹ Ruloff v. People, 45 N. Y. 213, more fully reported, 11 Abb. Pr.

evidence,⁹⁰ and, in the discretion of the court, examined by the jury through a *stereoscope*,⁹¹ or other magnifying glass,⁹² and taken by them to their room.⁹³ Accordingly, in an action for damages for an injury to real property, a photograph of the premises taken at the time, is admissible, for the purpose of showing the nature and extent of the injury.⁹⁴

(N. S.) (N. Y.) 245. If considerable time has elapsed so that conditions and appearances are not the same a recent photograph may be rejected. *Columbia & P. D. R. Co. v. St.*, 105 Md. 34, 65 Atl. 625. In a case involving filiation photographs of child and putative father have been used together for a means of detecting family resemblance, though the court was of opinion that they were entitled to little weight. *In re Jessup*, 81 Cal. 408, 22 Pac. 742, 6 L. R. A. 594. And photograph of the hand of an accused to show its peculiarity, because of finger marks on objects at the place of a homicide. *Powell v. St.*, 50 Tex. Cr. R. 592, 99 S. W. 1005.

⁹⁰ *Ibid.*; *Locke v. Railway Co.*, 46 Iowa, 109 (photographs of a railway wreck); *Reddin v. Gates* (ferrotype of the plaintiff's back, taken after a battery, showing his injuries); *Blair v. Pelham*, 118 Mass. 420 (photographs of place of injury on defective highway); *German Theological School v. Dubuque*, 64 Iowa, 736, 17 N. W. 153 (stereoscopic view of premises injured by water); *Udderzook v. Com.*, 76 Pa. St. 340 (photographs of the deceased, on a trial for murder); *Marcy v. Barnes*, 16 Gray (Mass.), 161 (magnified photographic copies of a signature). The correctness of the photograph must be verified by the testimony of a witness, or it is inadmissible. *Hollenbeck v. Rowley*, 8 Allen (Mass.), 473. And whether it is

sufficiently verified is a preliminary question of fact, to be decided by the trial judge, whose decision thereon is not subject to exception. *Blair v. Pelham*, 118 Mass. 420; ante, ch. XIII. Objection that the photograph exhibits only a *partial view* of the premises untenable. *Locke v. Railway Co.*, 46 Iowa, 109, 112; *Kansas City etc. R. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363. X-ray photographs, properly verified, have come under like judicial cognizance. *Elzig v. Bales*, 135 Iowa, 208, 112 N. W. 540. It has been held in Vermont, that it is in the discretion of the court to allow a photograph in evidence without any direct proof of its accuracy, i. e. by the photographer testifying. other testimony tending to show appearances were fairly represented therein. *Smith v. R. Co.*, 80 Vt. 208, 67 Atl. 535. The rule seems generally to be, however, to require preliminary evidence directly upon the question of accuracy. *Chicago City R. Co. v. Smith*, 226 Ill. 178, 80 N. E. 716; *St. v. Bailey*, 79 Conn. 589, 65 Atl. 951; *Porter v. Buckley*, 147 Fed. 140, 78 C. C. A. 138.

⁹¹ *Rockford v. Russell*, 9 Bradw. (Ill.) 229.

⁹² *Barker v. Perry*, 67 Iowa, 146, 25 N. W. 100; *St. v. Wallace*, 78 Conn. 677, 63 Atl. 448. Or this may be refused. *Cotton v. Boston El. Ry.*, 191 Mass. 103, 77 N. E. 698.

⁹³ *Ibid.*

⁹⁴ *Cozzens v. Higgins*, 1 Abb. App. Dec. (N. Y.) 451; *Illinois S.*

§ 870. **Plans and Diagrams.**—Plans and diagrams of premises, which are the scenes of transactions under investigation, may be referred to by witnesses and exhibited to a jury, for the purpose of explaining their testimony and rendering it more intelligible. “They are often formally admitted in evidence, and are proper for the consideration of the jury, so far as they are shown to be correct, not as independent testimony, but in connection with other evidence to enable the jury to understand and apply such evidence.”⁹⁵ In testifying as to a disputed boundary line, a surveyor may use a diagram to illustrate his evidence or make it intelligible to the jury, although the diagram was not made by himself, and is not shown to contain a perfectly accurate description of the lines. Peters, C. J., in giving the opinion of the court, said: “A witness may as well speak by a diagram or linear description, when the thing may be so described, as by words. It is a common and usual method of pointing out localities and lines. Even savages resort to it, in lieu of words, in describing the course of rivers, and the line of the sea-shores. It is enough if it serves the purpose of the witness in the explanation of the lines and localities he is seeking to exhibit.”⁹⁶

§ 871. **Indicia of Crime—Blood-Stained Clothing, Burglar’s Tools, etc.**—As already stated, it is common, on criminal trials, to submit to the inspection of the jury burglar’s tools and other *indicia* of crime, found in the possession of the prisoner, in connection with evidence tending to show that they were used in the commission of the crime.⁹⁷ It has been held not improper, in a case of murder, to

Ry. Co. v. Hayner, 225 Ill. 613, 80 N. E. 316. Or to show the surrounding circumstances, including speed of cars at the time of a collision. Edge v. Ry. Co., 206 Mo. 471, 104 S. W. 90. See also Komig v. Indem. Co., 102 Minn. 31, 112 N. W. 1039. It was held in a case from Michigan in a proceeding to condemn land for a right of way for a railroad, that a phonographic record of sounds made by operation of railroad trains in proximity to defendant’s hotel was admissible. Boyne City G. & A. R. Co. v. Anderson, 146 Mich. 328, 109 N. W. 429.

⁹⁵ St. v. Lawlor, 28 Minn. 216, 218, 9 N. W. 698, and cases cited; ante, § 844; Corning v. Dollmeyer, 123 Ill. App. 188; McCarley v. Mfg. Co., 75 S. C. 390, 56 S. E. 1. If unproved, should not be admitted. Re Central R. Co., 74 N. J. L. 395, 65 Atl. 905; Camden v. City of New York, 119 App. Div. 84, 103 N. Y. S. 971.

⁹⁶ Shook v. Pate, 50 Ala. 91, 92; Austin v. Whitcher, 135 Iowa, 733, 110 N. W. 910.

⁹⁷ People v. Larned, 7 N. Y. 445; Hickey v. St., 51 Tex. Cr. R. 230, 102 S. W. 417.

allow the State to exhibit to the jury the *bones* of the vertebral column of the deceased, where it serves to show to the jury the attitudes and relative positions of the parties when the fatal shot was fired. The court said: "It was not an unnecessary parade of the bones of the dead man to excite prejudice against his slayer, but was legitimate and proper evidence; and a party cannot, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded from consideration."⁹⁸ So, on such a trial the *skull* of the deceased may be produced in court and exhibited to an expert surgeon, who may testify whether the fractures therein could have been caused by blows from a gun, as testified to by other witnesses.⁹⁹ So, the prosecuting attorney may exhibit to the jury the articles of *clothing* found upon the body of the deceased, as well as articles of personal property found near the body.¹ So, on the trial of an indictment for homicide, the exhibition to the jury of *blood-stained clothing*, worn by the deceased at the time of his arrest, shortly after the commission of the crime, has the sanction of immemorial usage.² "In short," in the language of Starkie, "upon the trial of a charge of homicide or burglary, all circumstances connected with the state of the body found, or house pillaged, the tracing by stains, marks or impressions, the finding of instruments of violence or property, either on the spot or elsewhere,—in short, all visible *vestigia* are part of the transaction, are admitted in evidence for the purpose of connecting the prisoner with the act. Such facts and circumstances have not improperly been termed *inanimate witnesses*."³

⁹⁸ St. v. Wieners, 66 Mo. 14, 29; affirming 4 Mo. App. 492.

⁹⁹ Gardiner v. People, 6 Park. Cr. (N. Y.) 157. And a photograph thereof, duly authenticated, taken before removal of the brain. St. v. Bailey, 79 Conn. 589, 65 Atl. 951. Where it had become so decayed that fractured parts dropped out, it was held error to allow its being exhibited. Self v. St., 90 Miss. 58, 43 South. 945.

¹ Ibid.; Moss v. St., 152 Ala. 30, 44 South. 598; Clark v. St., 51 Tex. Cr. R. 519, 102 S. W. 1136; St. v. Craft, 118 La. 117, 42 South. 718. As tending to show the instrument

with which a homicide is committed, a hammer, stained with blood and having white hairs attached to it, found near the crushed heads of an aged couple, was held admissible in evidence. People v. Bonier, 189 N. Y. 108, 81 N. E. 949.

² People v. Fernandez, 35 N. Y. 49, 64.

³ 1 Stark. Ev. (9 Am. ed.) 66, quoted with approval in People v. Fernandez, 35 N. Y. 49, 64. The provisions of the constitution of Georgia that "no person shall be compelled to give testimony tending in any manner to criminate himself" (Ga. Code, § 4998) does

§ 872. **When Court will not assume Labor of examining Natural Evidence.**—Where a party tenders material things in evidence, there is authority to the effect that the court is not obliged to assume the labor of examining them, without the assistance of witnesses. Thus, the defendant agreed to buy from the plaintiff a *book* which should correspond with a prospectus which was exhibited to him. In an action for the price, the plaintiff introduced the book in evidence, but put in no other evidence tending to show that it complied with the prospectus. It was held that the plaintiff had not proved his case; that he could not impose upon the court the obligation of examining the book to see whether it corresponded to the prospectus.⁴

ARTICLE II.—VIEW OF THINGS OUT OF COURT.

SECTION

- 875. In Real and Mixed Actions under the Common Law.
- 876. Under the Statute of Anne.
- 877. Under the Statute of Geo. II.
- 878. Under the Statute of Geo. IV.
- 879. In what Cases Granted under these Statutes.
- 880. Old Practice in Conducting a View.
- 881. The Subject Regulated by Statute in America.
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- 892. Instance under this Theory of a Proper Instruction to a Jury before sending them out.
- 893. Contrary Opinion that Knowledge Acquired by the View is Evidence.
- 894. [Continued.] The same View taken by Chief Justice Shaw.
- 895. But Jurors not to Disregard other Evidence.
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- 897. When Jury decide upon their Personal Knowledge.

not extend so far as to prevent the *clothing or other articles*, taken from the person of the accused, from being given in evidence or exhibited to the jury, where the same tend to show his guilt. It means that, when a person is *sworn as a*

witness, he shall not be compelled to testify to facts that may tend to criminate him. *Drake v. St.*, 75 Ga. 413, 415.

⁴ *Western Historical Co. v. Schmidt*, 56 Wis. 681.

898. Not Error to Exclude Evidence of Facts which the Jury have learned from the View.
899. [Michigan.] Scope of the Powers of the Jury in Condemnation Proceedings.
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912. Jury attended by the Proper Officer.
913. [Michigan.] Office of Judge or Court Commissioner when Attending.
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915. Obstructing the Showers in Running Lines.
916. Competent to show change in Premises after the Fact in Controversy, and before the View.

§ 875. In Real and Mixed Actions under the Common-Law Practice.—“In most real and mixed actions, in order to ascertain the identity of land claimed with that in the tenant’s possession, the tenant is allowed, after the demandant has counted, *to demand a view* of the land in question, or, if the subject of claim be rent, or the like, a view of the land out of which it issues.”⁵

§ 876. Under the Statute of Anne.—A statute passed in the reign of Anne, “for the amendment of the law, and the better advancement of justice,” extended the view seemingly to all civil actions, by enacting “that from and after the first day of Trinity Term, in any actions brought in any of Her Majesty’s courts of record at West-

⁵ Bouv. Law. Dict. tit. *View*; citing Vin. Abr., *View*; Com. Dig., *View*; Booth, 37; 2 Saund. 45 b.; 1 Reeve Hist. Eng. Law, 435. In Vin. Abr., tit. *View*, the old practice is set out at very considerable length; from which it appears that a view could be had only in real and mixed actions. It was much questioned whether it was demandable in the action of *dower* unde

nihil habet. According to Viner’s Abridgement, it was not demandable in such actions. Vin. Abr., *View*, A. 2. There is a well condensed and well written article on this subject, in the *Central Law Journal* for May 4, 1888, by J. C. Thomson, Esq., of St. Paul, to which the writer is indebted for citations to many authorities here examined.

minster, where it shall appear to the court in which such actions are depending, that it will be proper and necessary that the jurors who are to try the issues in any such action, should have the view of the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trials of such issues,—in every such case, the respective courts, in which such actions shall be depending, may order special writs of *distringas*, or *habeas corpora* to issue, by which the sheriff, or such other officer to whom the said writs shall be directed, shall be commanded to have six out of the twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who, then and there, shall have the matters in question shown to them by two persons in the said writs named, to be appointed by the court; and the said sheriff, or other officer who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had according to the command of the said writs.”⁶

§ 877. Under the Statute of Geo. II.—In the reign of George II. a law was passed “for the better regulation of juries,” which contains the following proviso: “Provided always that, where a view shall be allowed in any cause, that in such case six of the jurors named in said panel, or more, who shall be mutually consented to by the parties or their agents on both sides, or, if they cannot agree, shall be named by the proper officers of the respective courts of King’s Bench, Common Pleas, Exchequer at Westminster, or Grand Session in Wales, and the said Counties Palatine, for the causes in their respective courts, or, if need be, by a judge of the respective courts where the cause is depending, or by the judge or judges before whom the cause shall be brought on to trial respectively,—shall have the view, and shall be first sworn, or such of them as appear, upon the jury to try the said cause, before any drawing as aforesaid, and so many only shall be drawn to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of twelve to be sworn for the trial of such cause.”⁷

§ 878. Under the Statute of Geo. IV.—In the time of George IV. these statutes were re-enacted in a modified form, in the “act for consolidating and amending the laws relating to jurors and juries,” wherein it was provided “that, where in any case, either civil or

⁶ Stat. 4 Anne, ch. 16, § 8.

⁷ Stat. 3 Geo. II., ch. 25, § 14.

criminal, or on any penal statute, depending in any of the said courts of record at Westminster, or in the Counties Palatine, or Great Sessions in Wales, it shall appear to any of the respective courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case, should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such court, or any judge thereof in vacation, may order a rule to be drawn up containing the usual terms, and also requiring, if such court or judge shall so think fit, the party applying for the view to deposit in the hands of the under-sheriff a sum of money to be named in the rule, for payment of the expenses of the view, and commanding special writs of *venire facias*, *distringas* and *habeas corpora*, to issue, by which the sheriff or other minister to whom the said writ shall be directed, shall be commanded to have six or more of the jurors named in such writs, or in the panels thereto annexed (who shall be mutually consented to by the parties, or, if they cannot agree, shall be nominated by the sheriff or such other minister as aforesaid), at the place in question, some convenient time before the trial, who then and there shall have the place in question shown to them by two persons in the said writs named to be appointed by the court or judge; and the said sheriff or other minister, who is to execute any such writ, shall, by a special return upon the same, certify that the view hath been had according to the command of the same, and shall specify the names of the viewers.”⁸

§ 879. In what Cases granted under these Statutes.—Notwithstanding the unrestrained terms of these statutes, the courts would not, as a rule, order a view, except in actions of a *local nature* such as *trespass quare clausum fregit*, *nuisance*, and the like. They would not grant it in an action of *assumpsit* for work done by a carpenter or bricklayer upon a house; ⁹ for the judge had no power to make an order for the plaintiff, or his witnesses, to enter the defendant’s premises, in order to inspect the work done.¹⁰ Prior to the last statute above quoted, they would not grant it in a *criminal prosecution*, without consent, and this was the practice before the statute of Anne.¹¹

⁸ Stat. 6 Geo. IV., ch. 50, § 23.

¹⁰ *Turquand v. Guardians*, 8

⁹ *Stones v. Menhem*, 2 Exch. 382.

Dowl. P. C. 201.

So held in *Richmond v. Atkinson*,
58 Mich. 413; post, § 883.

¹¹ *Rex v. Redman*, 1 Keny. 384.

§ 880. **Old Practice in Conducting a View.**—"Before we make a rule for a view," said Ld. Holt, C. J., "the *venire facias* must be returned, and then we make a rule that so many of the panel shall view the premises."¹² A view was never granted without *affidavit*, except in actions of *waste*;¹³ nor without hearing both parties and examining into the propriety of it, unless the opposite party consented.¹⁴

§ 881. **The subject Regulated by Statute in America.**—In this country the subject is generally one of statutory regulation. It has been held not competent for the court to order a view, against the objection of a party, except in cases where a view is authorized by statute, the court proceeding upon the conception that it is more in consonance with the theory and method of judicial trials, that the jury should base their findings solely upon sworn testimony taken in open court, or upon depositions taken as provided by law.¹⁵

§ 882. **American Statutes.**—In all of the states, except Alabama, Georgia, Louisiana and Maryland, some form of legislation provides for the taking of a view by the jury in the trial of a case. In Illinois, Missouri and Tennessee this is confined to cases relating to realty.¹⁶ In Delaware and Vermont the statute concerns only civil procedure.¹⁷ In the other states view is allowed both in civil and criminal

¹² Anon., 2 Salk. 665. See also another case called Anon., on same page, also 1 Reeve Hist. Eng. Law, 435.

¹³ Com. Dig. *View*, A.

¹⁴ Ibid.

¹⁵ Doud v. Guthrie, 13 Bradw. (Ill.) 653; Smith v. St., 42 Tex. 444; Bostick v. St., 61 Ga. 635. This position was later receded from by the Illinois Supreme Court in a common law action by an abutter for damages from construction of approaches to a viaduct, the court ordering a view against objection by plaintiff. Springer v. City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609. Followed in Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40.

¹⁶ Ill. Rev. St. 1874, ch. 47; Mo. §§ 2362, 6457, R. S. 1909; Tenn.

Code 1896, § 1856. Also Processioning, § 3689.

¹⁷ Del. Rev. St. 1893, ch. 109, § 20; Vt. Stat. 1891, § 123. Delaware is stated to exclude criminal cases, though in general terms it resembles Virginia and West Virginia statutes, which according to Virginia ruling includes civil and criminal cases. See Litton v. Com., 101 Va. 833, 44 S. E. 923. *California*—(Civil Procedure)—"When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court.

cases, in some of the states being confined to premises, and in others extending to premises and property which cannot be brought before the court. These statutes it is unnecessary to set out in full. Inasmuch, however, as the California enactments are the types for many other states the main body of that for civil procedure and that for criminal procedure are here given for convenience and a better understanding of cases hereinafter cited.¹⁸

§ 883. **When Discretionary.**—Under these statutes, it has been frequently ruled that the granting or refusing a view is purely a matter of *discretion* with the trial court, which discretion is not reviewable on appeal except in cases of manifest abuse.¹⁹ Although a view is authorized by statute, the refusing of it will not be ground of reversing a judgment, where it does not appear that there was

for that purpose. While the jury are thus absent, no person other than the person so appointed, shall speak to them on any subject connected with the trial." *California*—(Criminal Procedure).—"When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate to the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay and at the specified time."

¹⁸ Cal. C. C. P. 1872, § 610; P. C. § 1119. States having similar statutes are Arkansas, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Utah and Washington; also the territories of Alaska and Arizona. The attention of the

practitioner is called to the statutes of his own state.

¹⁹ *Pick v. Rubicon etc. Co.*, 27 Wis. 433, 446; *Boardman v. Westchester Fire Ins. Co.*, 54 Wis. 364, 11 N. W. 417; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 7, 18 N. W. 827; *Clayton v. Chicago etc. R. Co.*, 67 Iowa, 238, 25 N. W. 150; *King v. Iowa Midland R. Co.*, 34 Iowa, 458; *Richmond v. Atkinson*, 58 Mich. 413, 25 N. W. 328; *People v. Bonney*, 19 Cal. 426; *Baltimore etc. R. Co. v. Polly*, 14 Gratt. (Va.) 447, 470; *Dobbins v. Ry. etc. Co.*, 79 Ark. 85, 95 S. W. 794; *People v. White*, 116 Cal. 17, 47 Pac. 771; *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 657; *Morrison v. R. Co.*, 84 Iowa, 663, 51 N. W. 75; *Cohankus Mfg. Co. v. Rogers*, 29 Ky. Law Rep. 747, 96 S. W. 437; *Blanchard v. Ry. Co.*, 186 Mass. 582, 72 N. E. 94; *Shalgren v. Lumber Co.*, 95 Minn. 450, 104 N. W. 531; *Dupuis v. Traction Co.*, 146 Mich. 151, 109 N. W. 413; *Alberts v. Husenetter*, 77 Neb. 699, 110 N. W. 657; *Mintzner v. Hogg*, 186 Pa. 541, 40 Atl. 1083; *Bodie v. R. Co.*, 66 S. C. 302, 44 S. E. 943; *Litton v. Com.*, 101 Va. 833, 44 S. E. 923; *St. v. Hunter*, 18 Wash. 670, 52 Pac.

any difficulty in deciding the question upon the whole evidence, or that there was any difficulty which might have been removed by a view. A mere contradiction in the evidence, without more, does not enable an appellate court to see that a view was necessary.²⁰ In such a case it has been said: "It would be an exceedingly difficult matter to show that the court had abused its discretion in *refusing* to make an order of this kind. It appears that, in this case, a *map* was used upon the trial [a proceeding to condemn land], showing the farm and the right of way through it, and the witnesses described fully the situation of the premises, and we suppose the court was correct in holding that a view of the farm was not necessary to enable the jury to understand and properly apply the evidence in this case, and reach a just determination of the rights of the parties."²¹ In an *action for work and labor done* and materials furnished in repairing a house, a view was requested and denied, and it was held that there was nothing which made it appear that the discretion of the trial court was abused.²²

§ 884. **In Equity Cases.**—In equity cases the verdict of the jury is *advisory merely*, and therefore a view of the *locus in quo* by the jury is not as important as in cases where their decision, subject to

247; *St. v. Musgrave*, 43 W. Va., 672, 28 S. E. 813; *Rickeman v. Ins. Co.*, 120 Wis. 655, 98 N. W. 960. For states which, having no statute on this subject where a view has been held to be within the power of the court, according to its discretion to grant, see *Campbell v. St.*, 55 Ala. 80; *Mayor v. Brown*, 87 Ga. 599, 13 S. E. 638; *Jenkins v. R. Co.*, 110 N. C. 439, 15 S. E. 193. Where statute provides for view only on request of one of the parties and one of them making no motion but merely expressing a desire for a view, granting same on request of jury will be taken to be the party's request. *Yore v. City of Newton*, 194 Mass. 250, 80 N. E. 472. Request may be denied where diagrams are shown by both parties. *McCarley v. Mfg. Co.*, 75 S. C. 390, 56 S. E. 1.

²⁰ *Baltimore etc. R. Co. v. Polly*, 14 Gratt. (Va.) 447, 470; *Mier v. Phillips Fuel Co.*, 130 Iowa, 570, 107 N. W. 621. It must be made clearly manifest, that a view was necessary to a just decision, that it was practicable and that probable injury was suffered by the losing party. *Gunn v. R. Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

²¹ *Clayton v. Chicago etc. R. Co.*, supra. Circumstances under which discretionary to refuse a view under Kansas statute in a proceeding to condemn land for a railway. *Kansas Central R. Co. v. Allen*, 23 Kan. 285.

²² *Richmond v. Atkinson*, 58 Mich. 413, 25 N. W. 328; ante, § 879.

the power of the judge to set it aside for good cause, is final. The difference between the relation of the judge to the finding of the jury, in cases in equity and in cases at law, is this: in cases in equity the judge, having heard the evidence, is at liberty *to adopt* the verdict, if he thinks fit; in cases at law, he is at liberty *to set it aside*, if he thinks fit. In either case, in order to enable him to exercise this office discreetly and justly, he ought to hear and see all the evidence which the jury hear and see. If the jury make a view of the premises out of court, the judge ought to make the same view. In point of fact, however, he never accompanies them in making the ordinary statutory view, except under special statutory provisions, such as the statute of Michigan relating to the condemnation of land for public uses, hereafter considered.²³ Nevertheless, we find that it has been held that where, in an equity case, the jury view the premises, the *judge should accompany them*; since he is not in a position to review and affirm or set aside their verdict, unless he has the same means of information which they had. In such a case the judge, finding himself in no position to review the verdict intelligently, properly, it was held, granted a new trial.²⁴

§ 885. **In Criminal Cases.**—It thus appears²⁵ that, in criminal cases, we have no warrant in the English practice for sending the jury out to make a view, except where such a course is authorized by statute. Before the enacting of any statute authorizing a view in criminal cases, a view in such a case was reluctantly granted by the Supreme Judicial Court of Massachusetts. The case was a prosecution for murder, and a view of the house, where the murder was alleged to have been committed, was at first *refused*, although moved for by the prisoner and consented to by the attorney-general, —the court saying: “We refused such a request in another case, and it does not appear to us that a view is necessary. It is attended with many inconveniences. We know not what the jury may hear, and what impressions may be made upon them while they are taking the view. The case should be decided by the evidence given in court.” Upon a second trial of the same case, the jury themselves requested that they might be permitted to see the place of the murder, and the counsel on both sides expressed their desire that permission should be *granted*. The prisoner likewise gave his con-

²³ Post, § 911.

²⁵ Ante, § 879.

²⁴ *Fraedrich v. Fllette*, 64 Wis. 184, 188, 25 N. W. 28.

sent. The court granted the request, but with hesitation, because they said this course was without precedent, and if it should turn out to be incorrect, they had doubts whether they could hold the prisoner to his consent. The court directed that no person should go with the jury, except the officers having them in charge, and that no person should speak to them, under penalty of a contempt. Plans were exhibited and explained to the jury in court, and they were permitted to take them with them.²⁶ This doubt was relieved by a statute subsequently enacted, which recited that "the court may order a view by a jury impaneled to try a criminal case."²⁷ With this statute in force, the court could, of course, have no doubt of its authority to grant a view, if it deemed it expedient. Thus, in the celebrated trial of Prof. Webster for the murder of Dr. Parkman, the attorney-general, after opening the case, suggested that it would be desirable that the jury should be permitted to go to the medical college, and take a view of the premises where the murder was alleged to have been committed. The court said, referring to the above statute, that they had no doubt of their authority to grant a view, if they deemed it expedient; and that views had been granted of late in several capital cases in that county. "And the court afterwards, on adjourning for the day, directed that the jury should be permitted to take a view of the medical college on the next morning, before the coming in of the court, attended by two officers, and one counsel on each side."²⁸ But in Texas, where there was no statute authorizing a view in criminal cases, it was held that, for the court to permit a view, was error for which a conviction would be reversed. The case in which it was so held was a case of hog-stealing. There was a controversy as to the *identity* of the animal alleged to have been stolen. The jurors were permitted by the court to leave the court room during the trial, and to inspect the animal alleged to have been stolen, with a view of thus solving, in connection with the evidence detailed by the witnesses, the question of identity and ownership. The court set aside the verdict and ordered a new

²⁶ Com. v. Knapp, 9 Pick. (Mass.) 496, 515. In the states which have no statute on this subject opinion is divided as to the power of the court to grant view in a criminal case. In North Carolina it was ruled it could be granted. St. v. Perry, 121 N. C. 533, 27 S. E. 997. While in Missouri this is denied

even upon defendant's application. St. v. Hancock, 148 Mo. 488, 50 S. W. 112.

²⁷ R. S. Mass. 1843, ch. 137, § 10; Gen. Stats. Mass. 1860, ch. 172, § 9. See ante, § 882, subsec. 8.

²⁸ Com. v. Webster, 5 Cush. (Mass.) 295, 298.

trial.²⁹ So, in Georgia, in a case of murder, the court asked the defendant's counsel whether he objected to the jury making a view of the premises, and received an answer that he did not, and thereupon sent them out in charge of a bailiff to make such a view. It was held that this was error such as required a reversal of the conviction. The court said: "This extraordinary proceeding on the part of the court was error. The court had no legal right to require the defendant's counsel to say whether he objected to that extraordinary proceeding or not, especially in the presence of the jury. and the fact that he did not object under the circumstances did not legalize that extraordinary proceeding."³⁰

§ 886. View that the Prisoner must Accompany the Jury.—Where a view takes place under the authority of a statute, in a criminal case, the prisoner must, according to several recent holdings, accompany the jury; since it is reasoned that, for the view to take place in his absence, is a violation of his constitutional privilege of meeting the *witnesses* against him face to face,—the conception being that no species of *evidence* can be communicated to the jury in any way except in his presence.³¹ Some of the cases³² also take the view that this supposed constitutional right of the prisoner cannot be *waived* by him.³³

²⁹ Smith v. St., 42 Tex. 444.

³⁰ Bostock v. St., 61 Ga. 635, 639, opinion by Warner, C. J.; ante, § 881.

³¹ St. v. Bertin, 24 La. Ann. 46; Carroll v. St., 5 Neb. 32, 35; Benton v. St., 30 Ark. 328, 348; People v. Bush, 71 Cal. 602, 10 Pac. 169 (overruling People v. Bonney, 19 Cal. 426). Compare Eastwood v. People, 3 Park. Cr. (N. Y.) 25; 3 Whart. Cr. L. (7th ed.), § 3160. It was held in Utah that the confrontation provision of the constitution was confined to the trial as conducted in the place where court is held, and, therefore, did not require that accused should be personally present at the taking of a view. St. v. Mortensen, 26 Utah, 312, 73 Pac. 562. In Idaho, under similar statute, it was held he had

of right to demand presence by himself or counsel. St. v. McGinnis, 12 Idaho, 336, 85 Pac. 1089.

³² Notably the case of People v. Bush, 71 Cal. 602, 10 Pac. 169 (overruling People v. Bonney, 19 Cal. 426).

³³ This proposition is denied in a vigorous argument by Brewer, J., in St. v. Adams, 20 Kan. 311, 324; Neal v. St., 32 Neb. 120, 49 N. W. 174; St. v. Sasse, 72 Wis. 3, 38 N. W. 343. It was also held by Supreme Court of Arizona, that, where the view is granted on motion of counsel for accused and in his presence, the contention of unconstitutionality was without merit, the accused not being present at the view and no witnesses being present at its taking. Elias v. Territory (Ariz.), 76 Pac. 605 (not re-

§ 887. **A Contrary View.**—There is equally good authority and reason in support of the contrary view. In Massachusetts it was not supposed necessary in the cases of Knapp and Webster,³⁴ to send the prisoner with the jury when they made the view. In England, it has been held, in the Court for Crown Cases Reserved, that no irregularity is committed in a criminal case, by allowing a jury to view the premises on which the alleged criminal act was committed, even after the case has been summed up and the jury have commenced their deliberations, the prisoner not consenting, his counsel being absent at the time, and neither the prisoner nor his counsel going with the jury to make the inspection.³⁵ The statute of Kansas is similar to that of Arkansas and California; but, nevertheless, the Supreme Court of Kansas hold that it is not necessary for the prisoner to accompany the jury in making the view; and that his right so to accompany them is a right which he may *waive*, and which he does waive by not demanding the privilege.³⁶ So, in

ported in state reports). If accused objects and the view is granted, he does not waive his objection by accompanying the jury on the view. *Jones v. St.*, 51 Ohio St. 331, 38 N. E. 79.

³⁴ Ante, § 885.

³⁵ *Reg. v. Martin*, L. R. 1 Cr. Cas. Res. 378. In this case another very serious question was presented. While the jurors were making the view, they asked the witnesses, who had testified in court, to point out the precise spot where they, the witnesses, had stood, and the place and the position in which the prisoners were standing, when the witnesses saw the prisoners do the alleged criminal act; and then the jurors placed themselves in the same position as that occupied by the witnesses, and looked in the same manner in which the witnesses stated they had looked. It was observed that if these facts had been *found* by the court below, instead of being merely *recited*, a very serious question would have arisen, upon which it would have

been necessary to examine several authorities; but as the facts were not found, the question was not presented to the reviewing court for decision.

³⁶ *St. v. Adams*, 20 Kan. 311, 324. The reasoning of the court is not as clear as its conclusion. It introduces the fiction that, although the prisoner does not accompany the jury in making the view, he is, nevertheless, with them, because they are in legal contemplation in the presence of the court. On this point, Brewer, J., said: "In contemplation of law, the place of trial is not changed. The judge, the clerk, the officers, the records, the parties, and all that go to make up the organization of the court, remain in the court room. The jury retire to discharge one duty connected with the trial, and yet, though absent while discharging that duty, inasmuch as it is done under the direction of the court, and while in charge of an officer appointed by the court, they are, in legal contemplation, in the pres-

Oregon, where, in a case of murder, a view was directed, and the order omitted to provide for the presence of the defendant or his counsel thereat, no application having been made therefor by them, it was held no error, since the right to be present was one which the accused might *waive*,—the court saying: “We consider the better doctrine to be, that the failure of the accused to be present when the jury were making their view, is no ground of error. We are unable to see what good his presence would do, as he could neither ask nor answer any question, nor in any way interfere with the acts, observations, or conclusions of the jury. He would only have been a mute spectator while there.”³⁷

§ 888. **Irregular to send out Witnesses with Jury.**—For the court to send a *witness* with the jury, on making the view, with directions to show them the position where the witness stood during the transaction in question, and where other persons stood, is a violation of the provision of a statute against suffering persons to communicate with the jury, for which a conviction will be reversed.³⁸

§ 889. **Theory that Impressions acquired by the View are not Evidence.**—The foregoing theory,³⁹ that for the view to take place without the presence of the accused is a violation of his constitutional right to have *all the evidence* which the jury receive presented to them in his presence, is reduced to nonsense by another class of holdings, one of them in the same court, to the effect that the knowledge acquired by the jurors in making the view is *not evidence at all*; that the view is not allowed for the purpose of furnishing evidence upon which a verdict is to be founded, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court;⁴⁰ that it is therefore error to instruct them that,

ence of the court. Though the defendant may not go with them into their place of retirement, he is nevertheless personally present during that portion, as well as the rest of the trial.” This reminds one of the fiction by which the Roman emperors, although sitting at ease in their capital, *personally commanded* in battles fought in the most distant parts of their empire.

³⁷ St. v. Ah Lee, 8 Ore. 214, 217.

³⁸ People v. Green, 53 Cal. 60; Garcia v. St., 34 Fla. 311, 16 South. 223. Nor may respective counsel go with them and “call their attention to the facts.” Sasse v. St., 68 Wis. 530, 32 N. W. 849.

³⁹ Ante, § 886.

⁴⁰ Chute v. St., 19 Minn. 271, 281; Brakken v. Minneapolis etc. R. Co., 29 Minn. 41, 43, 11 N. W. 124. That this was the original conception of the office of a view will appear from the English statutes already

in making it, they are to take into consideration in any degree⁴¹ the knowledge thus acquired;⁴² and that, though a view has been had and the bill of exceptions discloses nothing which took place at the view, it contains *all the evidence*.⁴³

§ 890. **Reasons Adduced in Support of this View.**—The reasons adduced in the support of this view will appear from the following quotations: "In authorizing a court to send the jury to view the premises in litigation, it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land, but only to enable them the more clearly to understand and apply the evidence. If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without remedy by a motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury, as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence), whether it was sufficient to raise a substantial conflict in the evidence. The cause would be determined, not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors, founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining. The statute could not have been intended to produce such results as these, in authorizing the jury to view the premises."⁴⁴ "The question then arises as to the purpose and intent of this statute."⁴⁵ It seems to us that it was to

quoted. Ante, §§ 876, 878. *Northwestern M. L. I. Co. v. S. I. Office*, 85 Minn. 65, 88 N. W. 272. In Georgia, which has no statute providing for view, it was held, in an equity case, that it appearing that the court's judgment reciting that it was made "after personal inspection" by the judge, and it not appearing, that this was done with the consent of counsel, such inspection was shown to be an integral part of the judgment, necessitating its being set aside. *Atlantic & B. Ry. Co. v. Cordele*, 125 Ga. 373, 54 S. E. 155.

⁴¹ *Close v. Samm*. 27 Iowa, 503,

507 (Wright, J., dissenting). *De Gray v. R. Co.*, 68 N. J. L. 454, 53 Atl. 200.

⁴² *Wright v. Carpenter*, 49 Cal. 607, 609; *Heady v. Vay Turnp. Co.*, 52 Ind. 117, 124.

⁴³ *Jeffersonville etc. R. Co. v. Bowen*, 40 Ind. 545 (overruling *Evansville etc. R. Co. v. Cochran*, 10 Ind. 560).

⁴⁴ *Wright v. Carpenter*, 49 Cal. 607, 609. This position has been repudiated in *People v. Milner*, 122 Cal. 171, 54 Pac. 833.

⁴⁵ Referring to the Iowa statute, ante, § 882, subsec. 4.

enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them; and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, in respect to which no opportunity for examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the evidence, or even refuse to set it aside, without knowing the facts ascertained by such personal examination by the jury? It is a general rule, certainly, if not universal, that a jury must base their verdict upon the evidence delivered to them in open court, that they may not take into consideration facts known to them personally, but outside of the evidence produced before them in court. If a party would avail himself of the facts known to a juror, he must have him sworn and examined as other witnesses.”⁴⁶

§ 891. Instructions held Erroneous under this View.—Under this view it has been held error to instruct the jury that, in estimating the damages, they are to use their own judgment, as well as the

⁴⁶ *Close v. Samm*, 27 Iowa, 503, 507, opinion by Cole, J. From the foregoing decision *Wright, J.*, dissented. In the course of his opinion, he said: “If the only object of the statute was to enable the jury to better understand, and the more intelligently to apply, the testimony of the witnesses, then I confess that I do not see why, upon this basis alone, they might not, in determining the ultimate facts, ‘include’ or make use of, this ‘personal examination.’ If they are to use it to enable them ‘to understand and apply the testimony,’ then, it seems to me, they are possessed of facts unknown to the parties; and whether the impressions received and the applications of the testimony are true or false, can no more be discovered than if they have actually ‘burdened’ them-

selves with *testimony*.” *Ibid*. 511. The learned judge extended his observations at considerable length upon the question, with reference to the particular case before the court. *Grandwater v. Washington*, 92 Wis. 56, 65 N. W. 871. In Ohio it was said that view is solely for the purpose of enabling the jury to apply the evidence offered on the trial. *Machader v. Williams*, 54 Ohio St. 344, 43 N. E. 324. It has also been held, that, even under a statute regarded as mandatory, such as the Colorado statute respecting view of a mine, when either party requests a view, its provisions cannot be invoked by one who has not introduced sufficient evidence to take his case to a jury. *McMillen v. Ferrum Min. Co.*, 32 Colo. 38, 74 Pac. 461.

judgment of the witnesses.⁴⁷ Under the same view it has been held error to give the following instruction: "You must determine the question of damages from the evidence before you, giving the same and each part thereof, the weight you think it entitled to, and no more; as a part of the evidence in the case, such information as you derived from the view of the premises through which the road is proposed, and on the line of the said proposed road." The court quoted and approved the reasoning of the Iowa court in the case next cited.⁴⁸ This view has been pushed to the extreme of holding that an instruction which allows the jury to base their verdict *in any degree* upon their personal examination of the premises, is error. It was so held of the following instruction: "You will determine from all the evidence in the case, and all the facts and circumstances disclosed on the trial, including your personal examination, whether the water was, by the act of the defendant, backed up on the premises of the plaintiffs, to the damage of their water power, as alleged." ⁴⁹

§ 892. Instance, under this Theory, of a proper Instruction to a Jury before sending them out.—On the third trial of an action for the recovery of land in California, it became material to determine whether the land was *swamp* and *overflowed land*, such as passed under the patent under which the plaintiff claimed. The court, upon ordering a view, instructed the jury as follows: "The jury will go with the sheriff, examine the land, examine the quality of the soil, of the growth upon it; but you are not to have any conversation with each other, or any body else, in relation to the quality of the land. Avoid forming an opinion as to its quality until you have finally heard all the evidence, and retired to your jury room to consider a verdict." It was held that this instruction was not erroneous. It did not authorize the jury to take into consideration, when they should retire into the jury room, the result of their own examinations of the land, as independent evidence in the case.⁵⁰

§ 893. Contrary Opinion that Knowledge Acquired by the View is Evidence.—There is no sense in the conclusion that the knowledge which the jurors acquire by the view is not evidence in the case.

⁴⁷ Brakken v. Minneapolis etc. R. Co., 29 Minn. 41, 43, 11 N. W. 124.

⁴⁸ Heady v. Vevay etc. Turnp. Co., 52 Ind. 117, 124.

⁴⁹ Close v. Samm. 27 Iowa, 503, 507 (Wright, J., dissenting).

⁵⁰ Wright v. Carpenter, 50 Cal. 556, on former appeals, 49 Cal. 608, and 47 Cal. 436.

The conception that what a body of jurors *see* themselves, relevant to the issue to be decided by them, is not evidence, but something to be considered by them in weighing oral evidence, is nonsense. What they see is evidence in a primary sense, and what is detailed to them concerning the same subject matter by witnesses, is evidence in merely a secondary sense. An objective lesson always impresses itself more vividly upon the mind than an oral lesson. Such a conclusion is tantamount to saying that they are to take the trouble of going in a body to inspect land, or other material object, out of court, and that when they come to make up their verdict they must resolutely forget the impressions acquired from such inspection. The conception that a body of freeholders, residing in the vicinity, shall view the land in controversy, in a proceeding to expropriate it for public use, and then shall put out of sight, in making their estimate of damages, their own knowledge of the value of land in that vicinity, applied to the character of the particular land as they have observed it, is also nonsense. Impressed with this view, the Supreme Court of Wisconsin, speaking through Lyon, J., has said: "We understand that the object of a view is to acquaint the jury with the physical situation, condition and surroundings of the thing viewed. What they see they know absolutely. If a witness testified to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed they cannot believe, the witness,—and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testified that a certain farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned,—no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of the testimony given in court." That court accordingly has held that the knowledge which the jurors acquire in making the view, is evidence to be considered by them in assessing damages, in a proceeding for the condemnation of land for public use⁵¹ upon which they may act to the exclusion of con-

⁵¹ Washburn v. Milwaukee etc. 245, 42 Atl. 128; U. S. v. Seufert B. R. Co., 59 Wis. 364, 368, 18 N. W. Co., 87 Fed. 35.
431; Shano v. Bridge Co., 189 Pa.

tradictory evidence;⁵² and similar views prevail in other jurisdictions.⁵³

§ 894. [Continued.] The same View taken by Chief Justice Shaw.—Opposed to the foregoing authorities⁵⁴ is a well considered case, in which the opinion was written by a judge no less eminent than Chief Justice Shaw. The proceeding was instituted for the purpose of assessing the damages sustained by a property owner, by the act of the City of Boston in widening the street. The judge *instructed the jury*, “that they, having viewed the land taken, and having heard the testimony of witnesses, and enlightened their consciences as fully as they could, must give a verdict according to their own opinion and conviction; that if any one of them knew any fact of his own knowledge, which bore upon the case, he ought to disclose it, and testify to it in court; that, in making up their verdict, they should take counsel of their own experience and knowledge of like subjects, and should consider, not only what the witnesses had testified, but what they themselves had seen in the view which they had taken; and that, if witnesses had sworn to matters of opinion, which the jury, in the exercise of their good sense, did not believe to be correct, they should disregard such testimony.” The propriety of this instruction was challenged. “It appears to me,” said Shaw, C. J., “that the direction of the court in this respect was singularly well guarded, and expressed with great accuracy and strictly conformably to law. The cases cited tend to show that, where a juror knows of a fact material to the issue, he must disclose and testify to it, in court; but in the case before us, the jurors were

⁵² Neilson v. Chicago etc. R. Co., 58 Wis. 517; post, § 598.

⁵³ Toledo etc. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; post, § 899; Parks v. Boston, 15 Pick. (Mass.) 198 (as seen in next section); Remy v. Municipality No. 2, 12 La. Ann. 500, 503; (still stronger view, as seen in § 897, post); People v. Milner, 122 Cal. 471, 54 Pac. 833; McGar v. Bristol, 71 Conn. 652, 42 Atl. 1000; St. v. Henry, 51 W. Va. 283, 41 S. E. 439. What one author calls “nonsense” may be forcibly illustrated by an analogous case of their

being allowed to smell the contents of a bottle alleged to contain whisky. Reed v. Territory (Okl.), 98 Pac. 583. In Illinois the settled rule is, that a view is “in the nature of evidence.” Chicago, R. I. & P. R. Co. v. Brewing Co., 174 Ill. 547, 51 N. E. 572. See also East & W. I. R. Co. v. Miller, 201 Ill. 413, 66 N. E. 275. It is to be used, where there is a conflict of evidence. Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498.

⁵⁴ Those examined in § 889, et seq.

referred to their own experience and knowledge of like subjects, especially that acquired by the view, to test the accuracy of the witnesses in matter of opinion. Were this a common-law action, therefore, I should feel strongly inclined to the opinion that this instruction was strictly and legally correct; but what we think puts it beyond any exception here is, that this was not an action, but an estimate of damages, in laying out a highway." The learned judge then referred to certain statutes, as showing that the practice had been for the jury to go upon the land and there make the appraisement or estimate, and continued thus: "The locating committee, and the sheriff's jury are to make an estimation upon view; and, speaking for myself, I cannot perceive why they might not, in both cases, have estimated the damages upon their own experience and judgment, without any evidence *aliunde*, though they might be at liberty to enlighten their own judgments by the aid of testimony. And there seems to be no substantial difference established by the mode of trial in this city. The whole city being within an easy walk of the court, it was manifestly a wise and convenient provision that, after having taken a view of the place, they should return into court and have the cause there conducted before the judge, and in conformity with the usual forms, rather than elsewhere before the sheriff. But the object of inquiry is still the same; it is to estimate the plaintiff's damages, and upon view, if either party desire it. The jury must, therefore, I think, exercise their own knowledge and experience fully; and perhaps, in most instances, with a competent and intelligent jury, such judgment could not be much aided by the estimates of others, though under oath in the form of testimony. It may follow as a consequence, as suggested by the learned counsel for the complainant, that it would be difficult, if not impossible, to set aside a verdict in such a case, on the ground of being contrary to the weight of evidence given on the trial; though probably the same result might be obtained by proving, by other evidence, such an excessive over or under-valuation as to show that the jury might have been misled by error or prejudice." ⁵⁵

⁵⁵ *Parks v. Boston*, 15 Pick. (Mass.) 198, 199, 209. While the question referred to in the text gave a particular coloring to the instruction to the jury and to the opinion of the chief justice upholding the same, the Supreme Judicial

Court of Massachusetts long afterwards held, in effect, that view generally was evidence from which inference might be drawn to sustain an otherwise insufficient case. Thus it was ruled in action against a street railroad for injuries aris-

§ 895. **But Jurors not to Disregard other Evidence.**—But the evidence which the jurors may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence. They are not to disregard *other evidence* in regard to the character and value of the property; and an instruction which conveys to them the impression that they may do so, is erroneous. It was so held concerning instructions which embraced the following sentences: “You are to determine it [the compensation] from the whole evidence that has been given you in the case—from your view—you to take the view you make; you take your own knowledge, your own judgment, your own good sense.” “If a witness, from his manner and appearance upon the stand, from his want of knowledge of the subject matter, *or from other causes* apparent to you and your judgment—his evidence does not convince your mind that he is right, you should disregard it, because it is not evidence in the case. On the other hand, if, from his knowledge, from his experience, from his appearance and manner, he does convince you, and your judgment, your knowledge acquired by your view, your good sense, together with all the evidence given in the cause—determines in your mind that the damages are so much, that should be your verdict,—more or less.”⁵⁶ The court held that these, and other similar sentences in the charge, were of a character to convey to the jurors the idea that they might assess the damages according to the impressions which they had acquired from the view, disregarding other evidence in the case. The court, continuing the language al-

ling from a ridge of snow between the tracks, that the statement by defendant’s counsel, in his opening, that the jury would see a certain snow plow in use prior to the accident, authorized the jury to infer as against defendant, that the parts of the plow pointed out by him at the view did not show it was impossible for the snow to have remained as claimed. *McMahon v. R. Co.*, 191 Mass. 205, 77 N. E. 826. This state has proceeded quite steadily on the theory of evidence by view. Thus it was ruled that an order directing a verdict for defendant will not be reversed, because a jury views the premises, when the bill

of exceptions fails to show there was anything on the premises from which the jury might infer negligence. *McCarthy v. Fitchburg R. Co.*, 154 Mass. 17, 27 N. E. 773. These rulings seem to mean, that, if one has the burden to show a certain fact, other evidence besides view should at least tend to show its existence, and with that, however small, view may be sufficient.

⁵⁶ It should be observed in passing, that this was probably an oral charge, taken down by a court stenographer, which accounts for the defects of grammatical construction.

ready quoted,⁵⁷ said: "But if the fact of which the jury may thus become cognizant is only one of many elements which must be considered, to determine some other fact which can only be satisfactorily determined by a resort to professional or expert testimony, the case is very different. Such are these cases. The jury were to assess the value of the land taken for the use of the railway company, and the damages to the other adjacent lands of the respective owners resulting from such taking. To do this intelligently, it became necessary to determine the location, quality, and condition of the land, the uses to which it was or might be applied, its market value, the manner in which the taking of a part of the tract would affect the residue, and perhaps other conditions affecting such value and damages. Some of these conditions, and more especially the value of the land, could not be definitely determined by the view alone, and cannot properly be said to be within the common knowledge of the jury. The opinions of witnesses acquainted with the values of such property, are essential to an intelligent judgment. At the common law, a view might have been had in a real action, and by statute in any action, to the end that the jury might see the land, or thing claimed, to enable the jurors better to understand the evidence on the trial.⁵⁸ We think such is still the office of a view. Hence, whatever the jury in each of these cases learned of the lands in question by the view, was available to enable them to determine the weight of conflicting testimony, respecting value and damage, but no further. * * * As to how far jurors may make up their verdict on their own knowledge, independently of the testimony, or against the testimony, the true rule is indicated by what has already been said concerning the view. A jury is not bound to give, and cannot give, any weight to testimony which, although undisputed by witnesses, is contrary to what every person of ordinary intelligence knows to be true. To illustrate, should a witness testify that at Boston on a certain day the sun arose at midnight, or that the Mississippi River empties into Lake Michigan, or that white is black, the testimony would be rejected at once. So, in matters of mere opinion, in cases where the testimony of experts is not required, if the jury know all the facts, they are not necessarily controlled by the opinions of witnesses, if such opinions have been received. In such cases, the jury are as competent as the witnesses to form an opinion, and the opin-

⁵⁷ Ante, § 893.

⁵⁸ Citing Jacob, Law Dict., tit. View.

ions of witnesses, if objected to, are inadmissible. Beyond this the jury cannot properly go. To allow jurors to make up their verdict upon their individual knowledge of disputed facts material to the case, not testified to on oath in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination, and the benefit of all the tests of credibility which the law affords. Besides, the evidence of such knowledge, or of the grounds of such opinions, could not be preserved in a bill of exceptions, or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel an appellate court to affirm judgments on the facts, when all of the evidence is before it, and there is none whatever to support the judgment. The court would be obliged to presume that the jury, or some juror, had, or at least thought he had, some personal knowledge of the facts outside the testimony, or contrary to it, which would sustain the judgment. Such a ruling in a case, the procedure in which was governed by common-law rules of evidence, we presume was never heard of. We think the correct rule in these cases is that above cited, to wit, if the testimony of value and damages is conflicting, the jury may resort to their own general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony; but their assessment must be supported by the testimony, or it cannot stand.”⁵⁹

§ 896. *Illustration of this View.*—Further to illustrate this view, Lyon, J., gave the following supposed case: “If no witness had estimated the compensation, to which a plaintiff was entitled, at less than \$500, or more than \$1,000, a verdict for less than \$500 or more than \$1,000, should be set aside, because unsupported by the evidence;”⁶⁰ which means that an estimate of values made exclusively

⁵⁹ Washburn v. Milwaukee etc. R. Co., 59 Wis. 364, 367, 18 N. W. 431 (approving Close v. Samm, 27 Iowa, 503); Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. 1083. The jury have no right to base their verdict upon a mere view. City of Grand Rapids v. Perkins, 78 Mich. 93, 43 N. W. 1037. In Missouri it has been held that, if the jurors personally examine the property, they are not bound to accept the

judgment of witnesses as to its value. City of K. C. v. Street, 36 Mo. App. 666. An instruction held correct was, that they should estimate the value from the evidence and not from their own judgment on seeing the land. Baltimore & O. R. Co. v. Flower, 132 Pa. 524, 19 Atl. 274.

⁶⁰ Washburn v. Milwaukee etc. R. Co., 59 Wis. 364, 370, 18 N. W. 431.

upon the evidence furnished by a view, is to be set aside as unsupported by substantial evidence.

§ 897. **When Jury decide upon their Personal Knowledge.**—In proceedings for the expropriation of land for public uses, under the Civil Code of Louisiana,⁶¹ the court, pushing this theory still further, hold that the jurors are entitled to rely upon their personal knowledge of the property in forming their conclusion, although they may be aided, especially if they request it, by the opinions of witnesses. “A jury,” said the court, “are in truth experts; and we suggest that a personal examination of the premises by the jury in a body, after it is impaneled, should be a feature of every proceeding under this article of the code.”⁶²

§ 898. **Not Error to exclude Evidence of Facts which the Jury have learned from the View.**—On a similar theory, where the jury have made a view of the premises, it has been held not error to exclude testimony of witnesses, as to matters concerning which they could form an opinion from the view as intelligently as could the witnesses. “Opinions in such cases are entirely outside the range of authorized expert testimony.”⁶³

§ 899. **[Michigan] Scope of the Powers of the Jury in Condemnation Proceedings.**—It is said in Michigan that, in such cases, the constitution as well as the principles of the common law, makes the jurors *judges of the law and fact*.⁶⁴ “Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge, from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matter of opinion. And while an appellate court is bound in such cases to set aside proceedings which appear to be based on false principles, it can not properly deal with rulings as if they were excepted to on a common-law trial, or dispose of the controversy on a merely technical motion.”⁶⁵

⁶¹ Civ. Code La., 1900, art. 2632.

⁶² *Remy v. Municipality No. 2*, 12 La. Ann. 500, 503. As to the nature of the proceeding under this statute, see also *Police Jury v. Manning*, 16 La. Ann. 182.

⁶³ *Ante*, § 893; *Neilson v. Chicago etc. R. Co.*, 58 Wis. 517, 524, 17 N. W. 310.

⁶⁴ *Chamberlain v. Brown*, 2 Doug. (Mich.) 120; *Toledo etc. R. Co. v. Dunlop*, 47 Mich. 456, 466, 11 N. W. 271; *McDuffee v. Fellows*, 157 Mich. 664, 122 N. W. 276. See Mich. Const. 1850, art. 18, § 2.

⁶⁵ *Toledo etc. R. Co. v. Dunlop*, *supra*, opinion by Campbell, J.

§ 900. **Difficulty of Reviewing on Appeal the Finding of the Jury.**—The absurd conclusion in which, as already seen,⁶⁶ several of the courts have landed themselves, that what the jurors *see and know* in consequence of making the view is to be shut out from their minds as evidence—even if this were possible—when they come to make up their verdict, has grown out of the difficulty which appellate courts have had in dealing with such verdicts when challenged as being unsupported by the evidence; and their conclusion has been that the knowledge which the jurors acquired in making the view is *not evidence*, because it cannot be got into a bill of exceptions so as to be conveyed to the minds of the appellate judges. They have been staggered by the thought of the consequences which would ensue, in a capital case, for instance, in dealing with a verdict thus challenged, where, in addition to the oral testimony of witnesses, the record should disclose the fact that the jurors had made a view of the scene of the supposed crime; but they have not stopped to reflect that, to hold that, because a species of evidence may be presented to the jury which was not even presented to the trial judge, and which, in the nature of things, could not be presented to the appellate judges, therefore it is to be regarded as not being evidence at all, and the jury are to be so instructed,—proves altogether too much, even for an ordinary criminal case; since, as already seen,⁶⁷ it has been the immemorial practice in criminal trials to exhibit to the jury burglars' tools, blood stained clothing, and other *indicia* of crime. Although the knowledge acquired by the jurors from such an inspection can never be accurately conveyed to the minds of the appellate judges through a bill of exceptions, would any court therefore fall into the wild dream of holding that the jurors should be instructed to disregard the evidence thus acquired?

§ 901. **How Courts have dealt with this Difficulty.**—The difficulty of dealing with the verdicts of juries, when challenged on the ground of being unsupported by evidence, where a view has been had, is exhibited in several reported cases. It has been said in Nebraska that, in a proceeding to condemn land for a railway, where there has been a view, "it is difficult to review the judgment as being against the weight of evidence, because all the evidence before the court cannot, from the nature of the case, be incorporated in the record; and in these cases there is no such discrepancy between the

⁶⁶ Ante, § 889.

⁶⁷ Ante, § 871.

evidence in the records and the verdicts, as to justify the court in setting them aside, which the court would not do, unless it was clear that the jury had erred.”⁶⁸ In California, in a contested election case, the evidence showed that one Twist voted in precinct A., and the question was as to the location of the boundary between that and another precinct, with reference to Twist’s residence. The trial court found that he voted illegally, and, on appeal, the question was whether there was evidence to support the finding. The record did not clearly show the location of the boundary line between the precincts; but, as it appeared that the trial judge (who acted as trier of the facts) visited, with the consent of the parties, the locality, it was held that the finding should not be disturbed. The court said: “As the case is presented in the transcript before us, we cannot reverse the decision of the court below upon this question. The record does not clearly show the relative positions of the natural objects referred to in the testimony, so that we can intelligently determine where the line runs with reference to the house of Twist, or with reference to his lands, or to his enclosure, as the same existed when the line was established. The judge below, with the consent of the parties, visited the locality, and certainly had better opportunities for determining satisfactorily the question in dispute than have we.”⁶⁹ In Indiana it was originally held that, where the jury have made a view, their finding in respect of value cannot be reviewed on appeal; because, although the bill of exceptions recites that it contains all the evidence, yet in point of fact it shows that it does not; since it contains nothing relative to the examination of the premises which was made by the jury, or in regard to the information conveyed to their minds by such examination. “Evidence,” said Hanna, J., “is that which produces conviction on the mind as to the existence of a fact. An ocular examination of the premises alleged to have been injured, might have had that effect, as well as an oral detail of circumstances, as in this instance.”⁷⁰ But in a subsequent case the court receded from this view, and held that, although the jury have made a view, yet a bill of exceptions which contains only the testimony which was presented at the trial in open court, contains *all the evidence*, so that an appellate court has before it the same means of revising the verdict as it would have if no

⁶⁸ Omaha etc. R. Co. v. Walker, 17 Neb. 432, 23 N. W. 348, 350; opinion by Maxwell, J.

⁶⁹ Preston v. Culbertson, 58 Cal. 198, 210.

⁷⁰ Evansville etc. R. Co. v. Cochran, 10 Ind. 560.

view had taken place, or as it would have if the appellate judges could have accompanied the jury in making the view.⁷¹ The grounds which induced the court to change its view, were thus pressed upon the attention of the court by counsel, and thus rehearsed by the court in its opinion: "It is urged that, to follow that case is to say that in no case where a jury has had a view of the place in which any material fact occurred, as contemplated by the statute,⁷² can the evidence be got into the record, as it would be impossible to put into the bill of exceptions the impressions made upon the minds of the jury by such view; and that in this way all benefit of appeal to this court, so far as any question is concerned which depends upon all the evidence being in the record, would be wholly cut off. It is further contended that, whether the jury shall have a view of the place, etc., is a matter entirely within the discretion of the court, and that the court may thus, in its discretion, deprive a party of the right to have questions depending on the evidence reviewed in this court, even in cases of the greatest moment. It is urged that, under the rule in that case, a party might be convicted and sentenced to be hanged on wholly insufficient evidence; yet if the prosecutor has got an order for the jury to view the place, and they have done so, it would be impossible to get the judgment reversed, no matter how insufficient the evidence might have been. These reasons have so much force in them, that we feel compelled to overrule the case of *Evansville etc. R. Co. v. Cochran*,⁷³ and other cases which have followed it, and to hold that the bill of exceptions may contain all the evidence, notwithstanding the jury may have viewed the property which is the subject of the litigation, or the place in which any material fact occurred, in accordance with the sections of the codes above cited."⁷⁴ These holdings strikingly illustrate the effect upon law which is produced by the effort of

⁷¹ So held in *Jeffersonville etc. R. Co. v. Bowen*, 40 Ind. 545; overruling *Evansville etc. R. Co. v. Cochran*, supra.

⁷² Referring to Burns' Anno. Stat. Ind. 1908, §§ 564, 2140.

⁷³ 10 Ind. 560.

⁷⁴ *Jeffersonville etc. R. Co. v. Bowen*, 40 Ind. 545, 548. In *Shular v. St.*, 105 Ind. 289, 295, 4 N. E. 870, the principle in the Bowen case

is reaffirmed, and in *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 550, 14 N. E. 572, the doctrine in *Cochran's* case is repudiated, except where view supplies the main evidence in the case. The Massachusetts doctrine on this subject denies, that view prevents review, but concedes the fact, that inability to lay all the facts "before the court in their complete strength and full-

trained minds to reduce its rules to scientific precision,—a thing which, in the nature of things, is impossible. In the same jurisdiction (California), as above seen, a view furnishes evidence in a criminal case, so that it is a fatal error for the accused not to be present when it takes place;⁷⁵ but it does not furnish evidence in a civil case, even where the question is whether the land which the jurors have inspected is dry land or swamp land;⁷⁶ and it does furnish evidence in an election case, so as to preclude an appellate court from setting aside a verdict based on it.⁷⁷ Again, in order that it shall not be evidence, the jurors are to be commanded by an instruction from the bench to reverse the involuntary mental processes by which conviction or belief is attained.

§ 902. **Observations on this Subject.**—This is emphatically what Goethe called the “nonsense of reason.”⁷⁸ The true solution of this difficulty is that cases where there has been a view stand, on appeal or error, on a *special footing*; that, although what the jurors have learned through the view is evidence to be considered by them,—yet, on grounds of public policy, having reference to the known imperfections which attend the conclusions of jurors, and even of

ness will always have a prevailing and often a decisive influence upon the judgment of the court in support of the verdict.” Shaw, C. J., in *Davis v. Jenny*, 1 Metc. (Mass.) 222. As in accord with this view see *Shepherd v. Camden*, 82 Me. 535, 20 Atl. 91; *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 432, 23 N. W. 348. Thus it appears, that view presents difficulty in matters of motions for new trial and appeals, which it is difficult to avoid. On the one hand, it is illogical to grant a view, if no practical effect is to ensue, and on the other, if effect is to be expected, it is not apparent how such evidence can be carried into a record for review. It would seem, that the most practical theory is, that which allows view to be considered in determining the truth, where there is conflict in evidence, and not otherwise.

⁷⁵ Ante, § 886.

⁷⁶ Ante, §§ 889, 890, 892.

⁷⁷ *Preston v. Culbertson*, supra.

⁷⁸ “Laws, like inherited disease descend,

And slyly wind their way
from age to age,

And glide almost unseen from
place to place;

Reason to nonsense grows, a
blessing to a worry.”

Or thus, according to Bayard Taylor's translation:

“All rights and laws are still trans-
mitted.

Like an eternal sickness of the
race,—

From generation unto generation
fitted,

And shifted round from place to
place.

Reason becomes a sham, benefi-
cence a worry.”

Goethe, *Faust*, Scene IV.

judges in the haste of *nisi prius* work, a reviewing court should set aside a verdict based partly on a view, unless it is supported by *substantial testimony*, delivered by *sworn witnesses*. It is necessary to have at least the testimony of *one* sworn witness, although ignorant, dishonest, partial to the party by whom he is brought into court, or otherwise not deserving of credit, to support the verdict of *twelve* presumably impartial men, not selected by either party, who are sworn to decide according to the evidence, and who deliver a verdict based upon the evidence of their senses.⁷⁹

§ 903. **The Report of Road Viewers not Evidence on Appeal.**—

Where, in a special proceeding to lay out a road and assess damages against property holders whose property has been taken for the same, a land-owner appeals to the circuit court, the reports of the “viewers and reviewers” who acted in the proceeding below, are not evidence at all, but the cause is to be tried *ne novo* upon original evidence.⁸⁰

§ 904. **Unauthorized View.**—Jurors must base their findings upon evidence adduced in their hearing in court, or upon a view authorized by the court. For a juror to go out of court, of his own motion, and make an inspection of the premises or things in dispute, will be good ground of setting aside the verdict; though, if the party entitled to complain have knowledge of the irregularity and remain silent, it will be deemed *waived*.⁸¹ But it has been held that the bare fact of the jury having visited, during the trial of an *indictment for burglary*, the premises where it was alleged that the defendant had committed the crime, is not a sufficient ground for discharging the jury; some prejudice to the prisoner must appear.⁸²

⁷⁹ Ante, § 896.

⁸⁰ Conyer v. Boyd, 55 Ind. 166; Charleston etc. Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. 69.

⁸¹ Stampofski v. Steffens, 79 Ill. 303; Harrington v. R. Co., 157 Mass. 579, 32 N. E. 955; Rush v. R. Co., 70 Minn. 5, 72 N. W. 733.

⁸² People v. Hope, 62 Cal. 291. It has been held that, if a private view may have influenced the juror's mind, a new trial should be granted. Harrington v. R. Co., 157 Mass. 579, 32 N. E. 955; Woodbury v. Anoka, 52 Minn. 329, 54 N. W. 187. If the

evidence is conflicting as to condition of premises, a private view has been held prejudicial misconduct. Garside v. Watch Case Co., 17 R. I. 691, 24 Atl. 470; Peppercorn v. Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818. Elsewhere it has been held a new trial is not to be granted in a murder case, if it is clear no prejudice has resulted. Warner v. St., 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 505; Com. v. Brown, 90 Va. 671, 19 S. E. 447.

Thus, where, in a *capital case*, after the court had closed, and the jurors were, pursuant to leave given by the court, walking out for exercise in charge of an officer, several of them came accidentally upon the place of the homicide and inspected it,—it was held that this irregularity was ground for setting aside a conviction, on the principle that, after a cause is submitted to a jury, if they receive any kind of evidence which can have the remotest kind of bearing upon the case, it will be fatal to their verdict.⁸³ The fact that certain jurors, in a *civil case*, while passing into court, stopped and examined the *horse* which was the subject of the injury sued for, in the presence of the plaintiff, who made no objection thereto, nor any objection to proceeding with the trial, afforded no ground of new trial,—since any objection grounded on such an irregularity was *waived*.⁸⁴

§ 905. **Experiments before Jury out of Court.**—The privilege of making *experiments* in the presence of the jury is generally refused, on the ground that such experiments, in the hands of skillful persons, are as likely to deceive as to enlighten them.⁸⁵ Thus, in an action brought to recover damages for personal injuries, alleged to have been caused by a collision between two street railway cars of the defendant, on one of which the plaintiff claimed to have been a passenger, it was held no error for the trial court to refuse an application to allow the jury to proceed to the car-house of the defendant and witness experiments with those cars, as bearing upon the question of the nature of the alleged collision. “The case was not within the provisions of the statute allowing a view by the jury, and, if such procedure were authorized or proper in any case, the question would be one resting in the *discretion* of the court.”⁸⁶ In an action to recover the value of lumber burned by a fire, alleged to have been caused by a locomotive operated upon the defendant’s railroad, the jury, by consent of the parties and the sanction of the court, were permitted to make an inspection of the railroad and the locality of the fire. While making the inspection, experiments were made in their presence by employees of the defendant, for the purpose of showing that the defendant’s engines could be run over the section of the defendant’s road contiguous to the fire, without the

⁸³ *Eastwood v. People*, 3 Park. C. R., (N. Y.) 25, 52.

⁸⁵ *Ante*, § 620.

⁸⁴ *Whitcher v. Peacham*, 52 Vt. 242.

⁸⁶ *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 7, 18 N. W. 827.

use of steam, and consequently without the emission of sparks. The trial court regarded this experiment as an irregularity sufficient to require the verdict (which was for the defendant) to be set aside; but the Supreme Court took a different view, declined to say that it was not proper and authorized by law, held that in the particular case it was not prejudicial, and reversed the judgment of the trial court and remanded the cause for judgment on the verdict.⁸⁷ Most of the analogies would sustain the conclusion of the trial court, and disaffirm that of the reviewing court in this case. Experiments made by the jury *in a criminal case*, outside of the court and in the absence of the prisoner, may afford ground for setting aside their verdict. It was so held where the counsel for a defendant in a criminal case, in the course of his argument, told the jurors that they had a right to try for themselves whether worn-out boots, like those described by the witness for the State, would make such *tracks* in the dust or sand as they described, and advised the jurors to make the experiment. Several of them did accordingly make the experiment, out of court, without the court's leave, and in the absence of the defendant. A fine sense of technicality held that, although the prisoner's counsel had led the jury into this irregularity, it was ground of setting aside the verdict.⁸⁸

§ 906. **Misconduct in making a View.**—If the jury are guilty of misconduct in making a view, the party claiming to be injured by it must bring it to the attention of the trial court and obtain a distinct ruling thereon, which he may embody in his bill of exceptions,—otherwise it will not be the subject of revision on appeal.⁸⁹ Upon principles more fully explained in a subsequent part of this work,⁹⁰ *improper communications with the jury* while making the view, as where a person presumes to rehearse *evidentiary matters* in their hearing, will require the granting of a new trial, unless it clearly appear that no prejudice resulted; since “the court is the place in which causes are to be tried, and to suffer them to be tried *elsewhere*, destroys confidence in the trial by jury, and brings the administration of justice into contempt.”⁹¹ Thus, where, in a case

⁸⁷ *Stockwell v. Railway Co.*, 43 Iowa, 470. See also *Flint v. Water Power Co.*, 73 N. H. 483, 62 Atl. 788.

⁸⁸ *St. v. Sanders*, 68 Mo. 202.

⁸⁹ See *Boardman v. Westchester Fire Ins. Co.*, 54 Wis. 364, 367, 11 N. W. 417.

⁹⁰ Post, §§ 2553, et seq.

⁹¹ *Hayward v. Knapp*, 22 Minn. 5. But attention should be called to same, if known, or the error will be deemed waived. *McMahon v. R. Co.*, 191 Mass. 295, 77 N. E. 826. And a view of the property, when

of homicide, it appeared that, when the jury arrived at the premises which they were sent to inspect, they there found a person who had never been sworn as a witness in the case, and who, in response to questions addressed to him by members of the jury, pointed out to them all the special features of the premises,—for this irregularity a conviction was reversed, the court saying: “Whether his answers were correct or incorrect cannot be known. They may have been false and extremely prejudicial to the defendant, but whether they were or not, makes no difference. It cannot be denied that the jury received material and vitally important evidence out of court from a witness who was not sworn, who was not confronted with the defendant and as to whom there was no opportunity of cross-examination.”⁹²

§ 907. [Continued.] Giving the Jury Refreshments.—On principles hereafter stated,⁹³ any tampering with the jury, by extending undue favors to them in the way of *food, drink and entertainment*, while making the view by or in the interest of the successful party, will demand the setting aside of their verdict; but this does not extend to *ordinary civilities*, such as the act of the deputy sheriff in charge of the jury in furnishing them with a pitcher of cider at the house of the petitioner, upon their request for refreshments.⁹⁴ And where, in making the view, the jurors, with the consent of the unsuccessful party, were treated several times to *liquid refreshments* at the house of the successful party, this was not deemed sufficient cause for setting aside the verdict. It was not regarded as the result of a sinister motive, but as the result of a motive of hospitality and kindness, for which the citizens of Virginia were generally dis-

unauthorized, must tend to affect the issue involved. Thus where damage was claimed to arise to land used for residential purposes, misconduct of jurors in going on the land and stepping off same and conversation with a third party as to quantity of hay that could be raised, was held immaterial. *Louisville A. & P. V. E. Co. v. Whipps*, 27 Ky. Law Rep. 977, 87 S. W. 298. Where the statutes merely empower the court to order a view by the jury in criminal cases, it was ruled that it should be “a view pure and

simple.” *O’Berry v. St.*, 47 Fla. 75. 36 South. 440. Under the Utah statute, similar to that of California, it was held that the fact, that certain of the jurors paced off distances between certain points referred to in the testimony was not such misconduct as vitiated the verdict of guilty in a murder case. *St. v. Mortensen*, 26 Utah, 312, 73 Pac. 562.

⁹² *St. v. Lopez*, 15 Nev. 407, 413.

⁹³ Post, §§ 2560, 2564, 2565.

⁹⁴ *Tripp v. Commissioners*, 2 Allen (Mass.), 556.

tinguished. Moreover, the consent of the unsuccessful party cured the irregularity, under the principle *omnis consensus tollit errorem*.⁹⁵ So, in Rhode Island, the *consent* of the unsuccessful party to such an irregularity was held a *waiver* of an exception to it⁹⁶ on the principle declared in another case,⁹⁷ "that where an irregularity has been committed, the party who *consents* to a proceeding which he might have prevented by resisting on that ground, *waives* thereby all exceptions to such irregularity." Where the jury went eight miles from the court house to view the *locus in quo*, the fact that the bailiff, by order of the sheriff, procured and caused *dinner* to be served at the house of the successful party, without his solicitation or the solicitation of the jury,—there being no other convenient place to procure it, the bailiff undertaking to pay for it, and no improper communication having been had with the jurors,—furnished no cause for setting aside their verdict.⁹⁸

§ 908. **View granted at what Stage of the Trial.**—Where there is a statute authorizing a view, without prescribing at what stage of the trial it shall be made, this is committed to the sound *discretion* of the court.⁹⁹ In Pennsylvania an application for a view presented during the week in which the case is set for trial, is not in time. Such an application will not be granted, where it would delay the trial of the cause.¹

§ 909. **Rule for a View continues through subsequent Trials.**—Under the New Jersey statute,² where a rule for a view by a jury is once entered, it continues in force until the cause is tried, or the rule discharged.³

§ 910. **Personal Notice in Condemnation Proceedings.**—It has been thought unnecessary to give the defendant personal notice, in a proceeding to condemn land for a railway, of the time and place of the meeting of the jury, in the absence of any statute requiring notice to be given in this manner.⁴

⁹⁵ Coleman v. Moody, 4 Hen. & M. (Va.) 1, 16, 21. v. Smith, 93 Ky. 449, 20 S. W. 392. 18 L. R. A. 63.

⁹⁶ Patton v. Hughesdale Man. Co., 11 R. 1. 188. ¹ Bare v. Hoffman, 79 Pa. St. 71.

⁹⁷ Tingley v. Providence, 9 R. I. 388. ² Gen. Stat. N. J. 1896, p. 1851.

⁹⁸ Johnson v. Greim, 17 Neb. 417, 23 N. W. 338. ³ Houston v. Woodward, 17 N. J. L. 344, 345.

⁹⁹ Galena etc. R. Co. v. Haslam, 73 Ill. 494; Kentucky Cent. Ry. Co. v. Harper, 100 Ky. 227.

§ 911. **Costs of the View.**—Courts of law have the power to allow reasonable expenses for surveys and views in proper cases, and the ordinary fee-bill does not apply to the expenses of such proceedings.⁵ In the Federal courts, under the provisions of section 914 of the Revised Statutes of the United States, the rule prescribed by the statute of the State in which the court sits, will be adopted as determining the assessment of the costs of a view, in civil suits other than in equity or admiralty.⁶ The plaintiff in *trespass quare clausum*, who recovered less than *forty shillings*, was not entitled to costs for increase, merely because a view was granted before trial, though upon the application of the defendant.⁷

§ 912. **Attended by the proper Officer.**—It should appear that the jurors were attended by the proper officer.⁸ The sheriff should accompany the jury, and keep them together in a body while making the view. It is irregular to tell the jurors that such of them may go and view the premises as choose to do so.⁹

§ 913. **[Michigan.] Office of Judge or Court Commissioner when Attending.**—The Michigan statute allows the judge to “attend said jury, to decide questions of law and administer oaths to witnesses.” But the same statute allows him to designate a circuit court commissioner for the same purpose, and also allows the jury to proceed without either. In view of these provisions, it is held that the functions of the judge, when so attending the jury, are merely *advisory*. The jury, being, as before seen,¹⁰ judges of both the law and the fact, the judge, it seems, ought not, when attending them, to control their conduct, to admit or exclude evidence, or to instruct them, as upon a regular trial;¹¹ though the fact of his having done so will not be ground of setting aside their award, unless it appear that the complaining party was prejudiced thereby.¹² In such a proceeding under the Michigan statute, the inquest may be conducted by the jury without legal assistance, and a *liberal practice* in the admission or rejection of evidence is *allowable*; nor

⁵ *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 89 (in which case the sum was \$4,800, was allowed as the expenses of the view).

⁶ *Huntress v. Epsom*, 15 Fed. 732.

⁷ *Flint v. Hill*, 11 East, 184.

⁸ *Patchin v. Trustees*, 2 Wend. (N. Y.) 377, 384.

⁹ *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47, 84.

¹⁰ *Ante*, § 899.

¹¹ *Toledo etc. R. Co. v. Dunlap*, 47 Mich. 456, 466, 11 N. W. 271.

¹² *Ibid*.

will the conclusions of the jury therein be disturbed, except for rulings which were manifestly inaccurate and contrary to substantial justice. The court say: "When the law provided how the tribunal should be constituted for these cases, and prescribed the method to be observed, it obviously contemplated that the practice respecting the admission of testimony should be as simple as a due regard to substantial justice would permit. It was not intended to leave the fate of the determination had in view, to any fine-spun theories, or to the refinements which are not uncommon in trials at the circuit. They were not supposed to be necessary to the fundamental purpose or beneficial working of inquests of this nature, and no provision was made for the certain attendance of any one presumptively qualified to deal with them. The statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert, and under circumstances in which it would be difficult, if not impracticable, to preserve technical or hair-drawn questions in a shape to be reviewed. And were the niceties of *nisi prius* to be insisted on, the proceeding would speedily break down under the perplexities and embarrassments due to its own methods. The conclusion to which these and other considerations lead is, that a very large *discretion* in admitting and rejecting testimony, is left to the jury, or the attending officer, whenever there is one, and that, when the case is brought here by appeal, the award cannot be disturbed on account of such decision, unless it is fairly evident, in view of the facts and circumstances, that the ruling was not only inaccurate, but was a cause of substantial injustice to the appellant in the matter of the result."¹³

§ 914. **Showers appointed under the Old Practice.**—Persons called showers were appointed under the old practice, whose office it was to accompany the jury to the land to be viewed.¹⁴ Under the old New York practice, following the English, where an application for a view was demanded by either party, showers were appointed to show the premises, under the direction of the sheriff,¹⁵ and such

¹³ Michigan Air Line Ry. v. Barnes, 44 Mich. 223, 226, 6 N. W. 651, opinion by Graves, J.

¹⁴ See the English statutes already quoted, §§ 876, 878. These functionaries were called in the old

books "shewers;" but I use the modern spelling, though somewhat suggestive of a *wet day* for making the view.

¹⁵ Brooklyn v. Patchen, 8 Wend. (N. Y.) 47.

also was the practice under the New Jersey statute.¹⁶ The showers were at liberty to show marks, boundaries, etc., to enlighten the viewers; and might say to them, "these are the places which, on the trial, we shall adapt our evidence to."¹⁷ The practical directions given in Bagley's Practice for the appointment of showers are, "that, if the opposite party refuses to name a shower, the attorney on the other side is to get an appointment from the master to name a shower; that a memorandum of the rule, with the name and place of abode of the one shower, and of the shower nominated by the adverse party, or by the master on his default, is to be taken to the office, and the clerk will draw up the rule."¹⁸ The practice was thus stated by Archbold: "Draw up a *præcipe* or memorandum of the rule you want. Get from the opposite attorney a memorandum of the name and place of abode of his shower, and take it, together with a similar memorandum of your own shower, and also of the time and place of meeting, etc., to one of the masters, and draw up the rule."¹⁹

§ 915. **Obstructing the Showers in Running Lines.**—In a curious old case in New Jersey (anno 1823), a special rule for a view for a particular line was made, supported by an affidavit that the landowner had obstructed a shower who had already been upon it, in running a line. The court said: "The party is entitled to the special view. We can never suffer justice to be defeated by the obstinacy of the party in preventing a line being run. In the great patent line, to the running of which great opposition was made, a rule of this kind was obtained by the late Mr. Stockton, and the *power of the county* went with him. In the Cumberland case, the agent of the plaintiff went to run the lines, and the persons in possession cut his saddle to pieces: the court granted him the power of the county and ordered the sheriff to accompany him. There is no doubt of the power of the court to grant the rule, and we think it should be granted."²⁰ The "special rule" established in New Jersey at an early day, seems to have authorized the sheriff to take the jury of view *over any land* which might be deemed necessary, and to run the lines which bounded the premises in dispute, upon whose

¹⁶ See the statute, ante, § 882, subsec. 14; also next section. Also Gen. Stat. N. J. 1896, p. 1851, § 31.

¹⁷ Symons v. Clark, Barnes, 457 (1790).

¹⁸ Bag. Prac. 228.

¹⁹ Arch. Prac. 407, 6th Eng. ed.

²⁰ Snyder v. Van Natta, 7 N. J. L.

land soever the same might be; but this rule was not granted, on the grounds of unfairness, injustice and expense, unless there was reason to believe that the viewers would be obstructed in the performance of their duty.²¹

§ 916. **Competent to show Change in Premises after the Fact in Controversy, and before the View.**—Where the jury is permitted to view the *locus in quo*, evidence is competent, tending to show that, after the fact out of which the controversy arose, and before the making of the view, the character of the premises was materially changed.²²

²¹ Den v. Woodward, 4 N. J. L. 122.

²² Morton v. Smith, 48 Wis. 265, 270, 4 N. W. 330.

TITLE IV.

ARGUMENT OF COUNSEL.

CHAPTER XXVIII.—OF THE RIGHT OF ARGUMENT GENERALLY.

CHAPTER XXIX.—OF THE RIGHT TO ARGUE QUESTIONS OF LAW
TO THE JURY.

CHAPTER XXX.—ABUSES OF THE RIGHT OF ARGUMENT.

CHAPTER XXVIII.

OF THE RIGHT OF ARGUMENT GENERALLY.

SECTION

- 920. Right of Parties to Argument by Counsel.
- 921. In Criminal Cases.
- 922. Waiver of Right of Argument.
- 923. Limiting Time of Argument.
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- 934. What must be Stated in the Opening Argument.
- 935. Limits of the Concluding Argument.
- 936. Cutting off the Plaintiff's Right to Reply.

§ 920. **Right of Parties to Argument by Counsel.**—It is said that every party to a trial, civil or criminal, has the legal as well as the natural right to be heard in his own cause, by himself or counsel, and that no rule of practice can deprive him of this right, if, at the proper time and in the proper way, he offers to exercise it.¹ Another

¹ *Sodousky v. McGee*, 4 J. J. Houck v. Gue, 30 Neb. 113, 46 N. W. Marsh. (Ky.) 271; post, § 1010; St. 280.
v. Mayo, 42 Wash. 540, 85 Pac. 251;

court has said that a party to a civil action "has a right to be heard, not only in the testimony of his witnesses, but also in the arguments of his counsel. It matters not how weak and inconclusive his testimony may be; if it is enough to present a disputed question of fact upon which he is entitled to the verdict of the jury, he has a right to present, in the arguments of his counsel, his view of the case. This is no matter of *discretion* on the part of the court, but an absolute right of the party."² But it is conceived that a distinction must be taken between the right to *appear* and *defend* by counsel and the right to be *heard in argument* by counsel. The right to appear and defend is undoubtedly an absolute right, existing in all cases, civil and criminal, of which no court possesses the power to deprive a party. But the right to be heard in argument in a particular case, is plainly not a right of this absolute nature; it does not exist at all unless there is something to argue which is fairly debatable. The true office of counsel is that of *aids* or *helps* to the court and jury in the administration of justice.³ Clearly, it is within the power of the court, in a *civil case*, to dispense with this aid or help, where it is not necessary. It is not error to deny the right of argument in such a case, where the evidence is all on one side and there is nothing to argue; nor will a judgment in such a case be reversed merely to allow a lawyer to make a speech.⁴ Nor is a judge, even in a criminal case, bound to hear argument upon a question of law, in respect of which his opinion is so fixed as to render discussion unavailing.⁵ It is scarcely necessary to say that the right of argument may be *waived* in civil cases.⁶

² Douglas v. Hill, 29 Kan. 527; Hettinger v. Beiler, 54 Ill. App. 320; Fareira v. Smith, 22 N. Y. S. 939, 3 Misc. Rep. 255. It was held that a rule of court, which provided that, if counsel offer himself as a witness on behalf of his client, he shall not argue the case to the jury except by permission of the court was not violative of an express statute giving him the right to address the jury, because by testifying such right was waived. Voss v. Bender, 32 Wash. 556, 73 Pac. 697. Such a rule has been held not unreasonable, even when applied to a criminal

case. St. v. Glein, 17 Mont. 17, 41 Pac. 998.

³ See Garrison v. Wilcoxson, 11 Ga. 154, 159, for an eloquent passage on this subject by Nisbet, J.; Warner v. Close, 120 Mo. App. 211, 96 S. W. 491.

⁴ Harrison v. Park, 1 J. J. Marsh. (Ky.) 170, 173; Neidig v. Cole, 13 Neb. 39, 13 N. W. 18; Gunn v. Head, 116 Ga. 325, 42 S. E. 343.

⁵ Howell v. Commonwealth, 5 Gratt. (Va.) 664, 668. It has been held in Georgia, in a criminal case, not *error* but an *irregularity*, for the trial court to refuse, under cir-

§ 921. **In Criminal Cases.**—In *criminal cases* the right of accused persons to be defended by counsel is a right of a very high nature, which is guaranteed by the constitution of the United States⁷ and by the constitutions of most of the States. Under these constitutional guaranties, it is the unquestioned right of every person tried upon a charge of crime to be heard by the court and jury, upon the whole case,⁸ through the lips of counsel learned in the law. “If,” said Scott, J., “there be any point involved in the issue before the jury, on which their minds may be enlightened or their consciences satisfied by argument, the accused has an undoubted right to all the advantage that may be derived from that source, and this right would be utterly destroyed if it were allowed to the court to prohibit argument merely because, *in its opinion*, the evidence is so clear that argument cannot vary it. Neither is this the only case in which an argument before the jury might be of importance to the accused, however direct and uncontradicted the evidence against him might be.”⁹

§ 922. **Waiver of Right of Argument.**—Where, after the submission of a cause to the court without a jury, the court states to defendant’s counsel that plaintiff’s counsel do not wish to argue the case, and asks the defendant’s counsel whether they wish to make an argument, and they make no reply, and the court thereupon ren-

circumstances, to hear argument in favor of a motion to arrest the judgment and to grant a new trial. Long v. St., 12 Ga. 295, 331; Bradish v. Grant, 119 Ill. 606, 9 N. E. 332.

⁶ It has been held that, when counsel decline to argue the case to the jury, after the evidence is closed on both sides, this is a *waiver* of their right of argument; and that, when the right is thus waived, it is not revived by allowing either party to read from a record book a piece of evidence which has, in the course of the trial, been properly read to the jury, although such second reading is permitted after the jury have been charged, and have retired and returned into court and informed the court that they cannot agree. Cot-

ton v. Rutledge, 33 Ala. 111, 115. Compare Prosser v. Henderson, 11 Ala. 484. Obviously, the refusal of the trial court to allow counsel to address the jury cannot be reviewed on error, unless the ruling is excepted to and preserved in a *bill of exceptions*. Wilkins v. Anderson, 11 Pa. St. 399.

⁷ U. S. Const. Amendments, art. VI. This amendment extends only to the Federal tribunals.

⁸ Word v. Commonwealth, 3 Leigh (Va.), 743, 759; Peagler v. St., 110 Ala. 11, 20 South. 363. By statute in New Mexico he has the right, where sole defendant, to be heard by at least two counsel in argument. Territory v. Sherron, 11 N. M. 515, 70 Pac. 562.

⁹ Ibid.

ders a decision adverse to the defendant,—defendant's counsel cannot thereafter claim the right of argument; it has been *waived*.¹⁰

§ 923. **Limiting Time of Argument.**—The rule, both in civil¹¹ and in criminal¹² cases, is that the courts have power, in the exercise of a *sound discretion*, to impose reasonable limitations upon the time which is to be allowed to parties for argument by counsel, which discretion will not be revised on error or appeal except in cases of manifest abuse. On the one hand, a reasonable exercise of this power is upheld as being absolutely necessary to enable the courts to dispatch the public business; on the other hand, a plain abuse of it, which has resulted in denying to an accused person the constitutional right of defense by counsel, or of unreasonably abridging this right, will afford ground for setting aside the judgment in a criminal case and granting a new trial.¹³ Just observations have been made upon the impropriety, even in civil cases, of curtailing the time of argument, where it can be avoided without detriment to the public business; pointing out the difficulty of the court undertaking to prescribe in advance the time which may be necessary for the proper presentation by counsel of his client's cause, and dwelling upon the fact that such a restriction has a tendency to hamper the efforts of counsel and to impair the public confidence in the administration of justice.¹⁴ While the rule which reposes this dis-

¹⁰ Piatt v. Head, 35 Kan. 282, 10 Pac. 822.

¹¹ Cory v. Silcox, 5 Ind. 370; Rosser v. McColly, 9 Ind. 587; Burson v. Mahoney, 6 Baxt. (Tenn.) 304, 307; Freligh v. Ames, 31 Mo. 253; Dobbins v. Oswalt, 20 Ark. 619, 624; Musselman v. Pratt, 44 Ind. 126; Trice v. Hannibal etc. R. R. Co., 35 Mo. 416. Contra, in Iowa, Hall v. Wolff, 61 Iowa, 559, 562, 16 N. W. 710; Rockwell Land etc. Co. v. Castroni, 6 Colo. App. 521, 42 Pac. 180.

¹² Brooks v. Perry, 23 Ark. 32; St. v. Paige, 21 Mo. 257 (Scott, J., dissenting); Lynch v. St., 9 Ind. 541; Weaver v. St., 24 Ohio St. 584; St. v. Collins, 70 N. C. 241 (Bynum, J., dissenting); Dille v. St., 34 Ohio St. 617; People v. Kelly, 94 N. Y. 527; St. v. Donnelly, 2 Dutch. (N.

J.) 463; Sullivan v. St., 46 N. J. L. 446; People v. Keenan, 13 Cal. 581, 584; Sullivan v. St., 47 N. J. L. 151; Thompson v. St. (Tex. Cr. R.), 97 S. W. 316 (not reported in state reports).

¹³ White v. People, 90 Ill. 117; Dille v. St., 34 Ohio St. 617; Hunt v. St., 49 Ga. 255; People v. Keenan, 13 Cal. 581, 584; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760. A rule of court providing that the closing argument shall not exceed one half of the time allotted to the closing side has been held reasonable, as also the further provisions that a waiver of the opening shall be considered a waiver of the closing argument. Reagan v. Transit Co., 180 Mo. 117, 79 S. W. 435.

¹⁴ Burson v. Mahoney, 6 Baxt.

cretion in the trial courts extends even to *capital cases*; ¹⁵ yet it has been suggested that if such a limitation is imposed at all in such cases, it should be done only in very extraordinary and peculiar circumstances. ¹⁶

§ 924. **What Limitations of Time Have Been Upheld.**—Applying these principles, it was held in Missouri, in a criminal prosecution for cutting timber upon school lands, that no abuse of discretion appeared in an order of the trial court limiting the time of argument allowed the counsel for the defendant, to fifteen minutes. Cicero having been allowed but half an hour to defend Caius Rabirius before the tribune of the people on a charge of murder, the court concluded that “a quarter of an hour allowed to a modern orator, in a petty case of cutting down timber on school lands, cannot be considered an inhibition to be heard in defense of his client.” ¹⁷ In the same State, where the action was for damages against a railway company for killing the plaintiff’s hogs, and the defendant introduced no evidence, the Supreme Court could not say that the trial court abused its discretion in limiting counsel on either side to ten minutes. ¹⁸ Where, in a civil action in Tennessee, the trial court

(Tenn.) 304, 307. Where the limitation is merely to subserve the personal convenience of the judge as that otherwise he could not catch a train on Saturday and would have to remain over Sunday, this is error. *Senior v. Brogan*, 66 Miss. 178, 6 South. 649.

¹⁵ *St. v. Collins*, 70 N. C. 241; *People v. Keenan*, 13 Cal. 581; *Vaughan v. St.*, 58 Ark. 353, 24 S. W. 885; *Bailey v. St.*, 37 Tex. Cr. R. 579, 40 S. W. 281; *Smith v. Com.*, 100 Ky. 133, 37 S. W. 586.

¹⁶ *People v. Keenan*, *supra*. See also *Kizer v. St.*, 12 Lea (Tenn.), 564. In Kentucky it being considered that two hours on a side was sufficient for a full discussion of the law and the facts, the limitation was sustained. *Harris v. Com.*, 25 Ky. Law Rep. 297. In Montana it was held error to fix any limit in a capital case. *St. v. Tighe*, 27 Mont. 327, 71 Pac. 3.

¹⁷ *St. v. Page*, 21 Mo. 257, 259. *Scott, J.*, strongly dissented, taking the ground that no limitation of time should be attempted in advance, but that this control should be exercised on the circumstances as they should transpire. He said: “It is not for man in his weakness to declare, before a defense is begun, how long it should be reasonably continued. If a court can limit the time of speaking to fifteen minutes, it can take away the right of making a defense; for I repeat it, that no counsel who had any regard for his reputation would attempt to make a defense in fifteen minutes, in a case in which it was really necessary to make one.”

¹⁸ *Trice v. Hannibal etc. R. R. Co.*, 35 Mo. 416. A limitation of fifteen minutes to close was held proper, where the only issue was how long a car slowed down or stopped for plaintiff to alight, she being the

limited counsel to five minutes on each side, the Supreme Court, after giving extended observations upon the impropriety of unnecessarily restricting the time for argument, said that, in a case involving larger interests, they would have made it a ground for reversing the judgment; but as it was, they allowed the judgment to stand.¹⁹ Complaint was made, in a civil case in Indiana, that the trial court had limited the argument of counsel for the plaintiff to ninety minutes; but it appearing that the defendant's counsel had declined to make any argument, the Supreme Court held, on plain grounds, that there was no abuse of discretion.²⁰ On less doubtful grounds the same court upheld the limitation of an hour and a half to the plaintiff and an hour to the defendant in a civil action for slander.²¹ In a criminal case in Ohio, where the subject was well considered by the Supreme Court, two days had been consumed in taking testimony in the trial court. The court had adjourned over Christmas day, and had also adjourned in order to allow one of the jurors to attend the funeral of a relative. It was held that, in limiting the time of argument to five hours on each side and in extending the defendant's time twenty minutes without interruption, the trial court did not abuse its discretion.²² Nor did the Supreme Court of Nebraska see an abuse of discretion, in a trial of murder, in limiting argument to two hours and a half on each side, and afterwards extending the defendant's time to three hours.²³ On an appeal from a conviction under an indictment for an assault with intent to kill, the Court of Appeals of New York went so far as to uphold a limitation of half an hour to the defendant, it appearing that not many witnesses had been sworn, that the questions of fact were not numerous, and that the evidence on both sides had been submitted during the same day.²⁴

only witness and defendant having five witnesses. *Reagan v. Transit Co.*, 180 Mo. 117, 79 S. W. 435. Illinois Supreme Court sustained limitation of thirty minutes where evidence was brief and the issues plain. *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452, 69 N. E. 816. In Colorado limit of one hour a side in prosecution for robbery, where there were fifteen witnesses and testimony comprised about 500 folios was sustained. *Barr v. People*, 30 Colo. 522, 71 Pac. 392.

¹⁹ *Burson v. Mahoney*, 6 Baxt. (Tenn.) 304, 307

²⁰ *Rosser v. McColly*, 9 Ind. 587.

²¹ *Musselman v. Pratt*, 44 Ind. 126.

²² *Weaver v. St.*, 24 Ohio St. 584; approved in *Dille v. St.*, 34 Ohio St. 617.

²³ *Hart v. St.*, 14 Neb. 572, 16 N. W. 905.

²⁴ *People v. Kelly*, 94 N. Y. 527. See also *Christiansen v. Tank Works*, 223 Ill. 142, 79 N. E. 97.

Reasoning upon such a case, it was conceded that a restriction to five minutes in a case of felony, was one which could rarely be sustained while allowing the largest limits to the discretion of the trial court, if the question were properly presented for review.²⁵ In a capital case where the prisoner was defended by *three counsel*, and the court limited counsel to one hour and ten minutes on each side, the reviewing court was unable to say, on a general exception merely, that the discretion of the court has been abused, though it intimated an opinion that the time had been unnecessarily restricted.²⁶

§ 925. **What Limitations Have Been Held an Abuse of Discretion.**—On the other hand, on the trial of an indictment for larceny, where four witnesses had been examined in chief for the prosecution, three for the defense and two for the prosecution in rebuttal, it was held, on obvious grounds, an abuse of discretion to limit counsel on either side to five minutes.²⁷ On the trial of an indictment for burglary and larceny, seven witnesses were examined for the State and four for the defense. Half a day was occupied in taking the testimony. It was entirely circumstantial, and there were serious conflicts in it. It was held by a majority of the court, on appeal, that a limitation of thirty minutes to the defendant's counsel was an abuse of discretion for which there must be a new trial.²⁸ In Georgia, on the trial of an indictment for an assault with intent to murder, where the evidence was conflicting as to whether the stabbing was done in self-defense, the Supreme Court held that, in limiting the defendant's counsel, against his protest, to thirty minutes, the trial court committed "a grave error," which was not cured by extending the time to forty minutes, which error had resulted in denying the defendant the privilege and benefit of counsel in his defense, as contemplated by the constitution.²⁹

²⁵ Williams v. Com., 82 Ky. 640, 643.

²⁶ Kizer v. St., 12 Lea (Tenn.), 564.

²⁷ White v. People, 90 Ill. 117.

²⁸ Dille v. St., 34 Ohio St. 617. Where trial lasted five days, evidence was conflicting and there was raised the question as to whether the testimony of child prosecutrix in rape could be considered at all, held abuse of discretion to limit

counsel to one and three-fourths hours, notwithstanding that when it appeared counsel for defendant could not complete his argument, he was allowed an additional 20 minutes. People v. Fernandez, 4 Cal. App. 314, 87 Pac. 1112. Semble. St. v. Mayo, 42 Wash. 540, 85 Pac. 251. See also Jones v. Com., 87 Va. 63, 12 S. E. 226; Walker v. St., 32 Tex. Cr. R. 175, 24 S. W. 898.

²⁹ Hunt v. St., 49 Ga. 255.

§ 926. **Question how Presented for Review.**—Although it has been held in California that this question may be presented for review in an appellate court by *affidavits*,³⁰ yet the better and prevailing rule of practice is that the counsel complaining of the limitation of time must promptly object to it, and save an *exception*, which must be shown to the reviewing court by a bill of exceptions. There is a further view that the mere fact that counsel excepts to the order of the court, is not sufficient to bring the abuse of discretion by the court, if such it be, to the attention of the reviewing court; but counsel must “ask for further time, or at least in some way inform the judge that, in his opinion, injustice will be done him by the restriction, and not content himself with a mere exception.”³¹ The fact, then, that a court limits the time of argument to an extremely short period, will not be ground of new trial where counsel make no claim at the time that the period is too short. It was so held in a case of felony, where the court limited each side to *five minutes*.³²

§ 927. **Practice of Limiting the Time of the Advocates Among the Ancients.**—In a case in Missouri,³³ where this question was under discussion, Ryland, J., thus stated the practice among the Greeks and Romans, without stating from what historical sources he derived his information: “This matter of limiting the time to be occupied in the prosecution of causes before courts of justice is of very ancient origin. It is found among the Greeks, and was carried thence to Rome. The Greeks had their instruments by which they measured time in the halls of judicature. The *clepsydra* was used. It was an instrument by which they measured time by means of the flowing of water through it; and so frequent and common was the practice of limiting the time to the speakers by water flowing through these instruments, that the word ‘water’ was used metaphorically for time. When a speaker was allowed to speak so long, they said he was allowed so much water. The Greeks had an officer in their courts of justice whose duty it was to watch this measuring of time, and when a certain amount was allotted to a speaker, if

³⁰ *People v. Keenan*, 13 Cal. 581, 584. See also *Hall v. Wolff*, 61 Iowa, 559, 561, 16 N. W. 710; *Dowdell v. Wilcox*, 64 Iowa, 721, 724; *Turner v. St.*, 68 Tenn. (4 Lea) 206; *St. v. Comstock*, 20 Kan. 650.

³¹ *Williams v. Com.*, 82 Ky. 640; *Kizer v. St.*, 12 Lea (Tenn.), 564.

Compare *Sewell v. Com.*, 3 Ky. Law Rep. 86.

³² *Williams v. Com.*, *supra*. The objection ought to be made before opening argument is finished. *Cunningham v. Com.*, 88 Va. 37, 13 S. E. 309.

³³ *St. v. Page*, 21 Mo. 257, 259

there were any documents to be read during his speech, the time the reading of such documents consumed was not to be estimated as any part of what had been allotted to him; therefore this officer, whose station was near the *clepsydra*, stopped the water while the documents were being read. The orator did not waste his water in reading documents. Pliny tells us that he was allowed ten large *amphoræ* of water once, and so important was the cause in which he was engaged that the judges added four more to the amount. He says he spoke five hours. He tells us likewise that he himself used to allow the accused as much water as he wanted. The tribune of the people, Titus Sabienus, only allowed half an hour to Cicero to speak in defense of Caius Rabirius when he was prosecuted for murder. This, too, on an appeal from the judgment of the *Duumviri* to the people. The orator complained of being cramped by the narrow space of time; for though it would be nearly enough to make the defense for his client, it would not be enough for preferring the complaints he had a right to bring forward. 'I have spoken the time allowed me,' he said, when about to conclude; and in no part of the monument erected by his genius to its own immortality will you find a more polished or more brilliant gem than this half hour's work.'

§ 928. Limiting Number of Counsel and Number of Speeches.³⁴

The principle which vests in the trial courts the *discretionary power* of limiting the *time* of counsel, must also operate to give them the like power to limit the *number* of counsel who may be heard in behalf of a single party. It has been suggested that the constitutional right of being heard by counsel is satisfied where the party is allowed the privilege of being heard by *one* counsel, and that he cannot demand, as a matter of right, that he be allowed to be heard by a greater number.³⁵ Where several persons voluntarily *join* as parties, so that they constitute, in contemplation of law, but a single party to the litigation, they cannot of right claim to be heard by

³⁴ As was done in *Dille v. St.*, 34 Ohio St. 617. See also *Wilkins v. Anderson*, 11 Pa. St. 399; *Roeder v. Studt*, 12 Mo. App. 566; *Bradshaw v. St.*, 22 Neb. 361, 22 N. W. 361; *Bullis v. Drake*, 20 Neb. 167, 29 N. W. 292; *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565; *McLain v. St.*, 18 Neb. 154, 24 N. W. 720, 724; *Rudolph v.*

Landwerlen, 92 Ind. 34, 35; *St. v. Anderson*, 10 Ore. 448, 457; *Commonwealth v. Scott*, 123 Mass. 239; *St. v. Abrams*, 11 Ore. 169, 172, 8 Pac. 327; *St. v. Caveness*, 78 N. C. 484, 489; *Carruthers v. McMurray*, 75 Iowa, 173, 39 N. W. 255.

³⁵ *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267.

more than one counsel, speaking for them collectively.³⁶ But *where* several persons are, against their wills, *joined as defendants* in an action, whose interests are diverse and repugnant to each other, and who have an interest in discharging upon each other the burden which the plaintiff is endeavoring to cast upon them all,—in such a case any one of such parties, where not represented by counsel appearing for the others, may of right claim to be heard in his separate behalf by at least one counsel. But, as was said by Robertson, C. J., “while the general right is acknowledged, the courts should be careful lest it may be abused and perverted to purposes of vexation, inconvenience and injustice. Before a defendant can insist on such a right he should be prepared to show very clearly that he is justly entitled to the enjoyment of it. The bare fact that he has employed other counsel than those who were employed by his co-defendants, would not of itself entitle him to be heard, after two speeches had been made by the defense. If the interests of the defendants seem to be in unison, if the argument for one includes or benefits the others, and if they all act in concert, the court might refuse to permit more than two of the counsel to be heard, and leave it to the defendants to make the selection.”³⁷ It was ruled by Mr. Justice Curtis, of the Supreme Court of the United States, at circuit, that in a capital case the *junior counsel* has the right to argue the law and the facts, but that only one counsel has the right to close. In the particular case, however, as all the witnesses were government witnesses, and as none were called for the defendant except those whom the government had declined to examine, two counsel were permitted to close in full on the law and facts—not, however, making a precedent for cases in which the prisoner’s counsel should call witnesses not examined by the grand jury and sworn on the part of the defendant.³⁸ A statute of Texas provides that “in prosecutions for felony the court shall never restrict the argument to a less number than two on a side.”³⁹ It is held that this statute applies only to cases where the prisoner has more than one counsel, and that it was not intended to confer upon him the benefit of having two speeches where he has but one counsel.⁴⁰

³⁶ Ibid.

³⁷ *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267, 271, where the propriety of the above conclusions is very forcibly argued by Robertson, C. J.

³⁸ *U. S. v. Mingo*, 2 Curt. C. C. 1.

³⁹ Texas Code Crim. Pro., art. (1895) 704.

⁴⁰ *Morals v. St.*, 1 Tex. App. 494, 499. It was also reasoned that, even on the contrary view of the

§ 929. **Statutory Rules Prohibiting such Limitations.**—In *North Carolina*, about the year 1874, a circuit judge, in a criminal case, restricted the prisoner's counsel to an hour and a half in addressing the jury, allowing two of his counsel to divide this time between them. To this ruling exceptions were taken, and, on an appeal from a conviction, the Supreme Court, while expressing its disapprobation of the manner in which the trial judge had exercised his discretion, nevertheless held that it was a power vested in him, the exercise of which could not be controlled by a reviewing court.⁴¹ The decision of the Supreme Court was unsound, in that it held that the discretion of the trial court was absolute, and not subject to control by the appellate tribunal in a case of manifest abuse. Thereupon the legislature passed the following extraordinary statute: "Any counsel appearing in any civil or criminal case, in any of the courts of this State, shall be entitled to address the court or the jury for such a space of time as, in his opinion, may be necessary for the proper development or presentation of his case." It is to be noticed that the statute begins by vesting this right in "*any* counsel appearing in any civil or criminal case." If, therefore, the whole bar appear, as they frequently do in the country circuits in important cases, on the one side or the other, "*any*" (and consequently *every*) counsel so appearing may exercise the right of addressing the court or jury as long as, in his discretion, it may be necessary. The statute thus places it within the absolute power of a combination of lawyers, by following each other and "speaking against time," to protract trials until the term lapses by operation of law, to produce mistrials, to prevent other causes from being heard, and totally to obstruct and prevent the dispatch of the public business. That discretionary control over the conduct of causes in the courts of *nisi prius* which is absolutely essential to dispatch litigation and prevent denials of justice, is taken away from the judge and vested, not in the bar as an aggregate body, but in any particular lawyer or lawyers who may presume to exercise it. "What we suppose is meant," said Reed, J., commenting on this remarkable piece of legislation, "is that it is left to the discretion of *counsel* instead of to the discretion of the *presiding judge*, how they shall address themselves to the court and jury. It must be left either to the judge

statute, it would be incumbent upon the counsel intending to make two speeches to notify the court of such intent before the commencement of

his argument, failing in which he would be deemed to have waived the right.

⁴¹ *St. v. Collins*, 70 N. C. 241.

or the counsel, and the legislature has left it with the counsel. It may be that the confidence is not misplaced. But one instance is recorded⁴² where any counsel has felt himself at liberty to abuse his privilege to the obstruction of the due administration of the law, and that was before many of the profession had many of the advantages which they now possess, and, it may be, before it was fully known that 'we cannot do evil that good may come of it.' At any rate, the law is plain, and the experiment has to be made whether it is prudent to entrust the discretion in the courts to the *counsel* instead of to the *judge*."⁴³ The court also ruled that, under a proper interpretation of the statute, the trial court does not possess the power to limit the *number* of counsel who shall speak; in other words, that the trial court cannot limit the *time* which the counsel for a party shall employ in arguing his cause by limiting the *number* who shall speak.⁴⁴ By statute, in *Iowa*, "the court may restrict the time of an attorney in any argument to itself, but shall not do so in any case before the jury."⁴⁵ With this statute in force, the judges in that State are often driven to the expedient of *vacating the bench* during an argument to a jury and engaging in the trial of another cause in another room. That State, so far as the writer knows, is the only jurisdiction in which this abominable practice has been sanctioned by an appellate tribunal. "In this State," said Rothrock, J., "a *nisi prius* judge is not permitted to limit counsel in their argument to jurors; and it often occurs that, in order to dispose of the business of the court, and keep court expenses within some limit, by consent of the parties and counsel, the judge transacts other business during part of the time taken in arguments to juries. Now, in such a case, counsel are bound to argue the case made in the record. If not disposed to do so, it would be an unjust rule that would require an opposing counsel to make objection which is usually unavailing, and call upon the judge to return to the court-room and correct the error." And the court hold that the fact that such prejudicial remarks were made in argument, under such circumstances, may be shown by affidavit.⁴⁶ Where there is a statute providing that the whole time occupied in

⁴² He referred to the instance stated in the dissenting opinion in *St. v. Collins*, 70 N. C. 241.

⁴³ *St. v. Miller*, 75 N. C. 73, 75. See *St. v. Jones*, 117 N. C. 768, where it was held statute did not apply to arguments on motions and questions during the progress of a trial.

Under statute the court may limit the time "in all cases, except in capital felonies." *Pells' Rev. Code N. C.* 1908, § 216.

⁴⁴ *Ibid.*

⁴⁵ *Anno. Code Iowa* (1897) § 3704.

⁴⁶ *Hall v. Wolff*, 61 *Iowa*, 559, 562, 16 N. W. 710.

the argument of a cause shall not exceed two hours on either side, unless the court, for special reasons, shall otherwise permit, it is not error for the court, against the objection of a party, to limit his argument to a shorter time. The statute is merely a limitation upon the power of the court to extend the time for argument unless for special reasons, and does not take away its discretion of making a reasonable curtailment of the time.⁴⁷

§ 930. **Order of Making the Argument.**—This has been already much considered in a former chapter,⁴⁸ wherein it is seen that, as a general rule, the order of argument is a matter of right and follows the burden of proof. But there is an extensively prevailing view that, “in the absence of any positive rules upon the subject, the order of argument to the jury is matter of practice, within the control of the trial judge, and an appellate court will not interfere, unless there is a clear abuse of discretion, and there is good ground for believing that the party complaining has been injured by a wrong ruling as to such matters.”⁴⁹

§ 931. **The Approved Order Suggested.**—The old and approved practice is said to be, that each party shall open his case to the jury just before introducing his evidence, and that, when the evidence is all in, the defendant’s counsel may sum up to the jury, and plaintiff’s counsel may then close.⁵⁰

§ 932. **Effect of Waiver of Opening Statement.**—Where the plaintiff’s counsel, after having waived his right to open his case to the jury, is not confined by the trial court to a *strict reply* to the arguments of the defendant’s counsel, there is no ground of reversal, if it does not appear that he was permitted to *wander from the issues* in the case.⁵¹

§ 933. **Scope of the Opening Statement.**—The scope of the opening statement has been already considered;⁵² but it may not be amiss to notice two or three cases which have come to the attention of the writer since those paragraphs were printed. It is, of course,

⁴⁷ Hurst v. Burnside, 12 Ore. 520, 526, 8 Pac. 888.

⁴⁸ Ante, ch. 9.

⁴⁹ Marshall v. American Express Co., 7 Wis. 1; Central Bank v. St. John, 17 Wis. 157; Savings Bank v. Shakman, 30 Wis. 333; Bonnell v. Jacobs, 36 Wis. 59; Austin v. Austin, 45 Wis. 523; Kaime v. Omro,

49 Wis. 371, 378, 5 N. W. 838; ante, § 226, n. 4.

⁵⁰ Kaime v. Omro, 49 Wis. 371, 5 N. W. 838.

⁵¹ Kaime v. Omro, Id. (qualifying dicta in Brown v. Swineford, 44 Wis. 282).

⁵² Ante, §§ 261, et seq.

no objection in a criminal case that the State's attorney, in his opening statement, sets out fully what he expects to prove against the accused; but this is rather a benefit to him, since it notifies him of the case which he must be prepared to meet.⁵³ Where the State's counsel, in opening the case to the jury exhibited to them a photograph of the deceased, a young girl, the same having been afterwards identified by a witness as a photograph of her, it was held that no error was presented, such as could be reviewed by an appellate court, and secondly, the court regarded it as not an error such as would produce a reversal; since if the jurors had known the deceased, they would not for that reason have been incompetent, and if the people's counsel had described her personal appearance in argument, that would not have been such an abuse as would have required a new trial.⁵⁴ It cannot be assigned for error that the judge directed counsel not to spend time on certain issues in their opening statement, where, though an exception was taken to the ruling, no suggestion was made at the time that anything had been omitted from the statement, and no evidence was afterwards offered to establish the issues as to which an opening statement had been excluded.⁵⁵ The interruption by opposing counsel of the opening statement to raise questions as to its competency, or the restriction of the opening by the court, is unjustifiable, except in very clear cases of abuse; and any question raised upon it should be disposed of summarily and without argument.⁵⁶ In discussing this question in the case first cited, Cooley, C. J., said: "Since the decision in the case of *Scripps v. Reilly*,⁵⁷ an impression seems to have prevailed with some members of the bar that the opening statement of counsel might be challenged step by step, and questions of the relevancy and materiality of evidence raised and considered, and even argued at length, on counsel stating what he proposed to prove. Under this impression, the practice of interrupting counsel and demanding the judgment of the court on the compe-

⁵³ Dowda v. St., 74 Ga. 12.

⁵⁴ Walsh v. People, 88 N. Y. 458, 463. The principal difficulty which the court had was that, under the Revised Statutes (2 R. S. N. Y., p. 736, § 21), the matter was not the subject of exceptions, but addressed itself only to the discretion of the trial court on a motion for new trial, or to the governor on appeal for executive clemency. On

this point the court cite: *People v. Thompson*, 41 N. Y. 1; *Gaffney v. People*, 50 N. Y. 416; *Willis v. People*, 32 N. Y. 715. See *Storer's Code Civ. Proc. N. Y.* 1902, § 996.

⁵⁵ *Frazier v. Jennison*, 42 Mich. 206, 3 N. W. 882.

⁵⁶ *People v. Wilson*, 55 Mich. 506, 513, 21 N. W. 905; *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174.

⁵⁷ 38 Mich. 10

tency of what he proposed to show, has in some cases been carried to extraordinary lengths, and elaborate arguments have been indulged in over the question whether counsel should be suffered to make certain statements of proposed evidence to the jury. Any such practice is a great abuse, and in a desperate criminal case, might be resorted to for the purpose of defeating the ends of justice. by breaking the force of a connected statement of the case to the jury, and by prolonging the trial until the trouble and expense should dishearten the authorities, and result in a relaxation of effort for conviction. The cases must be rare in which counsel would be justified in interrupting the opening of his antagonist to raise questions of competency; and when he does so, the questions ought to be disposed of summarily and without argument.”⁵⁸

§ 934. **What must be Stated in the Opening Argument.**—Bearing in mind, then, that the State has, in every case where a different rule is not prescribed by statute, the right to make both the opening and the concluding argument, it becomes an important inquiry how far the prosecution is required, in its opening argument, to develop and present its case, in order not to take the accused at a disadvantage. It is the constant effort of unfair and disingenuous advocates, who represent the side of the issue which has the right to open and close, to attempt, by waiving the opening argument, to put the other party at the disadvantage of making his argument without knowing the argument which he will have to meet, the prosecuting counsel thus acquiring the advantage of delivering his entire argument in conclusion without giving to the defending counsel any right of reply to the positions which he may take. This practice ought never to be tolerated. Where the prosecution waives the opening argument and throws the burden of opening upon the defendant, the court should allow the defendant to close; for it is but just that the defendant should have a right to reply to the positions taken by the prosecution, and a spirit of fair play would dictate that the party which has the burden of opening should have the advantage of closing. To obviate such an unfair method of argument, courts have adopted the rule requiring the party possessing the right to the opening and closing arguments to deliver to the court and to the opposite counsel the points upon which he means to insist,⁵⁹ and to confine his concluding argument to the

⁵⁸ *People v. Wilson*, 55 Mich. 506,
513, 21 N. W. 905.

(N. Y.) 542; *Schmidt v. Union Ins.*
Co., 1 Johns. (N. Y.) 63; *Wynn v.*

⁵⁹ *Main v. Newson*, 3 Johns.

Lee, 5 Ga. 217.

points thus delivered.⁶⁰ Under a statute⁶¹ giving the State's counsel the right to make the concluding address to the jury in all cases, it has been ruled that the presiding judge should require him in his opening speech fairly to develop his case, and to present the law on which he relies; and that if he should fail to do this until his second speech, the presiding judge, in his discretion, would be authorized to allow the defendant's counsel again to address the jury.⁶² In Missouri, a statute prescribing that "unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for defendant shall follow, and the counsel for the prosecution shall conclude the argument,"⁶³ is held to be mandatory. The prosecuting attorney must therefore make the opening argument, in which he must apprise the accused of the theory of the prosecution and of the positions which it takes, in order that the accused may be able to reply: and if the State's counsel refuses to make such an opening argument, he cannot be permitted to argue at all.⁶⁴ Where the statute required the counsel for the people to open and close, allowed two counsel to argue on each side, and gave the court a discretionary power to change the order thus prescribed,⁶⁵ it was held that the court committed no error in denying the concluding argument to the defendant's counsel and in allowing the counsel for the prosecution and the accused to follow each other alternately, the prosecution opening and concluding.⁶⁶

§ 935. **Limits of the Concluding Argument.**—In order not to be unfair to the other side; the concluding argument must, then, be confined to the grounds stated and points of law announced in the

⁶⁰ *Wynn v. Lee*, supra. The court must exercise a sound discretion in confining discussion to the vital issues of a case. *Wynn v. Downey*, 27 R. I. 454, 63 Atl. 401.

⁶¹ Texas Code Crim. Pro., art. 704 (1895).

⁶² *Morales v. St.*, 1 Tex. App. 494, 500. This ruling was also made with reference to another Texas statute (ante, § 928), which allows two arguments on each side in a prosecution for felony.

⁶³ Rev. Stat. Mo. 1909, § 5231.

⁶⁴ *St. v. Honig*, 78 Mo. 249, 253; *St. v. Jackson*, 105 Mo. 196.

⁶⁵ Nav. Stat. 1861, ch. 472, §§ 355, 356, 357. (This statute amended in 1895, making it mandatory for prosecution to open and conclude argument. Comp. L. Nev. 1900, § 4357.)

⁶⁶ *St. v. Pierce*, 8 Nev. 291, 296.

⁶⁷ *Wynn v. Lee*, 5 Ga. 217. In criminal cases state concludes unless defendant introduces no testimony. Code Ga. 1911, Vol. II, § 1055. In civil cases generally it is to be said that the affirmative of main issue gives the right to conclude. *Id.* vol. 7, §§ 44, 88, 514, 5142, 6271, 6302. Rules of superior

opening argument;⁶⁷ and if counsel, in opening, refers to authorities merely, without reading them, he is understood to waive the right of reading them; and, unless they are referred to by the opposing counsel in his argument, the opening counsel cannot take them up again in his reply.⁶⁸ But if the counsel for the defendant, in his argument, comments upon a decision which is handed to him by counsel for the plaintiff, this obviously will give to the counsel for the plaintiff the right to comment upon the decision in his reply.⁶⁹ It thus appears that the concluding argument sustains an analogy to evidence in rebuttal. Its proper limit is a reply to what has been brought out in the defendant's argument. As the plaintiff (or, in a criminal case, the State) is not allowed to establish its case in chief by evidence introduced for the first time in rebuttal, so the plaintiff's counsel (or the State's counsel) ought not to be allowed, in the concluding argument, to take new ground, to state new points of law, or to read new authorities in support of the positions which he has assumed. But, as the court possesses the power, in the exercise of a sound *discretion*, of permitting evidence which should have been offered in chief to be introduced in rebuttal, provided it has been inadvertently overlooked or not availed of at the proper time by reason of accidental circumstances,⁷⁰ so it rests within the sound discretion of the trial court to permit counsel, in their concluding argument, to comment upon matters not referred to by the opposite counsel, and to which the opposite counsel are afforded no opportunity to reply,—which discretion will not be reviewed by an appellate tribunal except in a clear case of prejudice.⁷¹

courts established in 1907, govern the manner of argument and time to be allowed. *Id.* §§ 6261, 2, 4. *Strickland v. Ry. Co.*, 99 Ga. 124, 24 S. E. 981.

⁶⁸ *Cutler v. Estate of Thomas*, 24 Vt. 647; *Blaisdell v. Davis*, 72 Vt. 295.

⁶⁹ *Linsey v. Ramsey*, 22 Ga. 627, 637.

⁷⁰ *Rucker v. Eddings*, 7 Mo. 115; *Brown v. Burruss*, 8 Mo. 26; *Curren v. Connery*, 5 Binn. (Pa.) 488, *Richardson v. Lessee etc.*, 4 Binn. (Pa.) 198; *Dozier v. Jerman*, 30 Mo. 216, 220; *Blake v. Powell*, 26 Kan. 320, 327; *Rheinhardt v. St.*, 14 Kan. 322; *George v. Pilcher*, 28 Gratt. (Va.) 300, 310; *Farmers' Mutual*

Fire Ins. Co. v. Bair, 87 Pa. St. 124; *Huntsman v. Nichols*, 116 Mass. 521; *Taylor v. Shemwell*, 4 B. Mon. (Ky.) 577; *Clayes v. Ferris*, 10 Vt. 112; ante, §§ 345, et seq.

⁷¹ *Hull v. Alexander*, 26 Iowa, 569. Compare *Barden v. Briscoe*, 36 Mich. 255, 258; *Dean v. Chandler*, 44 Mo. App. 338; *Wills Point Bank v. Bates*, 72 Tex. 137, 10 S. W. 348. The theory of a case is not controlled by the concluding argument, where the pleadings, the evidence and instructions show that both parties proceeded upon a different theory. *Chicago City Ry. Co. v. Shaw*, 220 Ill. 532, 77 N. E. 139. Court has discretion to refuse to compel the prosecution to make the

§ 936. **Cutting off Plaintiff's Right to Reply.**—In a civil case in Michigan the somewhat novel question was discussed whether the defendant can, by waiving argument after the opening argument has been made, cut off the right of the plaintiff to his concluding argument. The conclusion was that the matter addressed itself to the sound *discretion* of the trial court; but, at the same time, it was pointed out that the defendant has not an absolute right to produce such a result, and that it ought to be prevented by the trial court. In the course of the opinion of the court, Campbell, J., said: "Usually the plaintiff's opening must indicate what the defendants are expected to meet. They have a right to know what arguments are to be alleged against them, and this they can only learn from the opening, inasmuch as they have no reply. In most cases, if they do not think the opening requires any arguments to fortify their case against it, they may fairly let the case go to the jury as it stands, and no reply is needed where there is nothing to be replied to. But while this is true in theory, it is also true that, when all the testimony is in, the defendants know perfectly well, before the opening, what the line of argument against them must be, and that its effect upon the jury will depend more or less upon the skill or force of opposing counsel in presenting the facts. As only one counsel opens, and as, where there are more than one, the ground is usually divided, and the junior commonly precedes, the effect of cutting off a reply would be to prevent the whole case from being thoroughly presented. We cannot think that there is any absolute right in a defendant to produce such a result. Every court is bound in fairness to prevent such abuses. But inasmuch as the propriety of interference must depend upon circumstances, we think the matter comes within those discretionary rules which must, unless in extreme cases, leave the trial judge to determine the course of procedure." ⁷²

closing argument immediately after defendant has closed, though there is ample time to do so. *St. v. Lewis*, 118 Mo. 79, 23 S. W. 1082.

⁷² *Barden v. Briscoe*, 36 Mich. 255, 257. The Indiana Court of Appeals has held, in effect, the same way, saying, in addition, that where there was nothing to prevent the opening from being made as complete as possible and nothing to show that a closing argument

would have changed the result, there would be no reversal for the court's refusal to allow it to be made. *Conrad v. Ry. Co.*, 34 Ind. App. 133, 72 N. E. 489. See also *Southern Kansas Ry. Co. v. Michaels*, 49 Kan. 388, 30 Pac. 403; *Henry v. Dussell*, 71 Neb. 691, 99 N. W. 484; *Collins v. Clark*, 30 Tex. Civ. App. 341, 72 S. W. 97. In New Jersey it was held, in a case where plaintiff was represented by two

CHAPTER XXIX.

OF THE RIGHT TO ARGUE QUESTIONS OF LAW TO THE JURY.

SECTION

940. How far Juries are Judges of the Law.
941. In Civil Cases.
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943. Contrary Doctrine that Counsel should be Permitted to argue Questions of Law to the Jury.
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947. Counsel not Permitted to read Law Books upon Questions of Fact.
948. Reading a Former Decision of the Supreme Court in the Same Case.
949. Reading or Stating Good Law to the Jury.
950. Stating Bad Law to the Jury.
951. [Conclusion.] Discretion, Cautions, Instructions.

§ 940. **How far Juries are Judges of the Law.**—The question to be discussed in this chapter is involved in another question upon which a great amount of useless judicial casuistry has been expended, —namely, in what sense and to what extent are juries judges of the law? The question assumes practical shape only in so far as it affords the key to the answers to the following questions: 1. To what extent are counsel permitted to argue questions of law to the jury? 2. What instructions shall the court give to the jury touching their authority as judges of the law? It is not proposed to consider this preliminary question now; it more properly belongs to the next title, where the whole subject of the relative provinces of court and jury is considered.

counsel, and one opened and defendant's counsel waives argument, that the court may, in discretion only allow the counsel who opened, and not the other, to close. *Hackney v. Telegraph Co.*, 69 N. J. L. 335, 55 Atl. 252. Under Texas statute providing that in prosecutions for felony argument shall not be restricted to less than two addresses on a side, defendant's counsel declining or failing for any reason to

make an argument does not change the rule. *Wilson v. St.* (Tex. Cr. R.), 72 S. W. 862 (not reported in state reports). Where statute reads, that plaintiff may open and be followed by defendant, and he be followed, etc., this was held not to permit a second address, where defendant declined to argue. *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498.

§ 941. **In Civil Cases.**—The question may be at once laid out of view, so far as *civil cases* are concerned, by the statement that in no such case, except according to some early conceptions in actions for damages for slander or libel, are the jury in any sense judges of the law. In such cases the jury must take the law from the court, and not from the counsel. The latter ought not to be allowed to argue questions of law to the jury, or to read them in argument from books of the law.¹ It has been doubted by one court whether counsel might not properly be permitted to read books of the law to the jury in civil cases, for the purpose of illustration merely;² but at a later period the same court held, on fuller consideration, that even such a practice is improper.³

§ 942. **Jurisdictions in which Counsel are not Permitted to argue Questions of Law to the Jury.**—In the courts of the United States,⁴ and in the courts of most of the States, it is settled that counsel cannot be permitted to argue to the jury questions of law which have been decided by the court.⁵ Juries have no power to judge of the *constitutionality* of acts of the legislature, and consequently counsel have no right to argue such questions to them.⁶

¹ Delaplane v. Crenshaw, 15 Gratt. (Va.) 457, 481; Philpot v. Taylor, 75 Ill. 309; Chicago v. McGiven, 78 Ill. 347; Sprague v. Craig, 51 Ill. 289; Tuller v. Talbot, 23 Ill. 357; Heagy v. St. ex rel., 85 Ind. 260. See contra, for a local and peculiar rule in Georgia, Robinson v. Adkins, 19 Ga. 398; Ransone v. Christian, 56 Ga. 351, 355; Buckalew v. R. Co., 107 Mo. App. 575, 81 S. W. 1176; Boltz v. Sullivan, 101 Wis. 608, 77 N. W. 870. In Missouri, where by statute the jury are judges of the law as well as fact in libel, it is ruled that no more in a libel suit than any other is it permitted for counsel to read law books to the jury, as, under the Bill of Rights in the constitution of that state, the jury determines the law "under the direction of the court" and statute makes it the duty of the court to give all instructions

upon law to the jury. Heller v. Pullitzer Pub. Co., 153 Mo. 205, 54 S. W. 457; St. Louis Clothing Co. v. Hail D. G. Co., 156 Mo. 393, 56 S. W. 1112. See also St. v. Dent, 170 Mo. 398, 70 S. W. 881. But it has been said the statement by counsel of a mere general proposition of law is not objectionable. Charner v. Boston & M. Ry., 75 N. H. 59, 70 Atl. 1078.

² Tuller v. Talbot, *supra*.

³ Chicago v. McGiven, *supra*.

⁴ Commonwealth v. Zimmerman, 1 Cranch C. C. (U. S.) 47; U. S. v. Columbus, 5 Cranch C. C. (U. S.) 304; U. S. v. Riley, 5 Blatchf. (U. S.) 204, 207.

⁵ St. v. Anderson, 44 Cal. 65, 70.

⁶ Franklin v. St., 12 Md. 236, 246, 249; Callender's Case, Whart. St. Tr. 688, 710; U. S. v. Riley, 5 Blatchf. (U. S.) 204, 207. Callender's Case, *supra*, was a prosecution, by

§ 943. **Contrary Doctrine that Counsel Should be Allowed to Argue the Law to the Jury.**—As hereafter seen,⁷ the contrary view prevails in Massachusetts, Maine, Indiana, Illinois and other States, that in criminal cases counsel have the right to argue the law to the jury. In *Georgia* the right is extended even to civil cases. But the origin of the doctrine in that State is found in the peculiar provisions of the constitution of 1777 and that of 1798, which need not be further considered. The Georgia courts, under these provisions, uphold the right to argue the law as well as the facts to the jury in civil cases, subject to the corrective power of the court in charging the jury and in granting new trials.⁸ The Supreme Court of *Tennessee* in upholding the right to argue the law to the jury in criminal cases, overruled the decision of a very able criminal judge.⁹ The court placed its conclusion upon a principle thus expressed in its opinion by Turney, J.: "It is impossible to understand how counsel can make out a case from facts, while he is forbidden to state and argue the law applicable to the facts. It requires both facts and law to make a prosecution or defense in either civil or criminal proceedings. Without facts there is no law to operate. To hold that

indictment for a seditious libel, in the Circuit Court of the United States for the district of Virginia, in the year 1800. William Wirt, in addressing the jury on behalf of the defendant, undertook to argue to them the constitutionality of an act of the legislature of Virginia, but, after several rude interruptions by the presiding judge (the Hon. Samuel Chase), was obliged to take his seat. Mr. Wirt's reasoning was summed up in his concluding sentence: "Since the jury have a right to consider the law, and since the constitution is the law, the conclusion is certainly syllogistic that the jury have the right to consider the constitution." The conduct of Mr. Justice Chase on this trial, and, among other things, this particular ruling, was made one of the grounds for his impeachment before the Senate of the United States. The Supreme Court of Indiana take

the same view of this question which was taken by Mr. Wirt, holding that as the constitution is a part of the law, it follows as a necessary corollary of the rule, that the jury are the judges of the constitution as well as of any other part of the law, and consequently may determine the constitutionality of a statute. *Lynch v. St.*, 9 Ind. 541. In *U. S. v. Riley*, 5 Blatchf. (U. S.) 204, 207, Mr. District Judge Shipman held that it was not error, in a criminal trial, to require counsel to argue the question of the constitutionality of the law to the court, instead of arguing it to the jury. See also on this question, *Commonwealth v. Murphy*, 10 Gray (Mass.), 1.

⁷ Post, § 2140.

⁸ *Robinson v. Adkins*, 19 Ga. 398, 401. But query? Post, p. 1509.

⁹ Judge Horrigan, of the Criminal Court of Shelby County

the facts shall be argued, but the law shall not be presented with these facts, is to deny the benefit of counsel. The value of facts depends upon the law, and that governs them. No lawyer can discuss propositions, except in a combination of facts and law.”¹⁰ The leading case in support of this doctrine is a decision of the Supreme Judicial Court of *Massachusetts*, in which the subject was discussed in an ample manner and with great ability by counsel, and considered in an important opinion of Chief Justice Shaw. The court upheld the right of counsel in criminal cases, to argue the law as well as the facts to the jury, both upon principle and in view of the practice which had long existed in that commonwealth. The question was reasoned with the massive force which distinguish the opinions of that eminent judge upon important questions. The decision is perhaps the leading American judgment upon the question in what sense juries are to be deemed judges of the law. Omitting those portions of the opinion which deal with that question, and referring to those portions which deal with the immediate question of the right of counsel to argue the law to the jury, one or two extracts will be given: “In thus conducting a jury trial in a criminal case, with a view to the return of a general verdict, it is obvious that the whole matter, of law as well as of fact, must be stated and explained to the jury, so that they may fully understand and apply it to the facts; because, as we have seen, in the form of a general verdict, they are to declare the law as well as the fact. For this purpose it must be necessary, and in our State it is the usual practice, for the parties respectively, by their counsel, to state the law to the jury, in the presence and subject to the ultimate direction of the judge, because, unless the jury understand the rule of law, with its exceptions, limitations and qualifications, they cannot know how to apply the evidence, and determine the truth of the material facts necessary to bring the case of the accused within it. In thus presenting their respective views of the law to the jury under the direction of the court, for the better information of both the judge and jury, great latitude has been allowed in the practice of this commonwealth, and counsel have been permitted to state and enforce their views of the law, especially in capital cases, by definitions and cases from such works of established authority as the court may approve. In this great latitude has been allowed, in tenderness to the accused, and a liberal confidence reposed in counsel

¹⁰ *Hannah v. St.*, 74 Tenn. (11Lea) 201.

called to defend the accused in the hour of his trial. But such an address, whether it be upon the matter of fact or matter of law, and whether in fact it be directed to the court or jury, is, in legal effect and actual operation, an address to both; not because they have not several duties to perform and distinct questions to pass upon, but because it is one trial, carried on at once before court and jury, in which the judge must have a clear comprehension of the evidence conducing to the proof of facts, which may or may not render the accused amenable to the law, in order that he may give such directions in matter of the law as the state of the evidence may require; and the jury must have a clear comprehension of the rules of law, in order to determine whether the facts proved bring the accused within them; and because the minds of both judge and jury, acting within their respective departments, must result in that general verdict of acquittal or conviction which is the proper determination of the cause. Considering the latitude which has been allowed in this commonwealth by a long course of practice, and the difficulty of drawing an exact line of distinction between that full statement and exposition of his views of the law, which counsel may properly make in a general address to the court and jury, upon the questions embraced in the issue and involved in the general verdict, and the address to the jury separately upon questions of law, we are of opinion that a party may, by his counsel, address the jury upon questions of law, subject to the superintendence and controlling power of the court to decide questions of law, by directions to the jury, which it is their duty to follow. In ordinary cases such directions to the jury, upon questions arising in the cause, are not given until the parties, by their counsel, have submitted their respective views of the law and facts in an argument to the court and jury. * * *

As the jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this court are of opinion that the defendant has a right by himself or his counsel, to address the jury, under the general superintendence of the court, upon all the material questions involved in the issue, and, to this extent and in this connection, to address the jury upon such questions of law as come within the issue to be tried. Such address to the jury, upon questions of law embraced in the issue, by the defendant or his counsel, is warranted by the long practice of the courts in this commonwealth in criminal cases.”^{10a}

^{10a} Commonwealth v. Porter, 10 the court distinctly ruled was, that
 Metc. (Mass.) 263, 283, 287. What the trial court erred in interrupt-

§ 944. Arguing Against the Law as Laid Down by the Court.—

If the court is the official mouthpiece of the law, and if the jury are bound to receive and administer the law as laid down by the court, it follows as a conclusion that counsel have not the right to argue to the jury the law contrary to the views expressed by the court. But if the jury are the judges of the law, and if the views of the court upon questions of law are merely advisory to the jury, which they are at liberty in their discretion to disregard, then it would seem to follow that counsel should be allowed to argue the law to the jury fully and freely, and in order to argue it fully and freely, to argue it, if necessary, contrary to the declarations of the court. Upon this question there is fortunately not very much controversy. It is held in the Federal^{10b} and in most of the State jurisdictions^{10c} that counsel have no right to argue to the jury propositions of law contrary to those which have been laid down by the court. The courts which so hold proceed upon the view that to permit this to be done would be contrary to the respect which the court owes to itself, and that it would be a perversion of the law to allow an appeal

ing counsel, and in prohibiting counsel from arguing to the jury, before the court had delivered its charge to them, propositions of law which were opposed to views of the law entertained by the court. This case is therefore a distinct authority, opposed to the cases cited in the preceding paragraph, which hold that counsel ought not to be allowed to controvert, in argument to the jury, the views which the court has expressed concerning the law. Aliter in civil cases, in which the court may in discretion refuse to allow counsel to read from decided cases. *Stone v. Com.*, 181 Mass. 438, 63 N. E. 123.

^{10b} *U. S. v. Morris*, 1 Curt. C. C. (U. S.) 23, 48 (fugitive slave case—able opinion by Mr. Justice Curtis); *Commonwealth v. Zimmerman*, 1 Cranch C. C. (U. S.) 47; *U. S. v. Columbus*, 5 Cranch C. C. (U. S.) 304. Compare *U. S. v. Watkins*, 3 Cranch C. C. (U. S.) 443.

^{10c} *Dejarnette v. Commonwealth*, 75 Va. 867, 882; *Davenport v. Com-*

monwealth, 1 Leigh (Va.), 585, 597; *Delaplane v. Crenshaw*, 15 Gratt. (Va.) 457, 481; *Smith v. Morrison*, 3 A. K. Marsh. (Ky.) 81; *Harrison v. Park*, 1 J. J. Marsh. (Ky.) 170, 173; *Edwards v. St.*, 22 Ark. 253. *Baltimore etc. R. Co. v. Boyd* (Md.), 7 Centr. Rep. 435, 438. See also *Bell v. St.*, 57 Md. 120; *Sowerwein v. Jones*, 7 Gill & J. (Md.) 335. Thus, the court has an undoubted right to state to the jury the *legal effect of evidence* which has been introduced and submitted to their consideration. *McHenry v. Marr*, 39 Md. 522; *Wheeler v. St.*, 42 Md. 570; post, § 2244. If counsel do not except to such statements, they become the law of the case. *Hogan v. Hendry*, 18 Md. 128; *Davis v. Patton*, 19 Md. 128; *Dent v. Hancock*, 5 Gill (Md.), 127; and, being the law of the case, counsel are not at liberty to argue against them. *Bell v. St.*, 57 Md. 109, 120; *Sowerwein v. Jones*, 7 Gill & J. (Md.) 341; *St. v. Jones*, 153 Mo. 457, 55 S. W. 80.

from the court to the jury for the purpose of correcting the errors of law committed by the court, instead of correcting them by an appeal to the proper appellate tribunal provided by the constitution and the laws for that purpose. On the contrary, in the most important American judgment which is to be found upon the question of the power of juries to judge of the law as well as of the facts, it was distinctly ruled, in an opinion given by Chief Justice Shaw that the trial court committed error in interrupting the argument of counsel to the jury, and in preventing counsel from expressing to the jury views of the law contrary to those entertained by the court.¹¹ In Indiana, where counsel have the right to argue law to the jury, where it is sought to put the trial court in error, for the reason that the counsel for the accused was prohibited from commenting on instructions which the court had announced its purpose to give, under the provisions of a statute, it must appear *what the comments were* which the counsel desired to make.¹²

§ 945. **Right to Read Books of the Law to the Jury.**—If the right exists to argue the law of the case to the jury, it must follow that the right exists to read books of the law to them, as authority and for illustration, in like manner as counsel would do in arguing the law to the court. This right has accordingly been upheld in those jurisdictions where the right to argue the law to the jury exists,¹³—those courts holding that a substantial denial or deprivation of it is error for which a new trial will be granted.¹⁴ Another

¹¹ Commonwealth v. Porter, 10 Metc. (Mass.) 263, 283, 287. It is not understood that counsel in this case attempted to argue to the jury against any *previous ruling* of the judge. He argued against the views of the judge, and was interrupted, and it was held that the judge had no right to do this. See also Lynch v. St., 9 Ind. 541; White v. People, 90 Ill. 117. In Kansas, counsel may argue against the court's instructions, in criminal prosecutions for libel. St. v. Verry (Kan.), 13 Pac. 838.

¹² Blizzard v. Applegate, 77 Ind. 527, 572.

¹³ Commonwealth v. Austin, 7

Gray (Mass.), 51; Jones v. St., 65 Ga. 506; Johnson v. St., 59 Ga. 142; Lynch v. St., 9 Ind. 541; Harvey v. St., 40 Ind. 516; Stout v. St., 96 Ind. 407 (overruling Carter v. St., 2 Ind. 617, and it seems Murphy v. St., 6 Ind. 490). A qualified rule exists in Georgia, applicable to civil cases, to the effect that counsel may argue to the jury their view of the law, or what they expect the court to charge as the law subject to the correction of the court. Ransone v. Christian, 56 Ga. 351, 355.

¹⁴ McMath v. St., 55 Ga. 304, 308; Warmock v. St., 56 Ga. 503; Goodwin v. St., 123 Ga. 569, 51 S. E. 598.

view remits the question, almost entirely to the *discretion* of the trial court.¹⁵

§ 946. Court May Curtail this Right Within Reasonable Limits.—It seems to be everywhere agreed that the court may curtail this right within reasonable limits.¹⁶ Accordingly the trial court is not obliged to allow the reading of numerous authorities to the jury, or the unnecessary consumption of public time in discussing to the jury such authorities, especially where the court is familiar with them, and is prepared in its charge to announce to the jury the propositions of law which they contain, so far as applicable to the case on trial.¹⁷ The refusal of the trial court to allow the counsel of the accused to read to the jury the whole of the statute upon one section of which the prosecution is founded, presents no question for review, if it appear that counsel was allowed to read those parts of the statute which, in his opinion, affected the construction of that section, and to comment to the jury upon the whole statute.¹⁸ Nor does the trial court commit any abuse of discretion in refusing to permit counsel to read to the jury legal authorities which have no pertinency to the facts of the case on trial.¹⁹ In

¹⁵ Thus, in *Texas* the rule is now established by repeated decisions that the extent to which counsel may read to the jury from *books of the law and of science*, as a part of their argument, is a matter left largely to the discretion of the trial judge, and one which will not be revised on appeal, unless that discretion has been clearly abused to the prejudice of the appellant. *Smith v. St.*, 21 Tex. App. 278, 307; *Wade v. De Witt*, 20 Tex. 398; *Dempsey v. St.*, 3 Tex. App. 429; *Hines v. St.*, 3 Tex. App. 483; *Foster v. St.*, 8 Tex. App. 249; *Cross v. St.*, 11 Tex. App. 84; *Lott v. St.*, 18 Tex. App. 627. As to books of science, see post, § 995; *Missouri, K. & T. R. Co. v. Smith* (Tex. Civ. App.), 101 S. W. 453 (not reported in state reports); *Cordes v. St.* — Tex. Cr. R. —, 112 S. W. 943; *Walley v. St.*, 133 Ala. 183, 31 South. 854; *St. v. Main*, 75 Conn. 55, 52 Atl. 257; *St.*

v. Neel, 23 Utah, 541, 65 Pac. 494; *Reed v. Com.*, 140 Ky. 736, 131 S. W. 776.

¹⁶ *Commonwealth v. Austin*, 7 Gray (Mass.), 51; *Murphy v. St.*, 6 Ind. 490; *Commonwealth v. Murphy*, 10 Gray (Mass.), 1; *Mayfield v. Cotton*, 37 Tex. 229, 232; *Curtis v. St.*, 36 Ark. 284, 292; *Winkler v. St.*, 32 Ark. 539; *People v. Anderson*, 44 Cal. 65, 70. It should not be permitted to read law books upon questions somewhat technical, which would have a tendency more to confuse than enlighten a jury. *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834; *Newport News etc. Ry. & E. Co. v. Bradford*, 100 Va. 231, 40 S. E. 900.

¹⁷ *Mayfield v. Cotton*, 37 Tex. 229, 232.

¹⁸ *Commonwealth v. Austin*, 7 Gray (Mass.), 51.

¹⁹ *Curtis v. St.*, 36 Ark. 284, 292; *Winkler v. St.*, 32 Ark. 539.

Massachusetts, where the right to argue the law to the jury is upheld, it has been held, that the refusal of the presiding judge to allow the counsel of the accused to read to the jury an *adjudication* of the highest court of *another State*, holding that a statute similar to the one upon which the prosecution was founded was contrary to the *constitution* of that State, presented no ground of exception. "This," said Chief Justice Shaw, "was a purely local decision, on a different *constitution* and different statute, and all merely local, of no force here. Without laying down any general rule respecting the reading of books on a trial, the court are of opinion that this was rightfully rejected."²⁰

§ 947. **Counsel not Permitted to Read Law Books upon Questions of Fact.**—Counsel have no right, in argument, to introduce any evidentiary matters to the jury which have not been regularly offered and admitted in evidence, in presenting the evidence in support of the action of the defense.²¹ The toleration of such conduct on the part of the prosecuting counsel in a criminal trial has been justly regarded as a substantial invasion of the right of trial by jury, which is guaranteed to accused persons by American constitutions.²² Applying these principles, it is held, even in those jurisdictions where counsel are permitted to argue the law to the jury,

²⁰ *Commonwealth v. Murphy*, 10 Gray (Mass.), 1.

²¹ *St. v. Lee*, 66 Mo. 165; *St. v. Kring*, 64 Mo. 591; *Yoe v. People*, 49 Ill. 410, 412; *Hennies v. Vogel*, (Ill.), 7 Cent. L. J. 18, 87 Ill. 242; *St. v. Smith*, 75 N. C. 306; *Mitchum v. St.*, 11 Ga. 615, 633; *Tucker v. Henniker*, 41 N. H. 317; *Hatch v. St.*, 8 Tex. App. 416, 423; *Brown v. Swineford*, 44 Wis. 282, 293; *Berry v. St.*, 10 Ga. 511, 522; *Thompson v. St.*, 43 Tex. 268, 274; *Festner v. Omaha etc. R. R. Co.*, 17 Neb. 280, 22 N. W. 557; *Rolfe v. Rumford*, 66 Me. 564; *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201, 208, 38 Am. Rep. 573; *Walker v. St.*, 6 Blackf. (Ind.) 2; *Hoxie v. Home Ins. Co.*, 33 Conn. 471; *Bullock v. Smith*, 15 Ga. 395; *Dickerson v. Burke*, 25 Ga. 225; *Doster v.*

Brown, 25 Ga. 24; *Cook v. Ritter*, 4 E. D. Smith (N. Y.), 254; *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509; *Bankard v. Baltimore etc. R. R. Co.*, 34 Md. 197; *Saunders v. Baxter*, 6 Heisk. (Tenn.) 369; *Bill v. People*, 14 Ill. 432; *Jenkins v. North Carolina Ore Dressing Co.*, 65 N. C. 563; *St. v. Williams*, 65 N. C. 505; *Devries v. Haywood*, 63 N. C. 53; *Gould v. Moore*, 40 N. Y. Super. (8 Jones & S.) 387, 395; *Northington v. St.*, 78 Tenn. (14 Lea) 424; *Flint v. Commonwealth*, 81 Ky. 186; *Sullivan v. St.*, 66 Ala. 48; *Grosse v. St.*, 11 Tex. App. 364, 367; *Brown v. St.*, 60 Ga. 210, 212; *Buliner v. People*, 95 Ill. 396.

²² *Tucker v. Henniker*, 41 N. H. 317, 324; *Mitchum v. St.*, 11 Ga. 615, 633.

that they cannot be allowed, under pretense of reading legal authorities to the jury, to read passages from such books which bear upon questions of fact which are before the jury for consideration, thus introducing to the minds of the jurors evidentiary matters which have not been regularly admitted by the presiding judge.²³ Thus, where the question of fact for decision was whether a *draft* was presented for payment within a reasonable time, it was held error to allow counsel to read to the jury and to comment upon cases found in the books of reports upon this subject.²⁴ So, where the case was a civil action against a municipal corporation, for *negligence* in allowing an obstruction in its highway, whereby the plaintiff had been injured, it was error to allow the plaintiff's counsel, against the objection of the defendant, to read extracts from reported cases in which large damages had been held not excessive.²⁵

§ 948. Reading a Former Decision of the Supreme Court in the Same Case.—It has been held upon the clearest grounds, that counsel have no right, in arguing the cause to the jury, to read to them a previous decision of the Supreme Court in the same case,²⁶ —the conclusion being that the court may, in its discretion, reserve

²³ *Dempsey v. St.*, 3 Tex. App. 429; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 512; *Evansville v. Wilter*, 86 Ind. 414; *Baldwin's Appeal*, 44 Conn. 37. Compare *Warren v. Wallis*, 42 Tex. 472; *Lucas v. St.*, 50 Tex. Cr. R. 219, 95 S. W. 1055; *Lewter v. Lindley* (Tex. Civ. App.), 89 S. W. 784 (not reported in state reports). It should not be permitted to read language from an opinion in a similar case calculated to arouse prejudice. Thus in a case involving title words of an opinion about "ripping up old land titles." *Matthews v. Thatcher*, 33 Tex. Civ. App. 133, 76 S. W. 61. If counsel in concluding argument reads findings of fact in a similar case the court may properly dismiss the panel. *Cunningham v. R. Co.*, 72 Conn. 244, 43 Atl. 1047.

²⁴ *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 512.

²⁵ *Evansville v. Wilter*, 86 Ind.

414; *Houston & T. C. R. Co. v. Gee*, 27 Tex. Civ. App. 414, 66 S. W. 78. If counsel is reading such cases ostensibly for the court, but really for the benefit of the jury, it is error to refuse to stop him. *San Antonio Traction Co. v. Lambkin*, (Tex. Civ. App.), 97 S. W. 574 (not reported in state reports); *Ricketts v. R. Co.*, 35 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901. In Virginia it has been held, that counsel has the right, in opening, to read from decisions to show what damages have been allowed by juries in similar cases. See *Norfolk & W. R. Co. v. Hannan*, 83 Va. 553, 8 S. E. 251. Also *Williams v. R. Co.*, 126 N. Y. 96, 26 N. E. 1048.

²⁶ *Good v. Mylin*, 13 Pa. St. 538 (overruling *Noble v. McClintock*, 6 Watts & S. (Pa.) 58); *Dempsey v. St.*, 3 Tex. App. 429. Compare *Warren v. Wallis*, 42 Tex. 472.

the opinion of the Supreme Court for its own guidance in instructing the jury. But in a State where the right to argue questions of law to the jury is upheld, on the ground that the jury are judges of the law as well as of the facts, it has been held no ground for a new trial that the prosecuting attorney, in a criminal case, in his closing argument to the jury, read to them a previous decision of the Supreme Court.²⁷

§ 949. **Reading or Stating Good Law to the Jury.**—Under any theory of this question, it is obvious that, if the court allow counsel to argue the law to the jury, and to read to them from books of the law, there will be no ground for a new trial if the passages which the counsel read are good law, applicable to the case before the jury, and contain no matter having a tendency to prejudice their minds in the decision of the case. Thus, in a criminal trial in Georgia, the counsel for the State read to the jury from a book of the law the following passage: “*Alibi*, as a defense, involves the impossibility of the prisoner’s presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as to reasonably exclude the possibility of such presence.” The Supreme Court of Georgia had previously held that this was the law,²⁸ and the trial court so charged the jury. It was held that no ground was presented for a new trial.²⁹

§ 950. **Stating Bad Law to the Jury.**—On a criminal trial, in a State where the instructions of the court precede the argument of counsel, where the court failed to instruct the jury upon a material point, and the prosecuting attorney, in his closing argument, took it upon himself to supply the omission, and, in so doing, stated the law in a manner prejudicial to the prisoner, it was held that the judgment must be reversed.³⁰ So, where, in his closing argument to

²⁷ Stout v. St., 96 Ind. 407.

²⁸ Wade v. St., 65 Ga. 756, 759. It has been held in West Virginia that, if counsel reads good law relevant to the case, there is no ground of error and if he reads bad law or such as is irrelevant to the case, there is no reversible error, if the instructions of the court are correct, and the court may refuse to permit counsel to state matter of law at all. Gregory’s Admr. v. R. Co., 37 W. Va. 606, 16 S. E. 819.

²⁹ Johnson v. St., 59 Ga. 142.

Though the court may refuse to allow counsel to read an excerpt from a decision, there is no harm, if the court instructs the jury that such is the law of the case. Mahoney v. Dixon, 34 Mont. 454, 87 Pac. 452.

³⁰ St. v. Reed, 71 Mo. 200. Court may stop counsel when stating unsound propositions of law. Alleghany Iron Co. v. Teaford, 96 Va. 372, 31 S. E. 525.

the jury, the prosecuting attorney told them that, where the charge was murder in the first degree, the defense of insanity admitted that the charge was proved, and the court refused, on the defendant's motion, to require him to withdraw the remark, it was held that this was error for which the judgment must be reversed.³¹ But it was not error to refuse a new trial, in a criminal case, because the prosecuting attorney stated to the jury, in argument, a proposition of law which, though erroneous, could have no bearing upon the question of the guilt or innocence of the accused, and hence no effect on their verdict.³²

§ 951. [Conclusion.] Discretion, Cautions, Instructions.—A just conclusion seems to be that, in those jurisdictions where the practice of the English courts of law is followed, under which counsel make their arguments to the jury before the charge of the court is given, counsel must be permitted, within reasonable limits, to state and to argue their views and theories of the law applicable to the case; that in every such argument it is necessary to the full presentation of the view upon which the prosecution or the defense rests, that a state of the law applicable to the facts should be assumed to exist, for which reason counsel must be permitted, in the very nature of things, to address the jury upon the whole case, both upon the law and the facts. But while this is so, counsel ought not be permitted to argue to the jury against propositions of law which have been decided by the court in the particular case, thus presenting the unseemly and indecent spectacle of an attempt to appeal from the judge, who is learned in the law and who is the official mouthpiece of the law, to the jury, who are unlearned in the law, and who are not judges of the law except in the limited sense hereafter stated.³³ It seems reasonably to follow that, in order to allow the proper freedom of argument, the court should not interrupt or check counsel—especially the counsel for the prisoner—in stating or enforcing propositions or conclusions of law which may be contrary to the views of the court, unless the conduct of counsel involves a flagrant and willful attempt to misstate the essential law of the case and to mislead the minds of the jury in respect of it, and unless counsel should deliberately assail or impugn propositions of law which the

³¹ St. v. Erb, 9 Mo. App. 588.

v. Common Council, 96 Mich. 625,

³² St. v. Dibble, 6 Mo. App. 584.

55 N. W. 1003.

³³ Post, §§ 2132, et seq.; Edwards

court has already decided in the case;³⁴ but that the court should, in ordinary cases, reserve the correction of erroneous statements of the law made by counsel to the jury, to be made in its general charge. In those jurisdictions where the charge of the court precedes the argument of counsel, the counsel should be confined, in their argument from legal premises, to the propositions of law embodied in the court's instructions, and the practice of reading books of the law to the jury ought not to be tolerated, especially where the attempt involves an effort to induce the jury to disregard the court's instructions, or to take the law of the case from the books rather than from the court.³⁵ If, in reading from books of the law to the jury, counsel read passages which are evidentiary in their nature, the court should, so far as possible, correct the error and remove the prejudice, by instructing the jury that such passages are not to be regarded as evidence in the case.³⁶ The court ought further, in instructing the jury, to disabuse their minds of any notion which they may have received from the argument of counsel, that, in their office of judges of the law, they have a right to set aside the law, or to refuse to apply the law as expounded to them by the court.³⁷ Finally,

. ³⁴ *People v. Anderson*, 44 Cal. 65, 70.

³⁵ *People v. Anderson*, *supra*; *St. v. Reed*, 71 Mo. 200; *St. v. Erb*, 9 Mo. App. 588.

³⁶ *Harvey v. St.*, 40 Ind. 515. Contrary to this view, it was held, in a criminal trial in Georgia, where counsel for the defendant had read to the jury in his argument, passages from Phillipps' *Remarkable Cases of Circumstantial Evidence*, that if the judge had reason to believe that the jury were likely, from any cause, to be misled thereby, it would have been his duty to state to them what evidence was to influence them in arriving at their verdict; but that it was error to instruct them that they "must not be influenced, guided by or accept as law in this case, any imaginary cases taken from works of romance." *Jones v. St.*, 65 Ga. 506. Counsel may state

to the jury what they believe to be law and base arguments thereon, but the jury must take the law from the court. *Vocke v. Chicago*, 208 Ill. 192, 70 N. E. 325.

³⁷ On this point, the charge of Mr. Justice Baldwin, in *U. S. v. Wilson*, Bald. (U. S.) 78, 108; that of Mr. Chief Justice Jay, in *State of Georgia v. Brailsford*, 3 Dallas (U. S.), 1, 4; that of Mr. President Addison, in *Pennsylvania v. Bell*, Add. (Pa.) 156, 160; that of Mr. Justice Story, in *U. S. v. Battiste*, 2 Sumn. (U. S.) 240, 243, may be referred to as fair models of cautionary instructions. See also and compare *Hamilton v. People*, 29 Mich. 173, 189; *Warren v. St.*, 4 Blackf. (Ind.) 150; *Townsend v. St.*, 2 Blackf. (Ind.) 151; *St. v. Snow*, 18 Me. 346, 348; *Lynch v. St.*, 9 Ind. 541 (where the court approved the instructions given on this point in *Stocking v. St.*, 7 Ind.

it may be doubted whether there is any sounder view of the question of the right to argue the law to the jury and to read to them passages from books of the law, than that which commits the whole subject to the sound *discretion* of the trial court, subject to the corrective power of the appellate courts in cases of abuse.³⁸

326, and doubted whether the instruction in *Carter v. St.*, 2 Ind. 617, could be sustained).

³⁸ *Curtis v. St.*, 36 Ark. 284, 292; *Winkler v. St.*, 32 Ark. 539; *Mayfield v. Cotton*, 37 Tex. 229, 232; *Commonwealth v. Austin*, 7 Gray (Mass.), 51; *Murphy v. St.*, 6 Ind.

490; *Good v. Mylin*, 13 Pa. St. 538; *Ogden v. St.* (Tex. Cr. R.), 58 S. W. 1018 (not reported in state reports); *Com. v. Renzo*, 216 Pa. 147, 65 Atl. 30; *Meyer v. Foster*, 147 Cal. 168, 81 Pac. 402; *Warner v. Com.*, 27 Ky. Law Rep. 219, 84 S. W. 742.

CHAPTER XXX.

ABUSES OF THE RIGHT OF ARGUMENT.

SECTION

955. Duty of Judge to Prevent Abuses of the Right.
956. To Correct Misrepresentations of Counsel.
957. Duty of Counsel to Object to Improper Argument.
958. Duty of Presiding Judge to Rebuke Misconduct.
959. [Illustration.] Checking Appeals to the Sympathy of the Jurors.
960. What will Cure the Prejudice.
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§ 955. **Duty of Judge to Prevent Abuses of this Right.**—The right of argument, as seen in a former chapter,¹ is a valuable right, secured to every suitor by the principles of Anglo-American law, which are embodied in American constitutions. But the right has its limits. The judge has power to see that it is not abused, and may, to this end, exercise a reasonable control over the course of the argument.² To this end it is his duty to *remain on the bench* during the argument to the jury; and if he vacate the bench, and, while he is absent, counsel, in arguing their client's cause to the jury, overstep the limits of privilege accorded to advocacy, to the manifest prejudice of the opposite party, a new trial will be ordered by an appellate court, in the exercise of a proper superintendence.³ The presiding judge is not a mere nose of wax; nor is

¹ Ante, ch. 28.

² Word v. Commonwealth, 3 Leigh (Va.), 743, 760.

³ Brownlee v. Hewitt, 1 Mo. App. 360; St. v. Claudius, Id. 551. In Iowa as already seen (ante, § 829), a statute prohibiting the curtail-

ment of the time of argument to the jury has enforced a change of rule in this respect. In Connecticut it has been ruled that, while it is the duty of the judge, presiding at a criminal trial, to be present during the whole of the argument,

he a mere umpire in a gladiatorial contest; nor is it merely his office to keep the peace in the court-room while the advocates and the jurors try the case. He not only checks abuses of the privilege of argument, but he decides, in cases of dispute, what evidence has been admitted.⁴ In those jurisdictions where the instructions precede the argument, it is his duty to interpose and restrain counsel who is indulging in arguments and illustrations before the jury, which are unwarranted by the instructions of the court, and which will, if unrestrained, be likely to mislead the jury; and it has been well said that "no duty incumbent upon the judge of a trial court is more imperative, nor more important to the fair and orderly administration of justice, than that of interposing to restrain everything in the course of the trial that tends to mislead the jury, and to divert their minds from the strict line of inquiry with which they are charged."⁵

§ 956. To Correct Misrepresentations of Counsel as to the Facts.—It has been said in Georgia: "It is certainly the business of the court, when practicable, to correct the misrepresentations of the testimony by counsel, particularly when that counsel is in conclusion. And it is practicable, when the witness whose evidence is charged to be misrepresented, is in court. He ought to be called to say what he did testify. And it is practicable in cases in which, like this, the law requires the testimony to be taken down, by reference to the brief. We differ with the judge in his opinion that the brief of the testimony taken down, in cases of felony, is but a memorandum for his private use. It is taken for the use of the reprieving and pardoning power, primarily no doubt; and we see no objection, where the witness is not at hand, to its being used to correct a misrepresentation on the argument. Its verity is presumed, because it

so that he can see and hear all that is done and said, yet it has been held not such an irregularity as would require a new trial, that, for a few moments during the argument of such a case, he went into the retiring room immediately behind the bench, but remained all the time where he could hear what was said, the door being apparently open, so that he could also see what was done. *St. v. Smith*, 49 Conn. 376, 383. Where prosecuting attorney in his closing address mis-

quoted testimony in a material matter, to which counsel for defendant objected, but there was no opportunity for the irregularity to be corrected owing to the absence of the judge during that part of the address, defendant was awarded a new trial. *Palin v. St.*, 38 Neb. 862, 57 N. W. 743.

⁴ *Davis v. Hill*, 75 N. C. 224, 228; *Long v. St.*, 12 Ga. 295, 330.

⁵ *Baltimore & Ohio R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315, 7 Cent. Rep. 435.

is taken under as serious sanctions as any act is done by the court or its authority in the progress of the trial. It is made the duty of the judge to take or cause it to be taken down, and in the event of a conviction and sentence, it is required to be approved by the court and recorded, and upon application for reprieve or pardon, a certified copy of it must accompany the application." The court concluded that the refusal of the trial court to have the testimony of a particular witness set right, either by calling the witness again or by referring to the brief, though not error, was an irregularity.⁶ In another case it is said: "The jury can consider the weight and effect of that evidence only, which has been allowed by the court to go to them. In cases where the court is not distinct in his recollection of the testimony, he may, and it is generally advisable, to refer it to the jury for their better recollection. If they have doubts as to the precise terms of the testimony, the court will, at their suggestion, have the witness recalled and re-examined on the doubtful point." ⁷

§ 957. Duty of Counsel to Object to Improper Argument.—In the discharge of this office, as of every other, the presiding judge is entitled to reasonable aid from the counsel in the case on trial, or from the parties themselves, where they appear in proper person. Where counsel, in arguing to the jury, exceed the limits allowed to advocacy, the way to correct the prejudicial effect of the argument is either to object to it at the time, to answer it by counter argument, or to ask suitable instructions to the jury with reference to it.⁸ After verdict it comes too late;⁹ and whether the objection is saved for

⁶ Long v. St., 12 Ga. 295, 330, opinion by Nisbet, J.

⁷ Davis v. Hill, 75 N. C. 224, 228. Where there is uncontradicted evidence of a fact, the court, where opposing counsel states such fact has not been shown, should at request of the other side instruct the jury that the fact has been shown and they should not find to the contrary. Davis v. Chicago, M. & St. P. R. Co., 93 Wis. 470, 67 N. W. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935.

⁸ Learned v. Hall, 133 Mass. 417, 419; Turner v. St., 68 Tenn. (4 Lea) 206; Roeder v. Studt, 12 Mo.

App. 566; Rudolph v. Landwerlen, 92 Ind. 34, 37; Earll v. People, 99 Ill. 123; Jackson v. St., 18 Tex. App. 586; infra, § 961; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; King v. St., 91 Tenn. 617, 20 S. W. 169; Lynch v. Peabody, 137 Mass. 92. He must ask that remarks be withdrawn or that jury be instructed to disregard same. People v. Wright, 4 Cal. App. 704, 89 Pac. 364; White v. St. (Tex. Cr. R.), 100 S. W. 941.

⁹ Powers v. Mitchell, 77 Me. 361, 368; Learned v. Hall, supra; Dowdell v. Wilcox, 64 Iowa, 721, 724;

review by affidavit, or by a recital in a bill of exceptions (according to the practice in the particular jurisdiction), it is equally necessary that the record should show that the objection was made at the time of the misconduct.¹⁰ Where such an objection is thus seasonably made, if counsel at once desist from the improper line or argument, there is, as a general rule, no available error; nor can error be predicated upon the silence of the court, where there is no request for an admonition to the jury not to be influenced by the statement.¹¹

St. v. Degonia, 69 Mo. 486; Barbour v. McKee, 7 Mo. App. 587; St. v. Forsythe (Mo.), 6 West. Rep. 438. It is scarcely necessary to add that such objections will not be available when made for the first time in an appellate court. St. v. Pollard, 14 Mo. App. 583; France v. Com., 30 Ky. Law Rep. 1297, 100 S. W. 1193; Ackerman v. Third Ave. R. Co., 76 Hun, 484, 27 N. Y. S. 102; aff'd 143 N. Y. 643, 37 N. E. 823. Or after the jury has retired. Ohio & M. R. Co. v. Wrape, 4 Ind. App. 100, 30 N. E. 428.

¹⁰ Dowdell v. Wilcox, supra; St. v. Zorn, 202 Mo. 12, 100 S. W. 591; Bankers' Life Assn. v. Lisco, 47 Neb. 340, 66 N. W. 412; Chapman v. Arn, 33 Ky. L. Rep. 965, 112 S. W. 507; Hencke v. R. Co., 69 Wis. 401, 34 N. W. 343. Even though there be an agreement between counsel that all exceptions may be taken advantage of without formal objection and exception, such would not excuse failure to object to improper statements in argument and request of the court to reprimand and instruct jury to disregard what is said. Bleich v. People, 227 Ill. 80, 51 N. E. 36.

¹¹ Worley v. Moore, 97 Ind. 15; re-affirmed and applied in Carter v. Carter, 101 Ind. 451. To the foregoing rule of procedure an *exception* must be noted in *Texas*. The rules prescribed in that state for

the government of procedure in the District Court recite that "counsel shall be required to confine argument strictly to the evidence and to the argument of opposing counsel," and that "the court will not be required to wait for objections to be made when the rules as to argument are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection." Tex. Rules, 39, 41. By another rule it is provided that any supposed violation of the rules, to the prejudice of a party, may be saved by bill of exceptions, presented as ground for a new trial, and assigned as error by the party who may have conceived himself aggrieved by such supposed violation. Id., Rule 121. "Under these rules," the Supreme Court of Texas say, "the duty devolves affirmatively, first, upon the counsel, to confine the argument strictly to the evidence and to the argument of opposing counsel; second, upon the court, upon its own motion, to confine counsel to this line of argument. If both the counsel who is making the argument and the court shall fail in the discharge of this duty, then the rules give to opposing counsel the privilege, but do not make it his duty, to then present his point of objection. This discretion given

§ 958. Duty of Presiding Judge to Rebuke the Misconduct.—

All courts agree that it is the duty of the presiding judge, either of his own motion¹² or upon the request of the opposing party or his counsel,¹³ to interpose and check the party or his counsel in an improper and prejudicial line of argument.¹⁴ It is the duty of the

to counsel, as to whether he will make objection at the time, was doubtless based upon the well known embarrassments and often prejudice which generally attend the interruption of the argument of one counsel by another; and was intended to place that as a duty where it properly belongs—upon the presiding judge. Whether counsel, under such circumstances, remain silent or object, may be alike prejudicial to his cause. Silence may be construed into acquiescence; objection may call forth a damaging repartee." Willis v. McNeill, 57 Tex. 465, 474, 475. In an important case in Georgia it was ruled, according to the official syllabus, drawn, it is understood, by the judge who wrote the opinion, that for counsel to attempt surreptitiously to get before the jury facts, by way of supposition, which have not been proved, is highly reprehensible; and that the attempt should be instantly repressed by the court, without waiting to be called upon by the opposite party. The statement, however, is to be regarded rather as a dictum of the judge than as a decision of the court; since, although the State's counsel was guilty of the misconduct, the prisoner was not for that reason allowed a new trial. In giving the opinion of the court on this point, Lumpkin, J., said: "That the practice complained of is highly reprehensible, no one can doubt. It ought in every instance

to be promptly repressed. For counsel to undertake by a side wind to get that in as proof which is merely conjecture, and thus to work a prejudice in the mind of the jury, cannot be tolerated. Nor ought the presiding judge to wait until he is called upon to interpose. For it is usually better to trust to the discrimination of the jury as to what is and what is not in evidence, than for the opposite counsel to move in the matter. For what practitioner has not regretted his untoward interference, when counsel, thus interrupted, resumes, 'Yes, gentlemen, I have touched a tender spot; the galled jade will wince. You see where the shoe pinches.'" Berry v. St., 10 Ga. 511, 522. These observations were quoted, and the rule therein expressed approved by the Supreme Court of Texas, in Willis v. McNeill, supra. Lunsford v. Dietrich, 93 Ala. 565, 9 South. 308, 30 Am. St. Rep. 79; Fayetteville & S. R. Co. v. Combs, 51 Ark. 324, 11 S. W. 418.

¹² Berry v. St., 10 Ga. 511; Forsyth v. Cothran, 61 Ga. 278; Willis v. McNeill, 57 Tex. 465, 474; Earll v. People, 99 Ill. 123; Brown v. Swineford, 44 Wis. 282; Greenwell v. Com., 30 Ky. Law Rep. 1282, 100 S. W. 552.

¹³ Hoxie v. Home Ins. Co., 33 Conn. 471; Fry v. Bennett, 3 Bosw. (N. Y.) 200, 242; Esterline v. St., 105 Md. 629, 66 Atl. 269.

¹⁴ Tucker v. Henniker, 41 N. H. 317; Bulloch v. Smith, 15 Ga. 395;

trial judge thus to interpose for the purpose of repressing needless scandal and gratuitous attacks upon private character. This duty is a very plain one, and good care should be taken to discharge it fully and faithfully.¹⁵ It is equally the duty of the court, when thus appealed to, to prevent counsel in argument from misstating the testimony of a witness; but where, in consequence of a disagreement as to his testimony, the witness has been recalled and has restated it, and his restatement has been written down, the judge may properly refuse to allow counsel to argue to the jury that the witness, when thus recalled, made a different statement from that read to the jury by the court.¹⁶ Here, as in other matters relating to the conduct of trials, a very large *discretion* is conceded to the presiding judge.¹⁷ It has been held that it is within the limits of this discretion for the judge to determine whether he will stop counsel at the time, or wait and correct the error in his *charge* to the jury; although where the abuse of privilege by the counsel has been gross and manifestly prejudicial, the failure of the trial court to stop him

Mitchum v. St., 11 Ga. 615; Dickerson v. Burke, 25 Ga. 225; Read v. St., 2 Ind. 438; Forsyth v. Cothran, 61 Ga. 278; Davis v. Hill, 75 N. C. 224; St. v. Caveness, 78 N. C. 484, 488; Clark v. Lowell, 1 Allen (Mass.), 180. It is said that "it is within the province, and it is the duty of the court to disentangle the case from any mistakes made by counsel in the statement of testimony, and for this purpose to restate and comment upon the testimony." Read v. St., 2 Ind. 438; citing Swan Prac. 910; West Chicago St. Ry. Co. v. Levy, 182 Ill. 527, 55 N. E. 554; Kellin v. St., 28 Fla. 313, 9 South. 711.

¹⁵ Rickabus v. Gott, 51 Mich. 227; Blair v. Madison County, 81 Iowa, 313, 46 N. W. 1093.

¹⁶ Davis v. Hill, 75 N. C. 224.

¹⁷ It has been held that where counsel properly interrupt the argument of the opposing counsel to correct an erroneous statement of fact, and a paper, not at hand, is

needed to settle the point in dispute, the court is not bound to allow time to search for the disputed paper; and where counsel having the floor exclaimed, upon such an interruption (in a way too frequently practiced), "The shoe pinches!" and the interrupting counsel complained of this as improper, and subsequently showed, by producing the lost paper, that the statement which gave occasion to the interruption was in fact erroneous—it was held no ground of error that the court answered, "Well, you have now stated it in your way; he has passed from it, let the argument go on." McLendon v. Frost, 57 Ga. 449; Daly v. Melendy, 32 Neb. 852, 49 N. W. 926; Parsons v. Com., 33 Ky. Law Rep. 1051, 112 S. W. 617. The manner of rebuke should be such as to prevent offending counsel from deriving any benefit from his offense. Henry v. Huff, 143 Pa. 563, 22 Atl. 1046; Wilson v. U. S., 149 U. S. 60, 37 L. Ed. 650.

then and there will afford just ground for a new trial.¹⁸ Although the court may not, in general, be bound thus to interfere unless appealed to, yet, when appealed to, the duty to interfere in some way is imperative, either by stopping counsel or by correcting the abuse in the court's instructions; since, if this is not done, the jury are, in effect, given to understand that the court is of opinion that they are allowed to take into consideration the erroneous or prejudicial statement thus made.¹⁹ On the other hand, unless the trial judge, on being thus appealed to, fails or refuses to interfere and to administer the proper rebuke or correction, no ground is afforded for a new trial;²⁰ though it is not error for the court to grant a new trial of its own motion because of such abuse, even though a seasonable objection may not have been interposed by the opposing counsel. The granting of a new trial for such a cause will be within the limits of the discretion of the trial court.²¹

§ 959. [Illustration.] **Checking Appeals to the Sympathies of the Jurors.**—Where, in a case of arson, counsel for the prisoners, in argument, pressed upon the jury the consideration that the *consequence of their verdict*, if guilty, would be that the prisoners would be *hanged*, and the court checked the counsel and admonished the jury that they had nothing whatever to do with the consequences of their verdict, but that their sole duty was to determine whether the prisoners were guilty or not guilty,—it was held that no error was committed. “This,” said the court, “is quite common in cases of this character, and we cannot say that it is improper.” The court did not regard it as a deprivation of the right of the jury to consider anything but the naked fact of the burning.²²

¹⁸ *Jenkinson v. North Carolina Ore. Dressing Co.*, 65 N. C. 563.

¹⁹ *Hoxie v. Home Ins. Co.*, 33 Conn. 471; *Clinton v. St.*, 53 Fla. 98, 43 South. 312; *Taylor v. St.*, 50 Tex. Cr. R. 560, 100 S. W. 393. Failure to reprimand but mere direction to counsel to keep within the record may not be deemed sufficient reproof. *St. v. Clapper*, 203 Mo. 549, 102 S. W. 560.

²⁰ *St. v. Lee*, 66 Mo. 165; *St. v. Degonia*, 69 Mo. 486; *St. v. Schorn*, 12 Mo. App. 590; *St. v. Emory*, 12 Mo. App. 593, affirmed, 79 Mo. 461;

St. v. Dickson, 78 Mo. 438; *St. v. Zumbunson*, cited in 79 Mo. 463; *St. ex rel v. Stark*, 10 Mo. App. 591; *Goldman v. Wolff*, 6 Mo. App. 491; *Klosterman v. Germania Life Ins. Co.*, 6 Mo. App. 582; *St. Louis etc. R. Co. v. Myrtle*, 51 Ind. 566, 576. Compare *St. v. Kring*, 64 Mo. 591, 595.

²¹ *Kinnaman v. Kinnaman*, 71 Ind. 417, 420.

²² *St. v. Dodson*, 16 S. C. 453, 461. Similarly the following language was held not improper: “If this defendant ought to pay this boy, I

§ 960. **What will Cure the Prejudice.**—An objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench and an admonition from the presiding judge to the jury to disregard the prejudicial statements, is generally, though not always, held sufficient to cure the prejudice.²³ The same result would, in most cases, follow a prompt and ample apology by the offending counsel; but it has been held in different jurisdictions that such a prejudice is not cured by the churlish form of apology which is involved in the expression that counsel will “take it back.”²⁴ Other courts have conceived that the prejudice is sufficiently cured where the presiding judge waits until he comes to charge the jury, and then admonishes them to disregard such considerations as those which have been improperly pressed upon their minds by the counsel in the argument.²⁵ The rule that the effect of a prejudicial line of

hope you will not quibble over the amount. The Good Lord knows he cannot have too much,” where it was further said: “We do not want you to give such an amount that it might shock the common sense of the community and people generally,” asking the jury at the same time to discard from their minds all sympathy and to give such a verdict as the attorney for defendant would give were he on the jury. *Retan v. Lake Shore & M. S. R. Co.*, 94 Mich. 146, 53 N. W. 1094. As an illustration of an appeal to sympathy or the arousing of prejudice it was held by Texas Supreme Court, that failure of court to check counsel for plaintiff in a personal injury case in his characterizing the personal examination of the plaintiff, a woman, made under order of court as an outrage, made such argument prejudicial error, such failure being after objection and protest, notwithstanding that defendant's counsel had argued that the examination showed she was not injured. See *Gulf C. & S. F. R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583.

²³ *St. v. Braswell*, 82 N. C. 693; *Gundlach v. Schott*, 192 Ill. 509, 61 N. E. 332, 55 L. R. A. 240; *Richmond & D. R. Co. v. Mitchell*, 95 Ga. 78, 22 S. E. 124; *Smith v. St.*, 165 Ind. 188, 74 N. E. 985; *Hogan v. M., K. & T. R. Co.*, 88 Tex. 679, 32 S. W. 1035; *City of Yankton v. Douglass*, 8 S. D. 441, 66 N. W. 923; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633; *Gidionsen v. Union Depot R. Co.*, 129 Mo. 392, 31 S. W. 800; *St. v. Burt*, 75 N. H. 64, 71 Atl. 30.

²⁴ *Baker v. Madison*, 62 Wis. 137, 148, 22 N. W. 141, 583; *Wolffe v. Minnis*, 74 Ala. 386. Mere withdrawal without court reprimanding counsel for committing the transgression has often been held insufficient to cure the error. *Illinois C. R. Co. v. Louders*, 178 Ill. 585, 53 N. E. 408; *Hill v. St.*, 42 Neb. 503, 60 N. W. 516; *Reed v. Madison*, 85 Wis. 661, 56 N. W. 182.

²⁵ *Fry v. Bennett*, 3 Bosw. (N. Y.) 200, 240, 243, affirmed, 28 N. Y. 324; *St. v. O'Neal*, 7 Ired. (N. C.) L. 251; *Melvin v. Easley*, 1 Jones (N. C.), L. 386; *Listman Mill Co. v. Miller*, 131 Wis. 393, 111 N. W.

argument may be cured in this way has been applied in a flagrant case, where the argument was unprofessional and where the prejudice must have been serious.²⁶ Another court has gone so far as to suppose that the practice of curing the prejudice by an admonition in the charge of the judge is "perhaps the most proper way,"²⁷—a conclusion from which the experience of most judges and practitioners will cause dissent. This conclusion has been denied in a case in Wisconsin, where this subject is ably reasoned. The court, speaking through Ryan, C. J., said: "Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries; and without notes of the evidence, it will be often difficult for juries to discriminate against statements of facts within the evidence and outside of it. It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury and affect the verdict."²⁸ On the other hand, the fact that the trial judge neglected to rebuke the impropriety will, in the view of many courts, be no ground of new trial, if the case was otherwise well tried, and it appears that, under the law and the evidence, no other result than a conviction was possible without a misbehavior of the jury.²⁹

496; *St. v. Hill*, 114 N. C. 780, 18 S. E. 971; *Williams v. St.*, 51 Tex. Cr. R. 361, 102 S. W. 1134. In a federal Circuit Court of Appeals it was said this is sufficient except in rare instances arising out of extreme cases. *Carroll v. U. S.* 154 Fed. 425, 83 C. C. A. 245. There is a presumption though not absolute that the irregularity has been cured. *St. v. Brandenburg*, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362. See also *Chicago City R. Co. v. McDonough*, 221 Ill. 69, 77 N. E. 577. Thus such presumption was thought to be overcome by the rendition of an excessive verdict where plaintiff's attorney in a libel suit persisted to the extent of bringing not only a rebuke, but also a fine upon himself in making reference to a similar suit and telling the jury the amount of the verdict therein.

Pullman Co. v. Pennock, 118 Tenn. 565, 102 S. W. 73.

²⁶ The case referred to is stated in the next section. See also *Gonzales v. St.*, 30 Tex. App. 203, 16 S. W. 978; *Schroeder v. St.* (Tex. Cr. R.), 36 S. W. 94 (not reported in state reports). For a prosecuting attorney to tell the jury that complaining witness had whispered in his ear, that counsel for defense had wanted to arrange for defendant to plead guilty was held to be a violation so flagrant as to be wholly beyond any correction or cure. *People v. Treat*, 77 Mich. 348, 43 N. W. 983. See also *Holder v. St.*, 58 Ark. 473, 25 S. W. 279.

²⁷ *St. v. O'Neal*, 7 Ired. L. (N. C.) 251.

²⁸ *Brown v. Swineford*, 44 Wis. 282, 292.

²⁹ *St. v. Zumbunson*, 7 Mo. App.

§ 961. [Illustration.] **Correcting the Prejudicial Remarks by an Instruction.**—The view that the prejudicial remarks may be sufficiently corrected by an admonition from the judge in his general instructions finds support in a celebrated case in New York, which was an action for libel against James Gordon Bennett, the proprietor of the New York *Herald*. Counsel for plaintiff, in his *concluding argument* to the jury, among other things, said: “The *Herald* by-and-by began to find that it could not live without doing something to attract public attention; and, about the days of Ellen Jewett, it came out as one of the most infamous sheets that ever existed since man was allowed by the Almighty to handle a pen.” The counsel for the defendant thereupon objected, on the ground that no evidence had been given in relation to this matter. The court replied: “He is drawing upon his imagination.” The plaintiff’s counsel then said: “My learned friend does not discriminate as to what we are at liberty to take notice of. I should like to know if we are bound to prove everything we talk about? Then I should be in danger for saying that it is daylight now. I am speaking of the public history of the time, as I would of the Mexican war, or the reign of Victoria; and if it became necessary to talk about it, it would be perfectly ridiculous to prove the reign of James I. It is a thing received by all mankind, and that portion which comes within the range of the fact I have a right to talk about. I suppose the gentleman knows that I have a right to talk about Bennett still publishing the *Herald*, without having proved it by evidence; or of other papers, such as the *Courier* or *Enquirer* or *Evening Post*. Now, Bennett comes up; I do not ask you to notice a single fact in relation to that paper, otherwise than as a part of the general history of the country; and so far as I know, the court will agree with me so far as this, that that which constitutes a part of the public history of the country is what we are at liberty to take notice of.” The counsel for the defendant responded: “The learned counsel claims, at matter of law, that, he has a right to refer to the articles in the *Herald* as part of the history of the country. I desire the court to say that it is not so.” The court responded: “I will say to the jury whatever is proper to be said at the end of the matter.” Counsel for the defendant replied: “I except to the refusal of the court now to stop the counsel.” It did not appear that the plaintiff’s counsel

526, affirmed, 86 Mo. 111. The fact to be deemed prejudicial error. that a case is close may be the de- Cox v. Continental Ins. Co., 119 termining factor whether there is App. Div. 682, 104 N. Y. S. 421.

subsequently made any remarks in which he should not have been permitted to indulge. The court, in charging the jury, used the following language: "Taking all these things into view, if you find for the plaintiff in this matter, you will assess these damages, taking constantly into view the application of this principle, and leaving out of view anything growing out of what has been said as to the character of his newspaper, about which there is no evidence before us any more than that the paper forms the libel, and divesting yourselves of all feeling of that kind, then say, in the exercise of a sound discretion, what damages ought to be assessed." It was held that the above ruling presented no reason for granting a new trial.³⁰

§ 962. **Question, How Saved for Review.**—There is a confusion, not very creditable to the courts, upon the question how the error of allowing a prejudicial line of argument is to be saved for review in an appellate tribunal. A class of decisions is met with to the effect that the error may be—

(1.) *Shown by Affidavits submitted to the Court on Motion for New Trial.*³¹—But the sound view is that, this being a matter occur-

³⁰ Fry v. Bennett, 3 Bosw. (N. Y.) 200, 241, 242, affirmed, 28 N. Y. 324. It was held error in another libel case for the court to refuse to instruct the jury to disregard the remark of plaintiff's attorney that he had heard it said since the trial began that "you can't down the Journal in Hamilton County." Indianapolis etc. Journal Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991.

³¹ Hall v. Wolff, 61 Iowa, 559, 561, 16 N. W. 710; Dowdell v. Wilcox, 64 Iowa, 721, 724, 21 N. W. 147; Turner v. St., 68 Tenn. (4 Lea) 206. In Iowa, where, as already seen, the judge is allowed by the rules of procedure, to quit the bench during the argument and proceed with other business of the term in another room, it becomes necessary to adopt the rule that the misconduct may be shown in this way. In that state it seems to be the practice to

bring such an objection to the attention of the trial court by affidavit on a motion for new trial, and to save it for review by incorporating the affidavit into the bill of exceptions—at least this is the inference which the writer draws from one case. Dowdell v. Wilcox, 64 Iowa, 721, 724, 21 N. W. 147. In Tennessee, where such misconduct was shown by affidavits of members of the bar who were counsel for the defendant, which affidavits were embodied in the bill of exceptions without any comments by the presiding judge, the statements contained in them were taken to be true by the appellate court, on the ground that the judge had made the affidavits a part of the bill of exceptions without questioning in any manner the correctness of their statements. Turner v. St., 68 Tenn. (4 Lea) 206.

ring in open court, in the presence of the presiding judge, his attention should be called to it by a seasonable *objection*, which, if overruled, should be followed by an *exception*, which exception should be noted and incorporated in the general bill of exceptions,³²—from which the conclusion follows that such an irregularity cannot be presented for appellate-review by affidavits.³³ Where the practice of the particular jurisdiction allows the question to be raised on motion for new trial by affidavits, and these affidavits are conflicting, the appellate court will resolve the doubt in favor of the ruling of the trial court.³⁴ It seems that the *affidavits of jurors*, in opposition to a motion for a new trial upon this ground, in which the jurors attempt to show that the improper remarks had no influence upon them in making up their verdict, are not to be considered; since, though the jurors might conscientiously believe this, few men are able to take exact cognizance of the operations of their own minds and of the influences which bear upon them, and they might be mistaken.³⁵

(2.) *By Objections, Exceptions and a Bill of Exceptions.*—The other and more correct view is that such an irregularity can only be saved for appellate review by an objection seasonably made, an exception properly taken if it is overruled, which exception is incorporated in a bill of exceptions, signed and sealed by the presiding judge.³⁶ Confusing ideas are met with even in this connection;

³² *Turner v. St.*, 68 Tenn. (4 Lea) 206; *Roeder v. Studt*, 12 Mo. App. 566; *Rudolph v. Landwerlen*, 92 Ind. 34, 37.

³³ So held in the cases cited in the preceding note. It seems at one time to have been the practice in Missouri to raise this question by affidavits; for in some cases the courts have refused to reverse a judgment for this cause because the affidavits were conflicting. *St. v. Baber*, 11 Mo. App. 586; *St. v. Johnson*, 76 Mo. 121; *St. v. Brooks*, 202 Mo. 106, 100 S. W. 416. The exception generally does not lie to the prejudicial remark but to the refusal of the court to dissipate the prejudice caused thereby. *Pressey*

v. Rhode Island Co. (R. I.), 67 Atl. 447.

³⁴ *St. v. Baber*, *supra*; *St. v. Johnson*, *supra*; *St. v. Comstock*, 20 Kan. 650. And if the portion of the remarks which appear clearly to have been made were not prejudicial, the conviction will not be reversed.

³⁵ *Kinnaman v. Kinnaman*, 71 Ind. 417, 419. Especially the affidavits of *six* jurors to this effect will not prevail, since they are not able to answer for the other six. *Ib.*

³⁶ *Bradshaw v. St.*, 17 Neb. 147, 22 N. W. 361 (distinguishing *Cleveland Paper Co. v. Banks*, 15 Neb. 20, 16 N. W. 833); *McLain v.*

for, while it is held in one jurisdiction that such an irregularity cannot be made available on appeal unless pointed out to the lower court and the ground of objection specifically stated, yet another decision of the same tribunal is to the effect that an exception taken at the time is not in all cases necessary; since the trial court may, in the exercise of its discretion, see fit to wait until its charge is given to the jury, to cure the prejudice; and that an exception to the refusal to grant a new trial upon this ground sufficiently saves the question for review, where the irregularity is shown to have been such as prevented a fair trial.³⁷ The correct rule of procedure in such cases is believed to be that laid down by the Supreme Court of Nebraska, speaking through Reese, J., in the following language: "The Supreme Court, in the exercise of its appellate jurisdiction in cases of this kind, is limited to the correction of the error of the District Court. Before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this State is now settled in this respect, and before this court can review questions of this kind, the attention of the trial court must be challenged by a proper objection to the language and a ruling upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can be noted. By a bill of exceptions, showing the language used, the objection, ruling of the court and exception to the ruling can be presented to this court for decision. If the court sustains the objection, and thus condemns the language, and requires the attorney to desist and confine himself to the evidence in the case, no injury is suffered by the accused."³⁸ This ruling has been re-affirmed by

St., 18 Neb. 154, 24 N. W. 720, 724; Bullis v. Drake, 20 Neb. 167, 29 N. W. 292; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; St. v. Anderson, 10 Ore. 448, 457; St. v. Abrams, 11 Ore. 169, 172; Commonwealth v. Scott, 123 Mass. 239; Earl v. People, 99 Ill. 123; Jackson v. St., 18 Tex. App. 586; Maclean v. Scripps, 52 Mich. 215, 222, 17 N. W. 816, 18 N. W. 209; Reese v. St., 53 Tex. Cr. R. 565, 102 S. W. 114; Johnson v. St., 152 Ala. 46, 44 South.

670; St. v. Murphy, 201 Mo. 691, 100 S. W. 414; Pierson v. Illinois C. R. Co., 149 Mich. 167, 112 N. W. 923; St. v. Hart, 140 Iowa, 456, 118 N. W. 784. The objection must appear among the grounds of motion for new trial. St. L. B. & T. Co. v. Cartan R. E. Co., 204 Mo. 565, 103 S. W. 519.

³⁷ Rudolph v. Landwerlen, 92 Ind. 34, 39.

³⁸ Bradshaw v. St., supra.

the same court in a more recent case.³⁹ It is scarcely necessary to add that an exception of this nature, in order to be available on error or appeal, should specify *what was said*; otherwise the reviewing court cannot see whether any prejudice resulted from the matter complained of.⁴⁰

§ 963. **Stating to the Jury Prejudicial Facts Which are not in Evidence.**—It is scarcely necessary to suggest that, in every judicial trial, a party must present his evidence either by the testimony of witnesses who are under oath, by the exhibition of documents which are competent under the rules of evidence, or by the exhibition of such material objects as are connected with the *res gestæ* and speak with reference to the issues on trial. He cannot be permitted to present his evidence in the form of the argument of his counsel to the jury, who is not sworn to speak the truth as a witness in the particular case. All courts, therefore, unite upon the conclusion that where counsel, in their argument to the jury, make statements of prejudicial matters which are not in evidence, it will afford ground for a new trial, unless the error is cured before the cause is finally submitted to the jury, in the manner stated in the preceding paragraphs.⁴¹ It is a necessary part of this rule that the matters thus

³⁹ *McLain v. St.*, 18 Neb. 154, 24 N. W. 720, 724.

⁴⁰ *St. v. Cavenness*, 78 N. C. 484. An old case in Illinois is to the effect that the reading of an improper paper by counsel in argument cannot be assigned for error,—the remedy of the opposite party being to request the court to instruct the jury that nothing which has been so read is 'evidence before them. *Kenyon v. Sutherland*, 8 Ill. 99. This decision is not only entirely out of the line with the authorities, but cannot be defended upon principle. If the only remedy for abuse of the privilege of argument lies in a request to the court to instruct the jury to disregard the prejudicial statement, then disingenuous counsel will be at liberty to fill the minds of the jurors with prejudicial matters, and the other side will

have no better remedy than the meagre chance of the effect being obliterated by an admonition from the bench.

⁴¹ *St. v. Lee*, 66 Mo. 165; *St. v. Kring*, 64 Mo. 591 (modifying the remarks of the same court in *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509, 514), in intermediate appellate court, 1 Mo. App. 438; *Yoe v. People*, 49 Ill. 410, 412; *Hennies v. Vogel*, 87 Ill. 242, 7 Cent. L. J. 18; *St. v. Smith*, 75 N. C. 307; *Mitchum v. St.*, 11 Ga. 615, 633; *Tucker v. Henninger*, 41 N. H. 317, 324; *Hatch v. St.*, 8 Tex. App. 416, 423; *Brown v. Swineford*, 44 Wis. 282, 293; *Berry v. St.*, 10 Ga. 511, 522; *Thompson v. St.*, 43 Tex. 268, 274; *Festner v. Omaha etc. R. R. Co.*, 17 Neb. 280, 22 N. W. 557; *Cleveland Paper Co. v. Banks*, 15 Neb. 22, 16 N. W. 833; *Rolfe v. Rumford*, 66 Me. 564;

improperly stated by counsel to the jury in argument should, in view of the issues on trial, the *status* of the parties, their attitude toward each other, and the like considerations, be, in their nature, of a tendency to *prejudice* the cause of the opposing party in the minds of the jurors. Where such statements, though of matters not in evidence and hence improperly made, are *immaterial* or at least *not prejudicial*, they will afford no ground for a new trial.⁴² The words

Union Central Life Ins. Co. v. Cheever, 36 Ohio St. 201, 208, 38 Am. Rep. 573; Walker v. St., 6 Blackf. (Ind.) 2; Hoxie v. Home Ins. Co., 33 Conn. 471; Bulloch v. Smith, 15 Ga. 395; Dickerson v. Burke, 25 Ga. 225; Gould v. Moore, 49 N. Y. Sup. Ct. (8 J. & S.) 387, 395; Keolges v. Guardian Life Ins. Co., 57 N. Y. 638; Crandall v. People, 2 Lans. (N. Y.) 212; Northington v. St., 78 Tenn. (14 Lea) 424; Flint v. Commonwealth, 81 Ky. 186; Sullivan v. St., 66 Ala. 48; McAdory v. St., 62 Ala. 154; Grosse v. St., 11 Tex. App. 364, 377; Brown v. St., 60 Ga. 210, 212; Bulliner v. People, 95 Ill. 396. Such conduct has been deemed, in a sense, a deprivation of the right of trial by jury. See Mitchum v. St., 11 Ga. 615, 633, where this view is enforced at length in glowing language by Nisbet, J. Also Tucker v. Henniker, 41 N. H. 317, 324, where the language of Nisbet, J., in the preceding case, is plagiarized, with some slight omissions and rhetorical improvements. Consult, on this subject, the following authorities: Hopt v. People, 7 Sup. Ct. Rep. 614; Bullard v. Boston etc. Co. (N. H.), 5 Atl. 16; People v. Carr, 64 Mich. 702. 31 N. W. 591; Gallinger v. Lake Shore Traffic Co., 67 Wis. 529, 30 N. W. 790; Henry v. Sioux City & P. R. R. Co., 70 Iowa, 233, 30 N. W. 630, and note; Manning v. Bresnahan, 63 Mich. 584, 30 N. W. 189; Palmer v.

Utah & N. R. R. Co., 2 Idaho, 315, 13 Pac. 425; Moore v. St., 21 Tex. App. 666, 2 S. W. 887; Huckshold v. St. Louis, I. M. & S. R. R. Co., 90 Mo. 548, 2 S. W. 794; Stone v. St., 22 Tex. App. 185, 2 S. W. 585; Little Rock etc. R. R. Co. v. Cavenesse, 48 Ark. 106, 2 S. W. 505, and note; Brennan v. City of St. Louis (Mo.), Id. 481; Willis v. Lowry (Tex.), 2 S. W. 449; St. v. Forsythe (Mo.), 1 S. W. 834, 89 Mo. 667; St. v. Robertson (S. C.), 1 S. E. 443; People v. White, 5 Cal. App. 329, 90 Pac. 471; People v. Mix, 149 Mich. 260, 112 N. W. 907; Menard v. Boston & M. R. Co., 150 Mass. 386, 23 N. E. 214; People v. Hagenon, 236 Ill. 514, 86 N. E. 370; Augusta F. S. R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706; Hundley v. Chadick, 109 Ala. 575, 19 South. 845; Shatton v. Nye, 45 Neb. 619, 63 N. W. 928; Schillinger v. Town of Verona, 88 Wis. 317, 60 N. W. 272; Berger v. Standard Oil Co., 31 Ky. Law Rep. 613, 103 S. W. 245, 11 L. R. A. (N. S.) 238.

⁴² City of St. Louis v. Fruin, 9 Mo. App. 590; Union Savings Assn. v. Clayton, 6 Mo. App. 587; St. v. Lewis, 6 Mo. App. 584; Davis v. St., 33 Ga. 98. The following remarks of Cassoday, J., in a recent bastardy case in Wisconsin, are quoted by the author with some reserve: "Of course, the remarks of counsel are to be restricted to matters in the case on trial. But this is not always confined to such evidence as

spoken must have been of such a character as may reasonably be supposed to have influenced the jury to the prejudice of the party complaining.⁴³ The rule has been held to have no just application to *erroneous statements* of counsel in argument, in respect of the testimony which has been heard on the trial,⁴⁴ the reason of the rule apparently being that it is admissible for counsel to state the evidence in the most favorable light for his own client, and that deductions or inferences in respect of what the evidence tends to prove are always a fair subject of comment to the jury. Where there is a conflict of testimony, the counsel will not be stopped by the court as misrepresenting the testimony, merely because he assumes that the facts testified to by his own witnesses were proved;⁴⁵ and the view of the courts is that it is so important that the just privilege of counsel in argument should not be unduly restrained, that it has been regarded as not sufficient ground for a new trial that counsel, in the closing address to the jury, rather *overstates* the facts which there is some evidence tending to prove.⁴⁶ It is scarcely

is pertinent to the issue on trial. Other evidence frequently gets into a case by consent of parties or without objection. So there may be, and frequently is, some fact or circumstances occurring upon the trial which is properly open to the comment of counsel, and yet never becomes a part of the record in the appellate court by being incorporated into the bill of exceptions. Counsel necessarily have a broad latitude." *Baker v. St.*, 69 Wis. 32, 33 N. W. 52, 55; *Robinson v. Woodmansee*, 80 Ga. 249, 4 S. E. 497; *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483; *Doran v. Ryan*, 81 Wis. 63, 51 N. W. 259.

⁴³ *Festner v. Omaha etc. R. Co.*, 17 Neb. 280, 22 N. W. 557.

⁴⁴ *People v. Barnhart*, 59 Cal. 402; *People v. Lee Ah Yute*, 60 Cal. 95. Especially where, as in the latter case, the court orders the improper remarks to be stricken out. *St. v. Whitworth*, 126 Mo. 573, 29 S. W. 595. It is sufficient interfer-

ence for the court to state, where counsel is alleged to be misstating evidence while contending that the evidence means what he states, that it is allowable for counsel to draw inferences, but he must not misquote a witness. *Ramsey v. St.*, 92 Ga. 53, 17 S. E. 613.

⁴⁵ *Hatcher v. St.*, 18 Ga. 460; *Moore v. Rogers*, 84 Tex. 1, 19 S. W. 283; *Valley Iron Works Mfg. Co. v. Mill Co.*, 85 Wis. 274, 55 N. W. 693. And he may also argue as to inferences to be drawn from failure of adversary to prove other facts, which he claims should have been shown. *Fletcher v. Town of Weare*, 66 N. H. 582, 27 Atl. 226; *Galveston H. & S. A. R. Co. v. Duelm*, 86 Tex. 450, 25 S. W. 406. He may also argue that natural presumptions militate against certain uncontradicted evidence. *Bronson v. Leach*, 74 Mich. 713, 42 N. W. 174.

⁴⁶ *McKnabb v. Thomas*, 18 Ga. 495, 507.

necessary to add that the rule does not apply to statements made by an *attorney* while testifying as a witness.⁴⁷ An exception to the rule has also been admitted where counsel have inadvertently omitted to introduce in evidence a document essential to his client's cause, such as an exemplification of the plaintiff's act of incorporation. Here the question is governed by the rule that the order in which the evidence is presented is within the discretion of the trial judge, and that the mere fact that evidence is presented out of its order is not ground of new trial unless prejudice appears.⁴⁸

§ 964. **Limits Within Which the Rulings of the Trial Court Will be Controlled.**—Recurring to what has already been said, and especially to the view that the control of argument, like other matters relating to the conduct of trials, must necessarily be committed largely to the *discretion* of the trial court, the conclusion follows that it is only in cases where the court has refused to exercise its powers, or where its *discretion* has been *manifestly abused* by permitting prejudicial matters to be rehearsed to the jury in argument, that appellate courts will interfere.⁴⁹ They will, as already seen, defer to the conclusion of the trial court, whose presiding judge was in a much better position to know whether prejudice really accrued to the unsuccessful party than the appellate court is,⁵⁰ especially where the evidence as to the nature of the remarks is conflicting.⁵¹ And, on a similar principle, they will not control the trial judge, who has heard the evidence and tried the cause, in his decision upon

⁴⁷ *Baker v. Madison*, 62 Wis. 137, 146, 22 N. W. 141, 583.

⁴⁸ *Bank of Charleston v. Emerich*, 2 Sandf. (N. Y.) 718, Oakley, C. J., saying: "It is surely not worth while to send this cause back for another trial, merely to have this document, upon which no question arises, given in evidence." Ante, §§ 344, et seq.

⁴⁹ It is said that, the trial judge being necessarily familiar with all the facts and circumstances, as well as the shades of the evidence, must necessarily have a broad discretion in such matters, and that error is not to be presumed in such a case; but that if counsel abuse

their privilege or the trial court its discretion, it should be made to appear affirmatively, by incorporating the essential facts and circumstances showing it in the record. *Baker v. St.*, 69 Wis. 32, 33 N. W. 52, 55; *Santry v. St.*, 67 Wis. 67; 30 N. W. 226; *Rogers v. St.*, 128 Ga. 67, 57 S. E. 227, 10 L. R. A. (N. S.) 999; *St. v. Force*, 100 Minn. 396, 111 N. W. 297.

⁵⁰ See the remarks upon this point in *Loyd v. Hannibal etc. R. Co.*, 53 Mo. 509, 514, and in *Cavanah v. St.*, 56 Miss. 299, 309.

⁵¹ *St. v. Comstock*, 20 Kan. 650; *St. v. Baber*, 11 Mo. App. 586; *St. v. Johnson*, 76 Mo. 121.

the question how far the remarks were warranted by the evidence, when it is not made clearly to appear that they were unwarranted.⁵² What abuses of the right of argument will warrant the interference of appellate courts, when thus clearly shown, will now be stated.

§ 965. **Observations on the Limits Allowed to Argument.**—On this subject it was said by Fowler, J., in what has come to be regarded as a leading case: "The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his address to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of the parties; to impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as learning can make it; and he may, if he will, give play to his wit, or wings to his imagination. To this freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentences is contempt. This is a matter of course in the courts of civilized communities, but not of form merely. No court can command from an enlightened public that respect necessary to an even administration of the law without maintaining in its business proceedings that courtesy, dignity and purity which characterize the intercourse of gentlemen in private life. So, too, what a counsel does or says in the argument of a cause must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so. Now, statements of facts not proved and comments thereon are outside of the cause. They stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel."⁵³ In 1878 this question came for the first

⁵² Cobb v. St., 27 Ga. 649.

⁵³ Tucker v. Henniker, 41 N. H.

time before the Supreme Court of Wisconsin, and it was said by Chief Justice Ryan in delivering the opinion of the court, that it was to the honor of the bar that this was the case. The counsel who had transcended the bounds of professional propriety, by commenting upon a supposed state of facts not in evidence, was eminent at the bar and of high character; and the observations of the court, while not implying personal censure, give for this reason greater emphasis to the rule which it laid down. The following view was delivered from the bench, in respect of the limits of professional propriety in arguing facts to juries: "The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but the method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and the right, and outside of the principal object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore, it is that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to the prejudice, just or unjust, against his adversary, and *dehors* the very case he is to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate

317, 323. This language was St., 8 Tex. App. 416, 423. See also quoted with approval by the Court Cavanah v. St., 56 Miss. 299, 309. of Appeals of Texas in Hatch v.

course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts, in jury trials, to interfere in all proper cases, of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court.”⁵⁴ In the case just quoted from Georgia, Judge Lumpkin delivering the opinion of the court, thus eloquently denounced the practice under consideration: “Is it, I ask, worthy of the noblest of professions thus to sport with the life, liberty and fortune of the citizen? A profession which is the great repository of the first talents of the country, and to whose standard the most gifted flock, as offering the highest inducement of reputation, wealth, influence, authority and power which the community can bestow? I would be the last man living to seek to abridge freedom of speech, and no one witnesses with more unfeigned pride and pleasure than myself the effusions of forensic eloquence daily exhibited in our courts of justice. For the display of intellectual power, our bar speeches are equaled by few, surpassed by none. Why then resort to such a subterfuge? Does not history, ancient and modern, nature, art, science and philosophy, the moral, political, financial, commercial and legal,—all open to counsel their rich and inexhaustible treasures for illustration? Why, under the fullest inspirations of excited genius, they may give vent to their glowing conceptions in thoughts that breathe and words that burn. Nay, more, giving reins to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time—*extra flammantia mœnia mundi*. But let nothing tempt them to pervert the testimony, or surreptitiously array before the jury facts which, whether true or not, have not been proven.”⁵⁵ After all this eloquence the court refused to grant the prisoner a new trial. So, in a case in Texas the practice was thus denounced by Mr. Justice Moore:

⁵⁴ *Brown v. Swineford*, 44 Wis. 282, 293. This language was also quoted with approval by the Texas Court of Appeals in *Hatch v. St.*, 8 Tex. App. 416, 424. It was said in Pennsylvania that, if counsel make offensive and reprehensible re-

marks, unsustained by the evidence, the only efficacious remedy is to withdraw a juror and continue the case. *Holden v. Penn. R. Co.*, 169 Pa. 1, 32 Atl. 103.

⁵⁵ *Berry v. St.*, 10 Ga. 511, 522.

“Zeal in behalf of their clients or desire for success should never induce counsel in civil cases, much less those representing the State in criminal cases, to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case and the conclusions legitimately deducible from the law applicable to them.”⁵⁶

§ 966. Instances of Reversals Under the Last Preceding Rule.—

In his opening speech to the jury, counsel for the plaintiff said “that in the former trial of the case the defendants had suborned their little son to commit perjury, * * * and that the appellant had committed perjury in his affidavit for a change of venue.”⁵⁷ In a criminal prosecution for forgery, the State’s counsel, in addressing the jury was allowed by the court, the defendant’s counsel not objecting at the time, to use the following language: “The defendant was such a scoundrel that he was compelled to move his trial from Jones County to a county where he was not known.” And again: “The bold, brazen-faced rascal had the impudence to write to me a note yesterday begging me not to prosecute him, and threatening me that if I did he would get the legislature to impeach me.”⁵⁸ On the trial of an action upon a policy of life insurance, the counsel for the plaintiff read to the jury and commented thereon, against the objection of the defendant, a pamphlet prepared by the secretary of the defendant company for use among its agents, which had been offered in evidence and, upon objection, withdrawn.⁵⁹ In a suit on a policy of insurance on a vessel, the plaintiff offered in evidence a protest which had been filed by the master of the vessel, after it had sustained injury at sea, with a consul of the United States. The protest was excluded by the court on the objection of the defendants. Nevertheless, in his closing argument to the jury, the plaintiff’s counsel attempted to state some of its contents, and, on objection, was allowed by the court to proceed, on the ground that such protests usually set forth the particulars of such a casualty, and that, under the circumstances, the plaintiff was entitled

⁵⁶ *Thompson v. St.*, 43 Tex. 268, 274.

⁵⁷ *Hennies v. Vogel*, 7 Cent. L. J. 18, 87 Ill. 242. It was said by Dickey, J., in giving the opinion of the court: “Were this true, it would in fact be good cause for reversing the judgment. But, on an

examination of the record, the court find that the charge that such language had been used was not sustained.”

⁵⁸ *Smith v. St.*, 75 N. C. 306.

⁵⁹ *Union Central Ins. Co. v. Cheever*, 36 Ohio St. 201, 208, 38 Am. Rep. 573.

to any fair inference from the general character of the paper and the refusal of the defendant to have it read.⁶⁰ On the trial of an indictment for larceny, the State's attorney, against the objection of the defendant's counsel, stated, in his closing argument to the jury, that "he heard, while out on the street in New Braunfels, a citizen remark that it was a great shame that the defendant should have taken the money of the old man Wucherer, near seventy-one years old, and all the money he had in the world."⁶¹ The defendant, on his trial for murder, identified three letters by a witness, and then handed them to the judge to be marked and preserved until they should be used, but afterwards offered in evidence only two of them. Nevertheless, the State's attorney, in his closing argument, alluded to the third letter, expressing curiosity as to what it contained.⁶² The State's counsel, in his argument to the jury was permitted, against the objection of the accused, to detail at length the facts of a similar case, which had been tried in another part of the State.⁶³ Where, in a prosecution for selling intoxicating liquors to a person when in a state of intoxication, the prosecuting attorney, in addressing the jury, stated, among other remarks of doubtful propriety, that "he knew personally the saloon keeper in this case, and that he was guilty of this, and, he was sure, of other crimes,"—and the court failed, upon request to instruct the jury to disregard these remarks, and counsel saved an exception.⁶⁴ In his argument in a case of *larceny*, the prosecuting attorney asserted that "he knew that the defendant was the man who took the money," and, notwithstanding a strong objection, the court failed to caution the jury to disregard this statement,—and an exception was saved.⁶⁵ In all the foregoing cases, with the qualifications stated in the notes, it was held that the remarks afforded ground for reversing the judgment and ordering a new trial.

§ 967. [Continued.] Doctrine as Restated by Supreme Court of Alabama.—The Supreme Court of Alabama, to avoid misunderstanding, have restated its views upon this question, thus: "There

⁶⁰ *Hoxie v. Home Ins. Co.*, 33 Conn. 471.

⁶¹ *Grosse v. St.*, 11 Tex. App. 364, 377.

⁶² *Bullner v. People*, 95 Ill. 394. The ruling here was that, although this conduct was irregular and should not have been allowed, yet,

as no objection was made at the time and no exception taken, it would not be ground for reversing the judgment.

⁶³ *Cross v. St.*, 68 Ala. 476.

⁶⁴ *Brow v. St.*, 103 Ind. 133.

⁶⁵ *People v. Dane*, 59 Mich. 550.

must be objection in the court below, the objection overruled, and an exception reserved. The statement must be *as of fact*; the fact stated must be unsupported by any evidence, must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury; or the case is not brought within the influence of this rule. To come within the last clause above, namely, where the natural tendency is to influence the finding of the jury, the case must be clear and strong. We would not embarrass free discussion, or regard the many hasty or exaggerated statements counsel often make in the heat of debate, which cannot, and are not expected to become factors in the formation of their verdict. Such statements are usually valued at their true worth, and have no tendency to mislead. It is only when the statement is of a substantive, outside fact—stated as a fact—and which manifestly bears on a material inquiry before the jury, that the court can interfere and arrest discussion.”⁶⁶

§ 968. [Continued.] **Doctrine Restated in Texas.**—In a criminal case in Texas the court, speaking through Willson, J., said: “It has become quite common to except to the remarks of counsel for the State in their address to the jury. We find such exceptions in the majority of contested cases that come before us. If we had sustained all these exceptions, the effect would have been to have virtually closed the mouths of prosecuting attorneys. While argument should be restricted legitimately, it should not be so unreasonably limited as to render it ineffectual. The State has rights in this respect as well as defendants. And in view of the frequency of exceptions of this character, we will take occasion here to say that, before we will reverse a conviction because of remarks of prosecuting counsel, it must appear to us: (1) that the remarks were improper; and (2) that they were of a material character and such, as, under the circumstances, were calculated to injuriously affect the defendant’s rights.”⁶⁷

§ 969. **Commenting on Evidence which has been Excluded.**—An aggravated form of the abuse of the privilege of argument, which is included in the rule stated and illustrated in the two preceding paragraphs, is presented where counsel, in arguing to the jury, are guilty of the highly unprofessional conduct of stating or

⁶⁶ Cross v. St., 68 Ala. 476, 484. 19 Tex. App. 227; Love v. St., 35

⁶⁷ Pierson v. St., 18 Tex. App. Tex. Cr. R. 27.

524, 564; reaffirmed in House v. St.,

commenting upon evidence which has been offered and excluded. This attempt to appeal from the judge to the jury, as to what is admissible as evidence in the case, is not only, within the limits stated in the preceding paragraphs, ground for a new trial,⁶⁸ but the writer has no hesitation in saying that the presiding judge would be justified in treating and punishing it as contempt of court. Scarcely less unprofessional and pernicious is the practice of counsel of presuming to state in argument what they *would have proved* had they been permitted under the rules of evidence.⁶⁹

§ 970. Commenting on the Defendant's Character, Evidence as to which has been excluded.—Where, in a criminal trial, the character of the defendant was not put in evidence, and the court had excluded evidence tending to show that he had been at one time arrested for a robbery, it was held an abuse of privilege for the State's counsel to comment upon his general character; and, that, in view of these improprieties, the court, in order to prevent as far as possible any prejudice to the defendant by reason of them, should have given to the jury the following special instruction, requested by the defendant: "You are charged that the law presumes that the defendant has a good character, and you cannot presume against it because the defendant failed to introduce evidence of a good character, and every presumption in favor of his innocence is indulged by the law,"—and the appellate court, being of opinion that the de-

⁶⁸ *Hoxie v. Home Ins. Co.*, 33 Conn. 471; *Gould v. Moore*, 40 N. Y. Sup. Ct. (8 J. & S.) 387, 395 (with which compare *Koelges v. Guardian Life Ins. Co.*, 57 N. Y. 638; *Crandall v. People*, 2 Lans. (N. Y.) 212; *Flint v. Commonwealth*, 81 Ky. 186; *Sullivan v. St.*, 66 Ala. 48; *McAdory v. St.*, 62 Ala. 154; *Stephens v. St.*, 20 Tex. App. 255, 271); *Hitchcock v. Moore*, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474; *Haynes v. Town of Trenton*, 103 Mo. 123, 18 S. W. 1003.

⁶⁹ *Festner v. Omaha etc. R. Co.*, 17 Neb. 280, 22 N. W. 557; *Esterline v. St.*, 105 Md. 629, 66 Atl. 269. In Vermont it was said that persistency in an attempt to

place a letter before the jury by stating its contents and reasons for offering same, made after its exclusion, can be cured only by showing the letter was admissible. *Rudd v. Rounds*, 64 Vt. 432, 25 Atl. 438. Such flagrant misconduct, said the Kentucky Court of Appeals, as counsel's stating that he holds in his hands a letter acknowledging defendant's liability (which had been ruled out as being an offer of compromise) and asking permission to read same, cannot be cured by counsel's withdrawing his statement and the court's sustaining an objection to such statement being made. *McHenry Coal Co. v. Sneddon*, 98 Ky. 684, 34 S. W. 228.

fendant had not had a perfectly fair trial, the judgment was reversed.⁷⁰

§ 971 Comments, not Supported by Evidence, on the Character and Credibility of Witnesses.—It has been held error to make statements and comments respecting the character and credibility of witnesses for which the evidence affords no basis or justification. In so holding the Supreme Court of Georgia, speaking through Nisbet, J., said: "I know of no rule of law which authorizes the credibility of witnesses to be impeached or fortified thus. The manner of attacking or defending the character of the witness is fixed by law, and fixed among other things that he may not be subject to irregular and irresponsible assaults upon his veracity and fairness. He, as well as parties and counsel, has rights which it is the duty of the court to protect. It were cruel injustice to permit his character to be driven to and fro like the shuttlecock by the outside statements of counsel. Where shall the license stop? If allowed against the credibility of a witness, then with equal reason they are to be allowed as touching the merits of the issue. If crimination is granted, recrimination cannot be refused. If statements on one side are permitted, counter-statements on the other cannot be denied.

⁷⁰ *Stephens v. St.*, 20 Tex. App. 255, 271. See also *Hall v. U. S.*, 150 U. S. 76, 37 L. Ed. 1003; *Leahy v. St.*, 31 Neb. 556, 48 N. W. 390; *Holder v. St.*, 58 Ark. 473, 25 S. W. 279; *Wichita Mill Co. v. Hobbs*, 5 Tex. Civ. App. 34, 23 S. W. 923. In a civil suit it was held reversible error, where the record in a divorce suit was offered for the sole purpose of showing that a divorce was granted, to comment on the allegations in the petition charging grave misconduct on the part of a party. *Waldron v. Waldron*, 156 U. S. 361, 39 L. Ed. 453. But, if fair inference may tend to justify an attack on character or motive, counsel will be allowed thus to animadvert. Thus it was held justifiable, in an action for libel for sending out letters through a "Bad Debt Collecting Agency," for coun-

sel to urge the jury to give such a verdict as would teach men to go into their home courts after debtors instead of resorting to scandalous libels through an irresponsible foreign concern. *Burton v. O'Neill*, 6 Tex. Civ. App. 613, 25 S. W. 1013. To charge a defendant with motives of parsimony in failing to repair machinery at which employes work is allowable. *Faerber v. Scott Lumber Co.*, 86 Wis. 226, 56 N. W. 745. Though reflections on character be unauthorized, a verdict manifestly right will not be set aside therefor. *Patterson v. Howley*, 33 Neb. 440, 50 N. W. 324. Allusions to other crimes as to which there is no evidence in the record is reversible error. *Taylor v. St.*, 50 Tex. Cr. R. 560, 100 S. W. 393.

If allowed to men of the highest honor, they cannot be denied to those few to be found in all professions destitute of all honorable principle. The concession, carried out in its legitimate consequences, would convert the stern inflexible law and order of a court of justice into confusion, uncertainty and injustice. All these objections apply alike to criminal trials and civil actions—to the prosecuting officer and to counsel.”⁷¹

§ 972. **Expressing Belief in Guilt or Innocence.**—“No lawyer,” said Dr. Bishop, “ought to undertake to be a witness for his client, except when he testifies under oath, and subjects himself to cross-examination, and speaks of what he personally knows. Therefore, the practice, which seems to be tolerated in many courts, of counsel for defendants protesting in their address to the jury that they believe their clients to be innocent, should be frowned down and put down, and never be permitted to show itself more.”⁷² The Court of Appeals of Texas quoted this language with approval, and held that it applied equally to counsel for the prosecution. “They should not intrude *their* belief in the guilt of the accused, upon the jury.” Where, however, such remarks were objected to, and the trial judge promptly told the jury that the remarks were beside the evidence, foreign to the issue in the case, and that they were to pay no attention to them, the appellate court thought it “not probable that the jury would determine a case upon the belief of counsel, an especially when instructed by the court to disregard such remarks,” and they accordingly held them no ground for a new trial.⁷³

⁷¹ *Mitchum v. St.*, 11 Ga. 611, 635; *Henderson v. St.*, 51 Tex. Cr. R. 193, 101 S. W. 245; *Young v. Kinney*, 79 Neb. 421, 112 N. W. 558; *St. v. Helm*, 92 Iowa, 540, 61 N. W. 246. It has been ruled that remarks tending to impress the jury with the idea that a witness was hired to swear falsely, in the absence of all evidence of such a thing, are ground for a new trial. *Magoon v. Boston & M. R. Co.*, 67 Vt. 177, 31 Atl. 156; *Chicago City R. Co. v. Barron*, 57 Ill. App. 469. Insinuation and suggestion of a witness having been tampered with, when such rests on the testimony of such witness and there

is nothing fairly justifying such insinuation or suggestion, have been held to constitute prejudicial error. *Sullivan v. Deiter*, 86 Mich. 404, 49 N. W. 261. This character of transaction has been deemed so serious in New Hampshire that it was said that there is presumptive injury and the burden is on the offender to show none resulted. *Jordan v. Wallace*, 67 N. H. 175, 32 Atl. 174.

⁷² *Bish. Crim. Proc.*, § 311.

⁷³ *Pierson v. St.*, 18 Tex. App. 524, 563; *Grace v. McArthur*, 76 Wis. 641, 45 N. W. 518. In Iowa it is held that these statements are rather to be taken, unless clearly

§ 973. **Alluding to Former Trials of the same Case.**—A statute of Texas enacts that “the effect of a new trial is to place the case in the same position in which it was before the trial had taken place,” and that “the former conviction shall be regarded as no conviction of guilt, nor shall it be alluded to in the argument.”⁷⁴ A statute of Utah, regulating proceedings in criminal cases, declares that the granting of a new trial places the parties in the same position as if no trial had been had,” and that “all the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument.”⁷⁵ These statutes express a general principle of procedure, which obtains with equal force where there is no such statutory enactment. Allusions, by counsel in argument, to the result of a former trial in the same case, favorable to the party for whom he is contending,⁷⁶ whether made directly or by the artifice of handing up to the court the opinion of the appellate court reversing the former judgment, accompanied by observations on the same in the hearing of the jury,⁷⁷ especially if accompanied with severe denunciation of the action of the appellate tribunal,⁷⁸ will, generally, though not always,⁷⁹ afford ground for new trial. It is an equal irregularity to permit counsel, in argu-

otherwise, as expressions of opinion from the record and therefore largely harmless. *St. v. Bricker*, 135 Iowa, 343, 112 N. W. 645. See also *Glasgow v. St.*, 50 Tex. Cr. R. 635, 100 S. W. 933; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. See *Howard v. Com.*, 110 Ky. 356, 61 S. W. 756.

⁷⁴ Texas Code Criminal Procedure (1895), §§ 823, 991.

⁷⁵ Compiled Laws Utah 1907, § 4951.

⁷⁶ *Crahan v. Balmer's Exr.*, 7 Mo. App. 585; *Prewitt v. Telegraph & T. Co.*, 46 Tex. Civ. App. 123, 101 S. W. 812; *Laughlin v. Street R. Co.*, 80 Mich. 154, 44 N. W. 1049; *Fuller v. St.*, 30 Tex. App. 559, 17 S. W. 1108; *Huckshold v. St. Louis R. Co.*, 90 Mo. 548, 2 S. W. 794; *Smiley v. Scott*, 77 Ill. App. 555; *aff'd*, 179 Ill. 142, 53 N. E. 544; *Willyard v. St.*, 72 Ark. 138, 78 S. W. 765.

⁷⁷ *Chicago etc. R. Co. v. Bragonier*, 13 Bradw. (Ill.) 467. In Missouri it was allowable to say that at former trial defendant introduced no witnesses. *Dahlstrom v. St. Louis I. M. & S. R. Co.*, 108 Mo. 525, 18 S. W. 919. But no reference can be made to the result, or how the jury stood. *Evans v. Town of Trenton*, 112 Mo. 390, 20 S. W. 614. The court, as ruled in Wisconsin, has discretion to determine whether or not such remarks constituted prejudicial error. *Heddles v. Chicago & N. W. R. Co.*, 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

⁷⁸ *Hatch v. St.*, 8 Tex. App. 416; *Moore v. St.*, 21 Tex. App. 666, 2 S. W. 887; *post*, § 976.

⁷⁹ *Chicago etc. R. Co. v. Bragonier*, *supra*; *Chicago & A. R. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181.

ing to the jury, to read minutes of the evidence taken at a former trial between the parties, which minutes have not been put in evidence at the present trial, and chiefly for the reason stated in the preceding paragraph,⁸⁰ that counsel are not to be permitted, in arguing to the jury, to state evidential matters which have not been regularly admitted in evidence in the case.⁸¹ The statute of Utah, above quoted, does not extend so far as to require the granting of a new trial, merely because the counsel for the government, in his final argument to the jury, alluded to the fact that the case had been many times before the tribunals. It was said: "If allusion to previous trials, such as were here made, were to vitiate a subsequent trial, a new element of uncertainty would be introduced into the administration of justice in criminal cases."⁸²

§ 974. **Appealing to Local Prejudices.**—Appealing to local prejudices,—as, in an action brought by a citizen of the county in which the trial was had, to which the venue had been changed, against a board of school directors in another county, saying to the jury: "Stand by your own citizen;" and also, against the objection of defendant's counsel and the admonition of the court, telling the jury that "the school directors, people and citizens of Fulton county are trying to disgrace and oppress a citizen of Marshall county,"⁸³—affords ground of new trial.

§ 975. **Appealing to Religious Prejudices.**—Thus, in an action for damages for an assault and battery, for the plaintiff's counsel to say, in his closing argument: "It is in evidence that this defendant is a Catholic priest, and all of his witnesses are members of his church, and it is a strange coincidence that they track the evidence of defendant with that minuteness and precision in the use of words and language that cannot be accounted for except as shown by the evidence. They heard the defendant, from the pulpit, detail his version of the case, and they can come here and swear to his version of the case, and the defendant can absolve them from the sin. If

⁸⁰ Ante, § 963.

⁸¹ *Martin v. Ormdorff*, 22 Iowa, 504. Compare *Morrison v. Myers*, 11 Iowa, 538; *Samuels v. Griffith*, 13 Iowa, 103.

⁸² *Hopt v. Utah*, 120 U. S. 431, 442, opinion by Field, J.

⁸³ *School-town of Rochester v.*

Shaw, 100 Ind. 268. It is prejudicial error to make comments attributing change of venue to local prejudice in the county from where the change was taken. *Kansas City F. S. & M. R. Co. v. Sokol*, 61 Ark. 130, 32 S. W. 497.

it is one of the doctrines of the Catholic church that one of the members may swear falsely as a witness, and the priest can forgive him his sin for such false swearing, so as to absolve him from all moral guilt, it is the privilege and duty of the jury to take this fact, in determining the credibility of such witnesses." And, after protest, saying: "The defendant is here, and if it is not the doctrine of the Catholic church, let him stand up and deny it, and that shall be the end of it." It was held that a new trial must be had.⁸⁴

§ 976. **A Catalogue of Prejudicial Statements.**—The following abuses of the right of argument have been held, under various circumstances, ground for reversing judgments and awarding new trials. For counsel, in arguing for the State in a criminal trial, when his language is excepted to, to retort, facing the jury, in the following strain: "Yes, take your bill; and as often as this case is taken to the Court of Appeals and there reversed on some foolishness or technicality, I will, as often as I can get the case before twelve honest men, convict him again and again." To repeat the language excepted to and to add: "Take bill and repeat them," and then to proceed to harangue the jury thus: "I mean to deal with these fellows [meaning men who had been indicted for complicity in land frauds], and commence with this one [meaning the defendant Hatch]; that when they know themselves to be guilty, and when they, as has this defendant, been once convicted by twelve honest men, and by a dodge and technicality have had the case reversed, and now represented by an able counsel watching for an error, I will teach them,—I will teach them to throw themselves on the mercy

⁸⁴Rudolph v. Landwerlen, 92 Ind. 34, 39. See also Freeman v. Dempsey, 41 Ill. App. 554; Cluett v. Rosenwald, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446. Appeal to national or race prejudice is similarly prejudicial error. Fatham v. Tumilty, 34 Mo. App. 236. A very common abuse of the right of argument consists in appeals upon the poverty of plaintiffs and the vast wealth of corporations, and by various character of allusion arousing resentment against corporation defendants. These have frequently been deemed so prejudicial as to

call for reversal, but it is difficult to draw the line of demarcation between a mere irregularity not warranting reversal, as to a particular case, and what should secure a new trial in another case. See Seaboard A. L. R. Co. v. Smith, 53 Fla. 375, 43 South. 235; Dolph v. Lake Shore & M. S. R. Co., 149 Mich. 278, 112 N. W. 981; Kirby v. Western U. T. Co., 77 S. C. 404, 58 S. E. 10; Wheeler & Wilson Mfg. Co. v. Sterrett, 94 Iowa, 158, 62 N. W. 675; Texas & P. R. Co. v. Beezely, 46 Tex. Civ. App. 108, 101 S. W. 1051.

of the jury and the court, and not make defenses to cost the State thousands. I demand of the jury, in the event you find the defendant guilty, that he be punished by the maximum of years allowed by law. He is defending and procuring the reversal of this case that, in the progress of time, witnesses may be scattered, and that, too, when he knows that he is guilty as hell itself. A taste should be put in his mouth in the shape of ten years' punishment, and then the next land thief who is tried will plead guilty and throw himself on the mercy of the court and jury." ⁸⁵ The following passage in the concluding argument of the State's attorney reversed a conviction under an indictment for an assault with intent to commit rape: "Gentlemen of the jury, a good jury of your county convicted the defendant of the offense with which is is now charged, upon a former and a previous indictment, and his attorney appealed it to the Court of Appeals upon a trifling technicality in drawing the indictment; and that court reversed the case, and, by taking advantage of this trifling technicality, without merit, he has caused your county great expense, which comes out of the pocket of every good taxpayer, yourselves among the rest; and now, in view of these facts, I ask you to give him such a term in the penitentiary that will make up for this great expense he has caused upon a mere technicality." In the course of its opinion, the court said: "In many decisions this court has urged upon counsel, whose duty it is to prosecute the pleas of the State, to refrain from injecting into the trial of cases of this kind, any matter calculated to inflame the minds or excite the prejudices of the jury. If we could add anything to what has been said, or could use any language calculated to reach the minds and consciences of those to whom such admonitions are addressed, we would avail ourselves of the present occasion to do so. As we cannot, we can only reverse and remand the case, in the hope that the accused may secure a fair and impartial trial, according to law, and according to those methods, alike ancient and honorable, which still obtain in all enlightened courts. It is so ordered." ⁸⁶ For the State's counsel, in a criminal trial, to read, against the protest of the accused, the proceedings which have taken place on an application for a change of venue which has been granted." ⁸⁷ For the court to permit the State's counsel, against the objection of the defendant and without hinderance or rebuke, to use the following

⁸⁵ Hatch v. St., 8 Tex. App. 416.

⁸⁷ St. v. Phillips, 24 Mo. 475, 483.

⁸⁶ Humphrey v. St., 21 Tex. App.

666, 668, opinion by Hunt, J.

language in the closing argument to the jury: "And that is the character of the man, and that is the character of the place they were going into—actually taking their lives in their hands—and there is no man on this jury who would have more bravely faced what those two men faced. I just ask you, however lion-hearted you may be, to put yourselves in their places—walking in there into a saloon in that part of the city, in the dead of night, face to face with two of the most terrible desperadoes of the city, to arrest them for highway robbery."⁸⁸ The defendant on trial was one of the two persons thus called "terrible desperadoes." For the State's counsel to indulge in gross denunciation, diatribe and abuse against the defendant on trial; as in a prosecution against a negro for larceny, to say in his closing argument, turning toward defendant: "You black thief! You are a thief—as black as hell itself." Then, turning to the jury, to say: "Gentlemen, if you do not convict this man you had better throw open the jail doors, tear down our court-houses and burn up our law books; because if you acquit such men, and that is to be the law in Waller county, people will flock to Waller county from north and south Texas to become thieves. All good men in Waller county know that this man ought to be convicted, and it is your duty to do so. I feel an interest in this case and want to see this man convicted;"—the court declining to take other notice of this language, upon objection, than to say to counsel for the defendant: "I will give you a bill of exception."⁸⁹ For the defendant's counsel in a civil case to state, in his argument to the jury, the presiding judge not being present, that plaintiff was only a cat's paw to lend the cloak of respectability to the case, meaning that he was a cat's paw for one of his own witnesses.⁹⁰ For the State's attorney, in a criminal trial, to allude to the failure of the defendant to introduce evidence to sustain his character, no attempt to impeach his character as a witness having been made.⁹¹ For the State's attorney, in a criminal trial, to comment to the jury upon the failure of the defendant to avail himself of the privilege guaranteed to him by the statute of calling his wife as a witness in his own behalf.⁹² For the counsel for a party in a civil action to comment upon the fact that a witness of the opposing party had claimed ex-

⁸⁸ *St. v. Foley*, 12 Mo. App. 431; following: *St. v. Lee*, 66 Mo. 165.

⁸⁹ *Crawford v. St.*, 15 Tex. App. 501.

⁹⁰ *Hall v. Wolff*, 61 Iowa, 559, 561, 16 N. W. 710.

⁹¹ *Fletcher v. St.*, 49 Ind. 124, 134;

St. v. Upham, 38 Me. 261. Compare *Walker v. St.*, 6 Blackf. (Ind.) 1;

St. v. McAllister, 24 Me. 139; *Ackley v. People*, 9 Barb. (N. Y.) 509.

⁹² *Knowles v. People*, 15 Mich. 409, 413.

emption from answering a question on the ground of privilege, which claim had been allowed by the court as well founded.⁹³ For the prosecuting counsel in a criminal trial, to say: "They have suffered, and Conn is put to trial, and you are told that he is only a hired man. They hope thus to clear this man, and then he is to swear his confederate clear. I tell you this is the trick." For such counsel to continue, after a request made by defendant's counsel to the court to stop him from using such remarks, which the court refused to do, to say to the jury: "Good men in this county, and best citizens of Gonzalez county, desire the conviction of this man and his partner;" the court overruling this objection to this language with the remark: "He speaks at his peril. I will sign your bill of exceptions."⁹⁴ For the counsel for the plaintiff in a civil trial to eulogize in extravagant language the character of his client, calling him a "large-hearted, great-souled, confiding, trusting man," of which facts there was no evidence, and then, upon objection, saying: "O, well, I will take it back."⁹⁵ For the counsel for the plaintiff, in an action for maliciously suing out an attachment, in his closing argument, to discuss the wealth of the defendants (plaintiffs in the attachment suit), and to insist that the wealthier they were the greater the amount of damages which should be assessed against them.⁹⁶ For the counsel for the plaintiff, in an action against an officer in a railway company, for a tort which might be the subject of exemplary damages, to comment to the jury in the concluding argument, upon the defendant's connection with the railway company, upon the wealth and power of the company, and upon the defendant's ability, from these circumstances, to pay any judgment which might be rendered against him, although no evidence has been given of his pecuniary ability.⁹⁷ For counsel, in the closing address in a civil case, to read to the jury

⁹³ *Carne v. Litchfield*, 2 Mich. 340.

⁹⁴ *Conn v. St.*, 11 Tex. App. 391, 339. For illustrative cases see *Gilbert v. Com.*, 106 Ky. 991, 51 S. W. 804; *St. v. Tuten*, 131 N. C. 701, 42 S. E. 443.

⁹⁵ *Wolfe v. Minnis*, 74 Ala. 386. Compare *Sullivan v. St.*, 66 Ala. 48; *Cross v. St.*, 68 Ala. 476.

⁹⁶ *Willis v. McNeill*, 57 Tex. 465, 474.

⁹⁷ *Brown v. Swineford*, 44 Wis. 282, 291. It seems that in an action for a tort for which exemplary

damages may be given, evidence of the wealth of the defendant is admissible, as speaking upon his ability to pay such damages. *Burchard v. Booth*, 4 Wis. 67; *Barnes v. Martin*, 15 Wis. 240; *Buckley v. Knapp*, 48 Mo. 162; *Trimble v. Foster*, 87 Mo. 49; *Evans v. Trenton*, 112 Mo. 390, 20 S. W. 614; *Bolo v. Fuller*, 84 Tex. 450, 19 S. W. 616. It has been ruled that an error of this kind is not curable by remittitur. *West Chi. R. Co. v. Muse*, 180 Ill. 130, 54 N. E. 168.

prejudicial matter not contained in the record, the evidence or the instructions given,⁹⁸ and to refer to or comment upon the instructions offered by the opposite party and refused.⁹⁹ For the State's counsel to allude to the fact that the judge did not direct an acquittal, by saying: "If the judge did believe that the defendant had made out a fair claim to the property, his Honor would have directed an acquittal without their leaving the box; but as he did not so say, the judge must not have believed that a fair claim of property had been shown by the defendant."¹ Where the counsel for the State, in a criminal trial has, under the provisions of a statute, admitted that an absent witness for the defendant would, if present, testify to a given state of facts, which admission is made in order to avoid a continuance,—for him, in his concluding argument, to say that the statement contained in the admission "was not the statement of sworn witnesses," but a statement "deftly prepared by counsel for defendant; that it was all a tissue of lies; that it contained nothing but lies, except a few immaterial things; that the persons named had never seen it, and would not have so sworn if they had been present;" but that "the State had proven her case by living witnesses, who had flesh and bone and blood, and had proven this statement to be lies, and nothing but lies."² In a criminal case the dis-

⁹⁸ The courts of procedure in the State where this ruling was made requires the court to instruct the jury in writing *before* counsel make their argument.

⁹⁹ *St. ex rel. v. Claudius*, 1 Mo. App. 552.

¹ *St. v. Cavenness*, 78 N. C. 484, 490. Compare *St. v. Johnson*, 1 Ired. L. (N. C.) 354; *Powell v. Railroad Co.*, 68 N. C. 395; *St. v. Dick*, 2 Winst. (N. C.) 45.

² *St. v. Barham*, 82 Mo. 67, 70. See also *St. v. Roark*, 23 Kan. 147; *St. v. Hickman*, 75 Mo. 416. It should be borne in mind that the Missouri statute, under which the admission was made in order to avoid the continuance, places the statement of facts set forth in the affidavit for a continuance on precisely the same footing, to all intents and purposes, as though the

absent witnesses had been personally present and had so testified. It is only upon this ground that the validity of such a statute, depriving, as it does, the defendant of compulsory process for the attendance of his witnesses, can be upheld. *St. v. Underwood*, 75 Mo. 234; *St. v. Jennings*, 81 Mo. 185. It should be added that the decision of the Missouri court was placed on the ground that the prosecuting counsel was permitted to argue to the jury, against his own admission, that the witnesses would not so testify if present. So much of his argument as was to the effect that, although they would so testify, their testimony would be false, was within the line of legitimate argument; since it is permissible for the State's counsel so to argue in the case of any witness, nor would

trict attorney in his opening speech said to the jury: "Gentlemen of the jury, the witnesses for the defense have sworn lies, and have come here for that purpose. I will show it by the testimony. They know that they have sworn lies, and if it was not so, they would not allow me to say it, but would make mince meat out of me when I charge them with having done so." The Court of Appeals, speaking through Hurt, J., said: "We deem it proper,—yea, an imperative duty on our part,—to sternly and emphatically condemn such conduct. Such bullying and defiant conduct was highly calculated to provoke the most serious results, and that, too, in the very temple of justice; a place in which the highest order and decorum should be preserved. The district attorney was not content to brand the witnesses as perjured liars, but calls the jury to witness that he proves the charge. How? Because they will not resent the terrible insult by at least an aggravated assault and battery—thus subjecting themselves to fine and imprisonment. Such conduct should not be tolerated for a moment, and if the court had knowingly permitted the same, we would feel it our duty to reverse the judgment because of this matter. However, the court's attention was not called to this matter at the time, and when this was done, the court reproved the attorney by stating that such remarks were highly improper. We think from the circumstances and nature of the remarks that the court should have gone further, by instructing the jury that the credibility of the witnesses could not be tested in any such manner; but as this matter will not arise upon another trial, we deem it unnecessary to determine whether or not it is reversible error."³ In all the foregoing cases, subject to the qualifications stated, it was

the court grant a new trial because he may have done so in strong and extravagant language. On the other hand, in an early case in Kansas, where the record showed that comments had been made upon an affidavit made by the opposite party to procure a continuance, but it did not appear what comments were made or under what circumstances, the reviewing court declined to regard it as ground for a new trial. For aught that appeared, the counsel for the party making the affidavit might have

first commented upon it; nor did anything appear in the record to show that such comments were prejudicial to the party complaining. If they were so, it would have been the duty of the trial court to restrain counsel within proper limits; and, as the record did not disclose the contrary, it was held that the proper discharge of this duty would be presumed. *Perkins v. Ermel*, 2 Kan. 325, 331.

³ *Ricks v. St.*, 19 Tex. App. 308, 319.

held that the limits of the privilege of advocacy had been exceeded, and new trials were ordered.

§ 977. **Referring to Recent Crimes, Lax Administration of Law, etc.**—In his closing argument in a prosecution for larceny, the prosecuting attorney referred to the riots at Cincinnati (then recent) and alleged, as a cause for the prevalence of mob violence, the lax administration of criminal justice in that city. The appellant objected to this line of argument, but the court overruled the objection. It was held that this was not error. "The remarks alluded to above, had reference to *an historical fact* concerning which the jury were supposed to be familiar, both in respect to its occurrence and the causes to which it was attributed." As there was no allusion made to the defendant in that connection, or to his being in any manner concerned in the riots, the court could not say that the privilege of fair debate had been transcended.⁴ So, it has been held, in Missouri, that remarks of the prosecuting attorney in his argument, in which he states, in substance, that there is no security for the lives or property of citizens, if juries fail to do their duty, while crime is so greatly on the increase, contained nothing which could be deemed prejudicial to the defendant. It was but a declaration of the duty of juries, everywhere recognized, and the statement of the fact that crime was on the increase could certainly have been no inducement to the jury to convict the defendant, if the evidence did not warrant his conviction.⁵ On the other hand, it has been held that, for the State's counsel, in a criminal trial, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, arguing that the same are caused by the

⁴ Heyl v. St., 109 Ind. 589, 594, 10 N. E. 916.

⁵ St. v. Mallon, 75 Mo. 355, 358. In Alabama a statement in a prosecution for the selling of liquor unlawfully that "it had come to such a pass in L. County that you cannot have a public gathering without whiskey being sold there" and that "they sell it at your churches," there being no evidence to such effect, was held so prejudicial as not to be cured by an instruction to disregard such statement. Sykes v. St., 151 Ala. 80, 44 South. 398. In

this state it was also held improper to speak of the frequency of day time killings in the community and to say that the law protected, on the theory that a man who will commit a murder of this kind "would murder you or me or rape our women." Griffin v. St., 90 Ala. 596, 8 South. 670. It was held prejudicial error in Missouri for the prosecuting attorney to assert that acquittal of offenders results in lynching. St. v. Jackson, 95 Mo. 623, 8 S. W. 749.

laxity of the administration of the laws, and stating to the jury that they should make an example of the defendant, the defendant's counsel objecting, and the court overruling the objection and remarking, in the presence of the jury, that such things were proper subjects of comment, has been held ground of new trial.⁶ The State's counsel, on the trial of an indictment for larceny, used language to the effect that there was a regular band of thieves in the neighborhood where this crime was committed; that the defendant was one of them (naming a number of others whose names were known to the jury as persons who had been recently convicted of crimes), and that unless the jury should convict the defendant he (counsel) would not blame the people for taking the law into their own hands, the defendant's counsel remonstrating and the court declining to interfere. This was held ground of reversal.⁷ In another case in the same State, on the trial of an indictment for a felonious homicide, the State's counsel, in his argument to the jury, remarked that "if the juries do not punish crime, the people will rise up, and should rise up, and punish it." These remarks, the Supreme Court said, "were very reprehensible, and the court ought to have rebuked him in the presence of the jury," but under the circumstances of the case it was not deemed a sufficient ground for a new trial.⁸ On the trial of an indictment for murder in Illinois, where the record showed that counsel, both for the defendants and the people, referred to the prevalence of crime and commented upon it, but not in a manner which was regarded by the Supreme Court as prejudicial to the defendants, this court, speaking through Scofield, J., among other things, said: "The trial judge should always see that the line of argument is kept within reasonable bounds, and not allow the defendant to be convicted or prejudiced on account of real or imaginary crimes for which he is not upon trial. And, unless for a palpable abuse of discretion in this regard, manifestly tending to an improper conviction, there should be no reversal."⁹

§ 978. **Indulgence Extended to Extravagant Declamation, Exaggeration, Erroneous Statements of the Evidence.**—The courts extend considerable indulgence to extravagant declamation and exaggeration. They obviously will not reverse judgments because coun-

⁶ *Ferguson v. St.*, 49 Ind. 33.

⁸ *Scott v. St.*, 71 Tenn. (7 Lea)

⁷ *Turner v. St.*, 68 Tenn. (4 Lea)

232.

206.

⁹ *Bulliner v. People*, 95 Ill. 394.

405.

sel in argument have stated erroneous conclusions as to what the evidence proves.¹⁰ The privilege of argument extends to a statement of the testimony as the counsel understands it, and therefore an erroneous statement of it, if not conceived in a spirit of unfairness or fraud, will be no ground of awarding a new trial.¹¹

§ 979. Illustrations.—So, where, in his argument on the trial of an indictment for resisting an officer, the prosecuting attorney said: “Malice may bud and bloom in a man’s heart almost in a moment or in a short time,” the court saw nothing in this which could have operated to the injury of the defendant.¹² So, an interruption by counsel, of the opposing party in his argument, charging him with “dodging the main issue,” has been held to afford no ground for a new trial.¹³ So, where, in an action for damages against a railway company, the counsel for the plaintiff, in discussing the question of punitive damages, said: “You can and you should, out of the abundance of this company, take enough to keep this woman and her children from want all the days of their lives;” and the court, upon objection, merely said: “Let it pass,”—no ground was perceived for a new trial.¹⁴ A statement by the prosecuting attorney that “the defendant has been guilty of one penitentiary offense, and would be guilty of a greater offense to cover the other up,”—has been held not sufficient ground of reversing a conviction on appeal, where it did not appear in what connection the statement was made.¹⁵ It is the duty of a prosecuting attorney, if he thinks the evidence establishes the guilt of the defendant, to demand his conviction; and where, in a trial for murder, the State’s attorney *demand*ed a conviction, “in the name of the State, in the name of the law, justice and right, in

¹⁰ *St. v. Mallon*, 75 Mo. 355. Remarks merely oratorical in character are within the latitude of forensic discussion. *Western & A. R. Co. v. York*, 128 Ga. 687, 58 S. E. 183.

¹¹ *People v. Barnhardt*, 59 Cal. 402; *Rusten v. Collins*, 103 Mich. 143, 61 N. W. 267; *West Chicago St. R. Co. v. Annis*, 165 Ill. 475, 46 N. E. 264. A verdict may be set aside where abusive language is resorted to, where the weight of evidence is apparently against it, or it calls for excessive damages. *Willis v. Lowry*, 66 Tex. 540, 2 S. W.

449. The court should prevent indulgence in coarse and vulgar abuse of witnesses and parties. *City of Salem v. Webster*, 192 Ill. 376, 61 N. E. 323; *Dollar v. St.*, 99 Ala. 236, 13 South. 576. See also if plainly prejudicial, *St. v. Cook*, 132 Mo. App. 167, 112 S. W. 710.

¹² *St. v. Estes*, 70 Mo. 428.

¹³ *Overcash v. Kitchie*, 89 N. C. 384, 389.

¹⁴ *East Tenn. etc. R. Co. v. Gurley*, 76 Tenn. 46, 54.

¹⁵ *St. v. McCool*, 34 Kan. 613, 9 Pac. 618.

the name of society, in the name of the widow and children of the deceased,"—the appellate court saw nothing wrong in this. "If the defendant committed the murder, he had acted against the peace and dignity of the State; he had outraged law, justice, right and society; he had clothed the wife in widow's weeds, and had made fatherless the children of the deceased; and each and all of these consequences of his crime demanded his conviction and punishment."¹⁶

§ 980. **And to the Use of Epithets.**—"Epithets and invective in which counsel sometimes indulge are frequently matters of taste, and cases sometimes occur in which severe animadversion is deserved and merited. But, after all, it is for the court, in the presence of which the trial is had, to determine whether counsel transcends the limits of professional duty and propriety, and that determination cannot, in any appellate tribunal, be assigned for error."¹⁷ Thus, it has been held no ground of new trial that the prosecuting attorney called him a *murderer* in his argument to the jury, where the indictment was for murder and the whole effort of the State was to prove him to be such.¹⁸ So, where it appeared in evidence that, after the prisoner had committed the assault charged in the indictment, he had gone to the Indian Territory, the court refused to grant a new trial because the prosecuting attorney, in his argument to the jury, said that "the defendant had gone to the Indian Territory, where all rascals go."¹⁹ It is said, in a case in Texas, that "to make vituperation and abuse grounds for reversing the judgment, it must appear that the remarks indulged in were grossly unwarranted and improper; that they were of a material character, and

¹⁶ *Pierson v. St.*, 18 Tex. App. 524, 564.

¹⁷ *St. v. Hamilton*, 55 Mo. 520, 522.

¹⁸ *St. v. Griffin*, 87 Mo. 608, 615. See also *St. v. Lang*, 75 N. J. L. 1, 502, 66 Atl. 942. Where death was claimed to have been caused by machinery out of repair, it was held not to exceed allowable comment for plaintiff's attorney to speak of "that old rattletrap of a machine." *Bodcaw v. Lumber Co.* (Ark.), 102 S. W. 1176. The general rule is that invective which is based on evidence and inferences legitimately to be drawn therefrom is

allowable, but it is not allowable to denounce a defendant in a criminal case by language not justified by the evidence, and the court should interfere promptly and prevent invasion of defendant's rights in this regard. *Johnson v. U. S.*, 154 Fed. 445, 83 C. C. A. 229.

¹⁹ *St. v. Stark*, 72 Mo. 37. It has been held within the limit of argument in the case of a party's being entrapped by a witness to speak of his having been bribed. *East St. L. C. Ry. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917.

calculated injuriously to affect the defendant's rights."²⁰ And, in general, comments on the argument delivered by opposing counsel ought not to be restrained, where they do not amount to comments upon matters not in evidence.²¹

§ 981. **Appeals to Sympathy—The Widow in Tears.**—So, it is said: "Great latitude is allowed in appealing to the sympathy of the jury, in the arguments of counsel. That, and the widow in tears, are a kind of stage performance which courts cannot very well, perhaps ought not to attempt to control." And, proceeding upon this view, no ground for a new trial was perceived in the conduct of counsel, in a civil action, in appealing to the sympathies of the jury in behalf of his client because she was a widow, and in denouncing the opposing parties as leeches and oppressors of poor women and widows—the widow, at the same time, facing the jury and weeping, or pretending to weep.²² Haranguing the jury on irrelevant matters not necessarily prejudicial, such as the fact that the defendant had a *mother* only fifteen miles away, that she had abandoned him, that she was not at the trial to share his troubles,—has been held no ground of new trial.²³ So, where, in response to an objection to testimony which the counsel was seeking to introduce, he said: "I am careful not to get error into the case. If my client was a rich

²⁰ *McConnell v. St.*, 22 Tex. App. 354, 3 S. W. 699, 702, citing *Pierson v. St.*, 18 Tex. App. 524.

²¹ In *Chambers v. Greenwood*, 68 N. C. 274, the action was upon a note payable to the plaintiff's intestate, which note the defendant alleged was embraced in a settlement of accounts between him and the plaintiff's intestate, in his lifetime, and which, as he alleged, had thus been settled, but was not delivered up because mislaid. The plaintiff had offered to prove what his intestate had said about the note, but this evidence was ruled out, on the objection of defendant's counsel. In his argument the defendant's counsel said to the jury that, if the plaintiff's intestate were alive, there would be no difficulty about it, and that he would be willing to leave it to him. In reply, the plaintiff's counsel said: "Well, if that is

so, why do you object to my proving what he said?" Thereupon the defendant's counsel asked the court to stop the plaintiff's counsel, because he was commenting upon evidence which had been ruled out. This the court declined to do, saying: "He is not commenting on the testimony which was ruled out, but he is commenting on your argument." It was held that, in thus refusing to stop counsel, no ground was presented for a new trial. For illustrative cases in murder trials where remarks of prosecuting attorney held reversible error, see *St. v. Thompson*, 132 Mo. 301, 34 S. W. 31; *Glass v. St.*, 147 Ala. 50, 41 South. 727; *St. v. Thompson*, 106 La. 362, 30 South. 895.

²² *Dowdell v. Wilcox*, 64 Iowa, 721, 724, 21 N. W. 147.

²³ *St. v. Griffin*, 87 Mo. 608.

man I should like to litigate this matter for the next twenty-five years, and I think it would give me a good support; but my client is poor, and we live in Minneapolis, and every time we come down here it costs him \$100,"—it was held there was no ground for a new trial.²⁴

§ 982. **Tricks of Advocacy, Sidebar Remarks, etc.**—Nor are mere tricks of advocacy, devised to arrest the attention of the jury at certain points in the evidence, ground for a new trial.²⁵ Thus, where a witness was being examined in a criminal case, and the prosecuting attorney, at a point in the evidence, remarked to his associate, "Put that down," an objection to this language was held frivolous.²⁶ Nor will a judgment be reversed, even in a capital case, because of indiscreet side remarks by the prosecuting attorney, unless the court can see that a jury of ordinarily intelligent men would be misled or prejudiced by them.²⁷

§ 983. **Bad Logic and Bad Law.**—Nor is it ground for a new trial, in a criminal case, that the prosecuting counsel has made an illogical argument, or has misstated the law in his address to the jury.²⁸ If the error is of logic—if illogical conclusions are drawn or illicit inferences are made—the courts cannot correct them by directing counsel to reason logically. If, however, counsel state the law incorrectly in their address to the jury, the adverse party can secure a correction. The correction is not to be obtained by objecting to the statements of counsel during the argument, but by asking the court to give the law to the jury in its instructions.²⁹

§ 984. **Other Statements Which Have Been Excused Rather than Justified.**—The allusion by counsel in argument to the absence of the defendant from the trial of a civil case, has been held a question of taste and propriety rather than misconduct, even where the

²⁴ Baker v. Madison, 62 Wis. 137, 147, 22 N. W. 141, 583.

²⁵ Haderlein v. St. Louis R. Co., 3 Mo. App. 601.

²⁶ St. v. Hopper, 71 Mo. 425, 433.

²⁷ St. v. Guy, 69 Mo. 430.

²⁸ Morrison v. St., 76 Ind. 335; Green v. St., 97 Ala. 59, 12 South. 416; People v. Willard, 150 Cal. 543, 89 Pac. 124. The court may admonish counsel to desist when his propositions of law are incorrect and misleading. Rogers

v. St., 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154.

²⁹ Proctor v. De Camp, 83 Ind. 559, opinion by Elliot, J. This rule would not be applicable in Missouri, where the charge of the judge is delivered *before* counsel make their argument. Under the system in that State an unfair statement of law by counsel to the jury ought to be corrected by the court when the objection is made.

plaintiff's counsel had charged him with fabricating evidence and said: "He did not want to be here, and it is well that he is not here, after making such an exhibition of himself." ³⁰ It is unquestionably a sound rule that *historical facts*, of which courts take judicial notice, may be alluded to in argument for the purposes of illustration, and this rule has been extended, on doubtful grounds, so far as to justify a State's counsel, in a criminal trial, in alluding to *other historical cases*, similar to the case at bar.³¹ Nor, in a capital case, where counsel for the defendant has allowed improper evidence to go to the jury without objection, can a new trial be claimed on the ground that the prosecuting attorney commented on such evidence in his argument to the jury.³² Although, as elsewhere seen,³³ counsel are not permitted in argument to refer to supposed facts not in evidence, yet it has been held not clearly error to permit counsel for the State, in a bastardy proceeding, to refer to the resemblance between the child (presumably in the court-room) and the respondent; since this, if a fact, was a fact which the jury could not well be prevented from

³⁰ Carter v. Carter, 101 Ind. 450, 454.

³¹ Thus, on the trial of a statutory felony, the State's attorney, in his closing argument, on the question of insanity, alluded to the facts of the Lawless case and the Guiteau case, and said that the case at bar did not show one-half or even the hundredth part of the eccentricities which those cases showed; that Guiteau's whole life was one of oddities and eccentricities; that experts were called from the whole nation, but nevertheless he was convicted by a jury, was allowed his appeal, and was finally hanged; that Tom Buford killed Judge Elliott and never went to the asylum. When the State's counsel commenced speaking of these matters, the defendant's counsel objected; but the court said these matters were merely in the nature of argument, and refused to stop him, and the defendant saved an exception. The Supreme Court overruled the exception, Freeman, J., in giving

its opinion, saying: "While it was not pertinent to the issues in this case to cite the facts, or supposed facts, in the cases of Guiteau and Buford, still such reference, by way of illustration, we do not think sufficient ground of reversal of the verdict of a jury. The true basis of the argument is always the facts presented in the testimony, but we cannot see that such allusions as are here found could have materially affected the conclusions of the jury; besides, they are not within the principle established by our cases. They are not facts detailed by the attorney-general, not in proof in reference to the prisoner or his conduct or relations, but only matters of current history, used by way of enforcing an argument. This objection is not sufficient for reversal." Northington v. St., 78 Tenn. (14 Lea) 424, 428, 431.

³² St. v. Banks, 10 Mo. App. 111, 115.

³³ Ante, § 963.

noticing, and "some extravagance in cases involving sensational elements" cannot well be restrained.³⁴ So, in the absence of specific objection, or of a request for an instruction, the reading, by counsel for the defendant, of the complaint in the case, verified by affidavit, has been held no ground for a new trial, the reading having apparently been done for the purpose of showing what allegations were not denied and hence admitted.³⁵

§ 985. [Illustrations.] **Transgressions in Criminal Cases which have been Overlooked.**—In a case of *larceny*, counsel, in closing for the defendant, by way of illustrating the value of certain testimony given on behalf of the State to sustain the reputation of a witness, said, in substance, that the witnesses did not profess to have any knowledge of the reputation of the witness whose testimony they were called to sustain, and that, from the same standpoint, he could personally sustain the reputation of the defendant. These observations were made the basis upon which the prosecutor said, in his argument, that he had personal knowledge of the fact that the defendant was reputed to be a *hotel thief*, and that he had been published and portrayed in the *Police Gazette* as such. The reviewing court censured this transgression of the prosecuting attorney, but finding "a bare shadow" of excuse for it, and the verdict being well sustained by the evidence, concluded not to reverse the conviction.³⁶ On the trial of an indictment of a supervisor for unlawfully withholding a record from the proper custodian, the State's attorney, in his closing remarks to the jury, charged the defendant with *stealing an affidavit* made by him at a previous term of court for a continuance, and reiterated the same after objection by defendant and after being warned by the court that it was improper; and stated that the defense was all a sham, and that defendant had fled from justice and never surrendered himself until he found a witness was dead, and then hatched up his rotten defense. There was no evidence upon which to base such remarks, and they were reiterated after being informed by the court that they were improper. The

³⁴ *People v. White*, 53 Mich. 537, 539; ante, § 856.

³⁵ *Garfield v. Knight's Ferry Water Co.*, 14 Cal. 35. It has been held not reversible error to say of witnesses, who are employes of a corporation, that they are afraid to

come forward and testify in behalf of plaintiff. *Trinity County Lumber Co. v. Denham* (Tex. Civ. App.), 29 S. W. 553 (not reported in state reports).

³⁶ *Heyl v. St.*, 109 Ind. 590, 594.

reviewing court characterized these arguments as clearly improper and a manifest breach of both professional and official duty; yet, under the circumstances, the court did not regard them as of so gross a character as to warrant a reversal of the judgment.³⁷ On a trial for murder the prosecuting attorney, in addressing the jury, said: "The defendant in this case has stooped so low as to drag before you, on the trial of this cause, the infidelity of his dead wife, and publish her before the court-house as a prostitute." The court could not deny that this remark was "unfair," but refused a new trial.³⁸ On a prosecution in Indiana for a murder by poison, one of the attorneys for the State, in his closing argument, delivered to the jury, notwithstanding repeated objections from the counsel of the accused, such paragraphs as the following: "Why, a man was hung at Ft. Wayne, in an adjoining county, on circumstantial evidence not a hundredth part as strong as the evidence in this case against Mrs. Epps." After an interruption and an admonition from the court to confine himself to the case, he replied: "I know what I am saying, and I do not want to be interrupted in my argument. It throws me off my line of argument." Commenting on certain evidence, he also delivered the following expressions, some of which were grossly unwarranted by the evidence: "This woman [pointing to the accused] took poison from Clinton Orndorff in Weaver's store and said: 'I know what it is; I know it's poison; I've handled it before; I have buried two husbands and children.' " The evidence to which this referred was merely that the accused had given the witness five cents to buy some arsenic to poison rats, and, on receiving it she said she had handled it before. On being interrupted by counsel for the accused and admonished by the court, the State's counsel kept on thus: "I don't mean that she [the accused] said it all in Weaver's store; I mean to say that she said in Weaver's store that she knew it was poison and had handled it before, and that it was a fact that she had buried two husbands and children; but I disclaim any intention to say that she testified to [these facts] all in the same connection in the store." Further on in his argument, he said: "Oh, gentlemen of the jury, if I could tell you what that good old man, Edward Mise [pointing to him], told me he knows about other dark things concerning this case, it would clear away much of the mystery about it, about which counsel for defendant talked so much." Be-

³⁷ *Baysinger v. People*, 115 Ill. 420, 426.

³⁸ *McConnell v. St.*, 22 Tex. App. 354, 3 S. W. 699.

cause the verdict was right on the merits, the reviewing court overlooked these shameful abuses of the right of argument,³⁹ for which the counsel committing them ought to have been punished. Objection was made in one case to the statement of the district attorney, in his argument to the jury, that the plea of insanity in criminal cases is generally a "sham" and a "device" resorted to by defendants who have no defense,—illustrating his remarks by a reference to the Guiteau case. It was claimed that this was unwarranted and of a prejudicial character; but the court nevertheless affirmed the conviction and sentence of death.⁴⁰

§ 986. Prejudice not Cured by Similar Misconduct in the Opposing Counsel.—Similar misconduct on the part of the opposing counsel does not justify such a course, although it may justify the counsel in endeavoring to remove the prejudice which may have been produced by the misconduct of the opposite counsel.⁴¹

§ 987. Illegitimate Argument first Introduced by Opposing Counsel.—We have had occasion to examine a rule of evidence under which a party who opens up, by his own witnesses, an improper line of inquiry, cannot complain that the other party was allowed to introduce evidence rebutting the same facts, or to follow up the same inquiry.⁴² Some courts admit a corresponding rule in respect of forensic argument; so that, where the counsel of the accused in a criminal trial enters upon a line of argument outside the record, the accused cannot complain that the State's attorney was allowed too free scope in *replying to the same*.⁴³ At least, where counsel on one

³⁹ *Epps v. St.*, 102 Ind. 540, 550, 1 N. E. 491.

⁴⁰ *Polin v. St.*, 14 Neb. 540, 548, 16 N. W. 898.

⁴¹ *Mitchum v. St.*, 11 Ga. 615, 629; *Tucker v. Henniker*, 41 N. H. 317, 322.

⁴² *Ante*, §§ 423, 699, 706.

⁴³ *Pierson v. St.*, 21 Tex. App. 15, 59; *American F. & M. Co. v. Brown* (Tex. Civ. App.), 101 S. W. 856; 856; *St. v. Johnson*, 119 La. 130, 43 South. 981; *Lipsev v. People*, 227 Ill. 364, 81 N. E. 348. Where counsel for one side has challenged counsel for the other to show why

certain testimony has not been produced, it is within judicial discretion to allow the party thus challenged to explain its absence. *King v. Rea*, 13 Colo. 69, 21 Pac. 1084. Where one remark outside of the record provokes another similarly objectionable the court's disapproval of both will ordinarily suffice to cure both irregularities. *Galvin v. Meridian Natl. Bank*, 129 Ind. 439, 28 N. E. 847. Where counsel for a railroad company said it was common street talk that, if a case could get by the court, the jury would "whoop it up" to the

side transcend their privilege by alluding to improper matter, the counsel on the other side may, without prejudicing their case, follow them, and indulge in *proper comments* upon the same matter.⁴⁴

§ 988. *Illustration.*—This is well illustrated by a case of murder, where counsel for the accused, among other irrelevant matters, appealed to the jury to look into the defendant's face, "for evidence of courage and consequent incapacity to commit such a crime." "The prosecuting attorney," said the court, "in a masterly manner, took up the gauntlet thus thrown down, and ably, eloquently, and with telling force, presented the State's side of the collateral issues thus forced upon the prosecution. We are not prepared to say that his remarks were not entirely legitimate, independent of the provocation and invitation thus given by the defense. If the defendant wishes to invoke the rule of confinement to the record, they themselves must keep within the record. When they voluntarily go outside, they at least invite, if they do not render it necessary, that the prosecution should follow. Appellant's counsel characterized the deed as a most dastardly and cowardly murder, and requested the jury to look into defendant's face for evidence of courage and incapacity to commit such a crime. Answering this argument, the reply was: 'Whoever saw that face [pointing at defendant] that could ever forget it? No, gentlemen, no. As the pistol flashed, there was a circle of light in his front, and through it gleamed the eyes of the assassin sitting there [pointing at defendant] in this court room.' This reply was called for, and was legitimate. As stated above, if the remarks excepted to were not legitimate primarily, they were most clearly so, and entirely within the bounds, as answers to the above argument of defendant's counsel."⁴⁵

railroad, it was no ground for reversal for plaintiff's counsel to reply in his argument that, if juries cannot be trusted in railroad cases, this was because the railroad is always inimical to plaintiffs and where a husband is killed they would go to the widow and offer to pay funeral expenses instead of telling her to "go to h—l." *Sweet v. Michigan C. R. Co.*, 87 Mich. 559, 49 N. W. 882. Where defendant's counsel sought to dis-

credit plaintiff for not bringing suit in his own state, plaintiff should have been allowed to show, that under the laws of that state he might have been deprived of a jury trial. *Merritt v. R. Co.*, 162 Mass. 326, 38 N. E. 447.

⁴⁴ *Hoffman v. St.*, 65 Wis. 46, 26 N. W. 110; *Baker v. St.*, 69 Wis. 32, 33 N. W. 52, 55.

⁴⁵ *Pierson v. St.*, 21 Tex. App. 15, 60.

§ 989. **Matters which have been Fair Subjects of Comment.**—The subornation of evidence by the opposing party, or his failure to produce important evidence within his reach, is always a fair subject of comment in argument to the jury,⁴⁶—as where the opposing party fails to call an important witness whom he might have called,⁴⁷ or to read the depositions of witnesses which he has taken to be used in the case,⁴⁸ or to introduce important papers in his possession.⁴⁹ So, the apparent *interest* of the witness is always the subject of fair comment in argument,⁵⁰ and in most jurisdictions may properly form the subject of cautionary instructions to the jury. *Contractual relations*, sustained by a witness to a party may, as already seen, be shown in evidence, on cross-examination, for the purpose of affecting the credibility of the witness in the opinion of the jury.⁵¹ Upon the like principle, the fact of such relationship is the subject of *fair comment* in argument. “Even though introduced by the party thus commenting, it is legitimate to call attention to the bias, in order to give more force to what the employe may swear against his master,—just as a brother swearing against a party in that relation to him might just as well be considered as entitled to great credit, and when for him, to less. Not that either could be impeached by the party calling him, but the fact of relationship or obligation or service may be properly evoked by counsel, with a view to strengthen or weaken the force of what is testified—the natural heightening or softening the colors of the story, without

⁴⁶ See *Knowles v. People*, 15 Mich. 412; *Anderson v. Russell*, 34 Mich. 110; ante, §§ 453, 794, 795; *People v. Young*, 102 Cal. 411, 36 Pac. 770; *St. v. Kiger*, 115 N. C. 746, 20 S. E. 456; *Busbey v. Northrup*, 78 Vt. 430, 62 Atl. 1015.

⁴⁷ *Gavigan v. Scott*, 51 Mich. 373, 16 N. W. 769; *St. v. Jones*, 77 N. C. 520; *Gray v. Burk*, 19 Tex. 228; *Peebles v. Horton*, 54 N. C. 374; *Brotherton v. Paving Co.*, 117 App. Div. 791, 102 N. Y. S. 1089; *Sam Yee v. St.*, 132 Wis. 527, 112 N. W. 425; *Morgan v. St.*, 124 Ga. 442, 52 S. E. 748. But where in a will contest one of proponents' attorneys drew and attended the execution of the will, it was held error

for contestants' attorney to comment on the failure of such attorney to testify as a circumstance to be considered against proponents. *Sanger v. McDonald* (Ark.), 102 S. W. 690. It has been held allowable for prosecuting attorney to refer to the failure of a joint indictee to testify. *People v. Yee Foo*, 4 Cal. App. 730, 89 Pac. 450.

⁴⁸ *Learned v. Hall*, 133 Mass. 417.

⁴⁹ *Chambers v. Greenwood*, 68 N. C. 274; *Tobin v. Shaw*, 45 Me. 331; *Logan v. Monroe*, 20 Me. 259. See also *Devries v. Phillips*, 63 N. C. 53.

⁵⁰ *Morehouse v. Heath*, 99 Ind. 509, 518.

⁵¹ Ante, § 450.

impeaching the integrity of the witness.”⁵² So, *if the accused takes the stand* as a witness in his own behalf his testimony is the subject of fair comment by the State’s attorney, the same as the testimony of any other witness;⁵³ though if he does not take the stand, the circumstance cannot be alluded to.⁵⁴ Where the prisoner had taken the stand as a witness, and, being pressed with a particular question, had *declined to answer it on the ground of privilege*, and the prosecuting attorney had alluded to the fact in argument,—it was observed that it would have been more proper to have abstained from so doing, but that the remark afforded no sufficient ground for disturbing the verdict.⁵⁵ As the argument of the opposing counsel is a fair subject of comment, so may be his mode of framing the questions which he puts to his own witnesses; and accordingly it is not error to permit counsel to make comments on the cross-interrogatories proposed by the adverse party to a witness who testifies by deposition, and to argue therefrom that the evidence of that party, as given at the trial, was incorrect. “If,” said Bigelow, J., “a witness should be examined on the stand, the mode in which questions were framed and put would certainly be open to observation. The same rule is applicable where the interrogatories are in writing.”⁵⁶ Matters which form a part of the record are generally regarded as subjects of fair comment. Thus, it has been held that a written motion for a continuance, being a part of the record, may be commented upon by the opposite counsel in their argument, without the formality of having it offered in evidence.⁵⁷ So it is legitimate for counsel, in argument, in a criminal trial, to allude to what has transpired in the case from the time it was called, through its entire progress; and the conduct of the accused or his counsel in connection with his trial is a proper subject of argument. Such matters, it is reasoned, are necessarily within the *discretion* of the trial court, which discretion will not be controlled except in cases of flagrant abuse; it must appear that the accused has received some positive

⁵² Central R. Co. v. Mitchell, 63 Ga. 173, 180.

⁵³ Heldt v. St., 20 Neb. 493, 500, 30 N. W. 626. Compare Comstock v. St., 14 Neb. 205, 15 N. W. 353, where the accused having elected to take the witness stand and failed to controvert the testimony of the State’s witnesses, it was reasoned

that this was tantamount to an admission that such testimony was true. See ante, § 646.

⁵⁴ Post, §§ 1001, 1002.

⁵⁵ People v. Wilson, 55 Mich. 506, 515, 21 N. W. 905.

⁵⁶ Smiley v. Burpee, 5 Allen (Mass.), 568.

⁵⁷ Cross v. Garrett, 35 Iowa, 480.

injury, or been denied some material right.⁵⁸ So, it has been held that the privilege of argument is not abused in a criminal case, by the statement by the prosecuting counsel that "the defendant stood mute, and said nothing when accused of this crime by the prosecuting witness in the presence of the officers of the law,"—this being a fact shown by evidence.⁵⁹ In a criminal trial, counsel for the defendant objected to the solicitor-general stating, in his concluding argument to the jury, that counsel for the defendant had "*dilly-dallied*" with this case; that they had moved for a *continuance* at the last term of the court upon the absence of a witness [naming him], and, at the present term upon the same ground; that the court had sent for the witness and had brought him into court, and yet counsel for the defendant had not introduced him. It was held that these facts were subjects of fair comment.⁶⁰ In a case of murder, the prisoner had testified to *admissions* which his *wife* had made to him respecting her character for chastity. The wife was offered as a witness to contradict this, and, in arguing the question of her competency, the State's attorney narrated the statements made by the husband which he proposed to disprove by her, charging that they were "false" and stated that he "denied them." It was said that this was not outside the legitimate scope of argument.⁶¹

§ 990. **Reading Documentary Evidence to the Jury.**—It is scarcely necessary to say that counsel, in arguing to the jury, are entitled to read to them any instrument which has been offered and admitted, for the purpose of refreshing their minds in respect to the same and of directing their attention to the view entertained by counsel as to its bearings. Nor is it necessary that the portion of the document which the counsel proposes to read, was read to them when offered and admitted as evidence. Accordingly, where a paper is put in evidence by a party for a peculiar purpose, and not read to the jury, but read to them in part only, it is generally the right of the opposing party to have the *whole* of it considered as evidence, and to read to them such portions of it as he may desire.⁶²

§ 991. **Reading from the Notes of the Official Stenographer.**—It is not an irregularity for the State's counsel, in a criminal trial,

⁵⁸ *Inman v. St.*, 72 Ga. 269, 274.

⁶¹ *Polin v. St.*, 14 Neb. 540, 548.

⁵⁹ *Leonard v. St.*, 20 Tex. App. 16 N. W. 898.

442.

⁶² *Hassler v. Schumacher*, 10

⁶⁰ *Inman v. St.*, 72 Ga. 269.

Wis. 419; *U. S. v. Crandell*, 4

in reviewing the evidence in his argument to the jury, to read from the notes of a stenographic reporter of the court; since, his right to state the evidence being clear, it can make no difference whether he states it from recollection, or reads it from the reporter's abstract, provided he states it correctly. "In most cases," said the court, "it is quite probable that a more exact statement of what the testimony was, will be given from the stenographer's report than from memory; but of the correctness of the statement, and what the testimony actually was, the jury will ultimately determine. In either case, it devolves on the court to see to it that the jury are not imposed upon by any misstatement of the evidence given in the case."⁶³

§ 992. **Use of Papers, Maps, Diagrams, etc., which are not in Evidence.**—It seems to be a sound conclusion that it is the right of a party, in arguing to a jury, to use a map or plan which is not strictly evidence in the case, for the purpose of illustrating his argument and explaining to the jury the position which he assumes—just as the teacher makes use of the figures on a blackboard for the purposes of illustration.⁶⁴ On the contrary, it has been held that trial

Cranch C. C. (U. S.) 683. See ante, §§ 412, 701, 835.

⁶³ St. v. McCool, 34 Kan. 613, 616, 9 Pac. 618.

⁶⁴ Thus, in a controversy between two coterminous owners as to a boundary, a plan of two lots, the location of the division line of which was the subject of the controversy, was made by the plaintiff's attorney, he not being a surveyor, and the plan not having been made prior to the survey of the lands. The plaintiff testified, without contradiction, that the plan "was all right and located the land correctly, as near as he could see." It was held proper for the court to allow the plaintiff to use this plan for the purpose of explaining to the jury what his claim was in relation to the location of the lots, and where, according to his claim, the division line was, the charge of the court having limited his use of it strictly to his purpose. Hale v.

Rich, 48 Vt. 217, 224. See also Wood v. Willard, 36 Vt. 82; ante, § 870. This is largely in the court's discretion. Chicago City R. Co. v. McDonough, 221 Ill. 69, 77 N. E. 577; M. K. & T. R. Co. v. Smith (Tex. Civ. App.), 101 S. W. 453; Hill v. Com'rs, 77 Hun, 491, 28 N. Y. S. 805. In Washington it was ruled that counsel could not use cancelled checks in his argument, where they were only used by a witness to refresh his memory and not put in evidence nor marked for identification. Cohen v. Drake, 13 Wash. 102, 42 Pac. 529. If a witness uses a diagram in testifying, opposing counsel may use it in commenting on his evidence whether it be put in evidence or not. East Tenn. & G. R. Co. v. Watson, 90 Ala. 41, 7 South. 813. In a case in Pennsylvania counsel was allowed to illustrate his contention that a higher column would discharge water with greater force

courts should not permit counsel, in arguing a case to the jury, to induce the jurors to take down with pencil and paper the *counsel's calculation* of amounts, nor should the jurors be permitted to take such memoranda to the jury-room, to be used in making up their verdict. "It may be," say the court, "that a juror, if he desire it, may make, on his own motion, memoranda of evidence, or even of the points of argument of counsel, but it should only be done on the motion of juror, and not by counsel."⁶⁵ But there seems to be no good sense in placing jurors under such restrictions. If they are fit for the discharge of their duties at all, they are competent to discharge them in a sensible and proper manner, just as the judge would discharge the same duties if he were sitting as the trier of the facts. But the line of propriety is clearly crossed when counsel, in argument, against the objection of the opposite party, hand to the jury a paper, in order that they may determine the question of a disputed signature by a *comparison of handwriting*.⁶⁶ This mode of proving handwriting by a comparison made by the jurors is not competent under the rules of evidence,⁶⁷ and therefore such an act is an act of the same quality as the act of getting before the jury, in argument, any other inadmissible, evidentiary matters.⁶⁸

§ 993. Referring to the Failure of the Opposite Party in a Civil Case to Testify.—The omission of the opposite party in a civil case to testify in his own behalf, for the purpose of explaining matters, which, from their own nature, lie within his own knowledge, unless a sufficient explanation is otherwise afforded by his evidence, is a fair subject of comment.⁶⁹ The contrary conclusion has been reached in North Carolina, but upon reasoning which does not commend itself to favorable consideration.⁷⁰ In one case that court

than a lower of the same dimensions. *Hoffman v. R. Co.*, 143 Pa. 503, 22 Atl. 823.

⁶⁵ *Indianapolis etc. R. Co. v. Miller*, 71 Ill. 464, 472.

⁶⁶ *Shorb v. Kinzie*, 100 Ind. 429.

⁶⁷ *Berryhill v. Kirchner*, 96 Pa. St. 489; *Benedict v. Flanigan*, 18 S. C. 506, 44 Am. Rep. 583.

⁶⁸ *Ante*, § 963.

⁶⁹ *Lynch v. Peabody*, 137 Mass. 92; *Van Slyke v. R. Co.*, 80 Iowa, 620, 45 N. W. 396; *Hull v. Douglass*, 79 Conn. 266, 64 Atl. 351.

Where the court refuses to order production of books, no comment should be allowed for failure to produce same. *Martin Brown Co. v. Penill*, 77 Tex. 199, 13 S. W. 975. If action is penal and court refuses to order production of books for inspection because thereby a party may be compelled to furnish incriminating evidence against himself comment not allowed. *Boyle v. Northman*, 146 Pa. 255, 23 Atl. 397.

⁷⁰ *Devries v. Phillips*, 63 N. C. 53; *Chambers v. Greenwood*, 68 N. C.

say: "The fact that a party does or does not offer himself as a witness, standing alone, does not allow the jury to presume anything for or against him, and can only be the subject of comment as to its propriety or necessity, in any given case, according to the circumstances, as the introduction of any other witnesses may be commented upon."⁷¹ In another case the court reasoned that it is the *privilege*, and not the duty, of a party to a civil action to offer himself as a witness. "The fact," the court say, "is not the subject of comment at all—certainly not unless under very peculiar circumstances, which must necessarily be passed upon by the judge presiding at the trial, as a matter of sound discretion."⁷² The sound rule is the reverse of that suggested in the language above quoted. In many cases the fact that a party does not offer himself as a witness, standing alone, will raise a fair inference that he is suppressing the truth, and this manifestly ought to be the subject of fair comment to the jury,—as much so as his failure to call any other credible witness within his reach, who knows the facts in controversy. Rules which hamper counsel in freely presenting their client's cause to the jury are not conducive to the proper administration of justice. Modern statutes rendering parties competent to testify, and providing for the examination of parties, having taken the last vestige out of the old common-law rule which shielded a party to a civil action from producing evidence against himself, there is no reason in the nature of things why the failure of a party to a civil action to take the stand as his own witness should not be the subject of fair comment to the jury, in like manner as his failure to produce any other witness who presumptively knows the material facts.⁷³

274, 288; *Gragg v. Wagner*, 77 N. C. 246. And later there appears to be a departure from former ruling and to be within the discretion of the court to allow opposing counsel to remark on the presence in court of a party and his failing to avail himself of the opportunity to contradict certain testimony. *Goodman v. Sapp*, 102 N. C. 471, 9 S. E. 483.

⁷¹ *Devries v. Phillips*, 63 N. C. 53. Where there is evidence tending to show fraud on the part of a

party, counsel may comment on his failure to testify, and there arises no exception to this rule from the fact that his deposition has been taken by his adversary and put in evidence by himself, where it contained no explanation of the circumstances tending to show fraud. *Hudson v. Jordan*, 110 N. C. 250, 14 S. E. 741; *Ledford v. Emerson*, 141 N. C. 596, 54 S. E. 433.

⁷² *Gragg v. Wagner*, 77 N. C. 246.

⁷³ *Post*, §§ 1001-1003.

§ 994. **Reading Newspapers to the Jury.**—Whether the reading to the jury, during argument, of paragraphs from a newspaper, will be ground for a new trial must, of course, depend upon the nature of the matter read. If it is evidentiary in its nature, or whether evidentiary or not, of a tendency to excite prejudice against the losing party, it will be ground for a new trial. It was so held where, in a suit brought against a railway company for a personal injury to an employee, the plaintiff's counsel read to the jury a newspaper-article intended to cast a stigma upon all railway companies on account of their recklessness in caring for the lives of their employees.⁷⁴ "It is not proper, however, to permit counsel to read newspaper-comments upon the case on trial, nor upon facts connected with it, nor upon like matters. In short, extracts can only be used for the mere purposes of illustration, and never as statements of facts or expressions of opinion; nor can they be used under the cover of illustrations, when they contain statements of facts or expressions of opinion, concerning the particular case in hearing, or cases of like character."⁷⁵ But it is a rule in this connection that prejudice from such a course of conduct on the part of counsel will not be presumed, but must appear, in order to warrant a reviewing court in granting a new trial on this ground. Thus, where it appeared from the bill of exceptions that the counsel of the successful party read, as a part of his argument and for the purpose of illustrating it, a slip cut from a newspaper containing the form of a promissory note calling for \$10, and then, by folding it in a peculiar manner, showed that it assumed the form of a note for \$279; and the bill of exceptions showed that the counsel commented upon the note read from the slip, but did not state what his comments were,—the Supreme Court could not see any prejudicial error, but presumed that the comments were such as were proper for the counsel to make. "If," said Elliott, J., "the counsel had written the paper which he used for the purpose of illustration, it would scarcely be contended that it was improper for him to make use of it for the purpose of illustrating the manner in which a man not used to business might be imposed upon and induced to believe he was signing one instrument, when in fact he was actually signing one of an altogether different character."⁷⁶

⁷⁴ Chicago etc. R. Co. v. Bragonier, 13 Bradw. (Ill.) 467.

⁷⁵ Baldwin v. Bricker, 86 Ind. 221, opinion by Elliott, J., citing Thomp.

& M. on Juries, § 351 and authorities; Ins. Co. v. Cheever, 36 Ohio St. 201, 38 Am. Rep. 573.

⁷⁶ Baldwin v. Bricker, 86 Ind.

§ 995. **Reading Books of Science to the Jury.**—In the former chapter the circumstances under which *books of the law* may be read to the jury in argument were considered, from which it will appear that the reading of books of the law stands on this peculiar footing: that whereas, juries are in criminal trials and in actions for libel, judges of the law as well as of the fact, it necessarily follows that counsel have the right to argue the law to them, so that they do not commit the indecency of arguing against the law as laid down by the court; in the making of which argument they must necessarily have the right to read to the jury extracts from books of the law. This, at least, is the limit of the right, as laid down by those courts which uphold to the fullest extent the doctrine that, in criminal trials and in actions for libel, juries are judges of the law as well as of the facts. But the reading of other books, and notably *books of science*, to the jury rests upon a different footing, which will now be considered. And first it must be observed,—

§ 996. **That Such Books are not Evidence.**—The rule is that professional books, books of science—*e. g.*, medical books—are not admissible in evidence, though experts may be asked their judgment and the grounds of it, which may be founded on books, as a part of their general knowledge.⁷⁷ The reason of the rule is, obviously, that if the authors were present they could not be examined without being sworn and exposed to a cross-examination. Their declarations or statements, whether merely verbal, or written, or printed and published in books, are not admissible.⁷⁸ While it is said that a

221, 223. Where a newspaper article wholly irrelevant to the facts involved, commenting on the utter disregard of corporations to the rights of private citizens was read for the evident purpose of inflaming the jury against defendant, this amounted to prejudicial error. *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96, 26 N. E. 1048.

⁷⁷ *Melvin v. Easley*, 1 Jones L. (N. C.) 386; *Collier v. Simpson*, 5 Carr. & P. 73; *Stilling v. Thorp*, 54 Wis. 528, 11 N. W. 906; *Northington v. St.*, 78 Tenn. (14 Lea) 424.

⁷⁸ *Battle, J.*, in *Melvin v. Easley*, *supra*; *Stilling v. Thorp*, *supra*;

Harper Brooks & Co. v. Weikel, 28 Ky. Law Rep. 650, 89 S. W. 1125. A recognized exception in some jurisdictions is the Carlisle Mortality Tables or other similar tables on expectancy of life. *Ward v. Damp Kibselkabet Kjoebenhavn*, 144 Fed. 524; *McMahon v. Bangs* (Del. Super.), 62 Atl. 1098; *Louisville Belt & Iron Co. v. Hart*, 29 Ky. Law Rep. 310, 92 S. W. 951. And it has been ruled that standard medical books which relate to a disease may be put in evidence. *Birmingham Ry. L. & P. Co. v. Moore*, 148 Ala. 115, 42 South. 1024. See post, § 2587.

general history may be read from, yet this is only to refresh the memory of the court as to something which it is supposed to know; that is of which it takes judicial notice.⁷⁹ Applying this rule it is held that quotations from medical books are not admissible as evidence, when offered independently, or when read by witnesses. So, in those jurisdictions where it is conceded that, under appropriate restrictions, *domestic law books* may be read to the jury, yet the reason assigned for allowing this is that the court, being the judge of the law, may correct the counsel as to the law so read, or as to the application of it. Nay, the court may prohibit counsel from reading to juries extracts from books of law which have no pertinency to the issues on trial. But the opinions of medical experts are in the nature of facts, and as such must, like all other facts of which judicial notice is not taken, be established by the testimony of living witnesses. They cannot be proved by writings which are in the nature of hearsay declarations, which come from persons who are not present testifying as witnesses, and who are not even shown to be competent to express scientific opinions.⁸⁰ In so ruling in a criminal case, Baron Alderson said to counsel: "I should not allow you to read a work on a foreign law. Any person who was properly conversant with it might be examined; but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. We should be inundated with books, if we were to hold otherwise."⁸¹ The doctrine has been reaffirmed in many cases.⁸²

§ 997. Instances Affirming and Disaffirming the foregoing Rule.—Thus, where it is a material question, upon a trial before a jury, whether a party has been treated by a medical practitioner in

⁷⁹ Northington v. St., *supra*.

⁸⁰ People v. Wheeler, 60 Cal. 580, 584, 44 Am. Rep. 70 (denying Bowman v. Woods, 1 Greene (Iowa), 441, 445).

⁸¹ Reg. v. Crouch, 1 Cox C. C. 94.

⁸² Reg. v. Taylor, 13 Cox C. C. 77; St. v. O'Brien, 7 R. I. 338; Ashworth v. Kittridge, 12 Cush. (Mass.) 193; Commonwealth v. Wilson, 1 Gray (Mass.), 338; Washburn v. Cuddihy, 8 Gray (Mass.), 431; Com-

monwealth v. Brown, 121 Mass. 81. Compare Legg v. Drake, 1 Ohio St. 286; Wade v. De Witt, 20 Tex. 401; Ripon v. Bittel, 30 Wis. 619; St. v. Sarton, 2 Strobb. L. (S. C.) 60; Collier v. Simpson, 5 Carr. & P. 73; Carter v. St., 2 Ind. 617; Attorney-General v. Plate Glass Co., 1 Anstr. 39; Luning v. St., 1 Chand. (Wis.) 178; Green v. Cornell, 1 City Hall Rec. (N. Y.) 14.

a proper and skillful manner, it is error to permit counsel, in arguing to the jury, to read an extract from a medical work, giving the opinion of the writer as to the proper mode of treatment to be followed in such a case.⁸³ On the contrary, where, in a criminal trial, the prosecuting attorney first proved by the testimony of a practicing physician that a certain medical work was a book "recognized by the medical profession as good authority on all subjects therein treated of," it was held competent to allow him to read extracts from it.⁸⁴ In a case of murder, where the homicide grew out of a difficulty between two "gentlemen" one of whom, after having vainly endeavored to obtain satisfaction according to the "code," proceeded to "post" the other as a coward, it was held not such an irregularity as required a new trial, that counsel for the State, in his opening argument, read extracts from a standard work on duelling and also from an essay on the same subject written by himself, which laid down the rules obtaining "among gentlemen" as to blows, insults and apologies, the "lie direct," the "*amende honorable*," etc., and which gave an account of the unhappy life of one who had killed his adversary in a duel. The court could not say that this was entirely impertinent to the case under consideration, or beyond the scope of the limits allowed to advocacy.⁸⁵

§ 998. **Whether such Books may be Read for Purposes of Argument or Illustration.**—Upon this question there is a difference of opinion, involving what might be called a strict and liberal construction of a well-settled and obvious rule. On the one hand, it is held that, such books not being admissible as evidence, it is not permissible for counsel to read to the jury extracts from them by way of argument or illustration; since this would have the effect of enabling counsel to get before the jury a species of evidence which the law rejects as incompetent.⁸⁶ It has even been held that an expert should not be allowed, in giving his testimony, to read from a work on medical jurisprudence.⁸⁷ On the other hand, it has been

⁸³ *Gale v. Rector*, 5 Bradw. (Ill.) 481, 484.

⁸⁴ *Merkle v. St.*, 37 Ala. 139 (following *Staudenmier v. Williamson*, 29 Ala. 566; *Acct. Bowman v. Woods*, 1 Greene (Iowa), 445).

⁸⁵ *Cavanah v. St.*, 56 Miss. 300, 308.

⁸⁶ *Reg. v. Taylor*, 13 Cox C. C. 77; *Ashworth v. Kittridge*, 12 Cush.

(Mass.) 193; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70. The practice of reading from law books to jury is not to be commended. *St. v. Brooks*, 92 Mo. 542, 5 S. W. 257.

⁸⁷ *Commonwealth v. Sturtivant*, 117 Mass. 139. Compare *Yoe v. People*, 49 Ill. 410, 412.

held that counsel may properly be allowed, by way of argument or illustration, to read a pertinent quotation or extract from a work of science or art, as well as a classical, historical or other like publication, because it would make no difference whether repeated by counsel from recollection or read from a book; though it would be an abuse of privilege for counsel to make the right to read such matter the means of getting improper matter before the jury.⁸⁸ But the following qualification has been made to this rule: "The matter read or stated should be pertinent to the subject of inquiry, and so far calculated to elucidate it as to aid the jury in a better understanding of the evidence produced at the trial."⁸⁹ So, in an English criminal case, it was held that counsel had the right to read to the jury the general observations of a learned judge, made in a case tried some years before, on the nature and effect of circumstantial evidence, if he adopted them as his own opinions and made them a part of his address to the jury.⁹⁰ It is also conceded that the trial court may, in the exercise of a sound *discretion*, determine how far the public time shall be taken up in this way.⁹¹ Other courts have settled upon the broader rule that the extent to which counsel in criminal trials may read books to the jury is a matter confided to the *discretion* of the trial court, which discretion will not be reviewed unless in clear cases of abuse;⁹² from which it follows quite clearly that where the trial court refuses to permit counsel to read from a book not introduced in evidence to the jury, this will be no ground of reversal except in very clear cases.⁹³

§ 999. **Instructing the Jury that Such Books are not Evidence.**—Where this practice has been permitted, it is the clear duty of the court to instruct the jury that the extracts from the books which have been read to them are not evidence, but simply the theories of medical men.⁹⁴ But whether such an instruction will cure the error and prejudice is quite another question. In Indiana, where a book purporting to be a medical work had been read by

⁸⁸ *Legg v. Drake*, 1 Ohio St. 287; reaffirmed in *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201, 209, 38 Am. Rep. 573. This is said to be a matter within the discretion of the court. *Davis v. Gerber*, 69 Mich. 246, 37 N. W. 281.

⁸⁹ *Union Central Life Ins. Co. v. Cheever*, *supra*.

⁹⁰ *Reg. v. Courvoisier*, 9 Carr. & P. 362.

⁹¹ *Legg v. Drake*, 1 Ohio St. 287.

⁹² *Dempsey v. St.*, 3 Tex. App. 429; *Hines v. St.*, 3 Tex. App. 483.

⁹³ *Wade v. De Witt*, 20 Tex. 398.

⁹⁴ *Yoe v. People*, 49 Ill. 410, 412.

counsel to the jury, and the court afterwards instructed them that the extract was to be regarded not in anywise as evidence, it was held that no reversible error had been committed.⁹⁵ The Supreme Court of California, on the contrary, in an elaborate judgment on this subject, regard the Indiana case as not having been well decided.⁹⁶ The question comes back to the conflict of opinion which obtains on the question whether the prejudice which flows from the admission of incompetent evidence is cured by the action of the court in subsequently instructing the jury to disregard it.⁹⁷

§ 1000. **Illustrations.**—Where the court allowed the counsel for the State to read to the jury, against the objection of the prisoner, the evidence of Charles H. Porter, who, as professor of chemistry, had given testimony in a criminal trial in another State, counsel reading from the published report of the trial of *People v. Hartung*,⁹⁸ it was held that the ruling was erroneous, and the court, speaking through Breese, C. J., said: "If the State's attorney, in such a case or in any case, read from medical books in his argument to the jury, the court should instruct them that such books are not evidence, but theories simply of medical men. To permit testimony given in another State to be used as evidence against a prisoner on trial in this State, was the height of injustice, as the prisoner had no opportunity to cross-examine the witness or to meet his testimony by other evidence."⁹⁹ In a civil action for damages for overflowing the plaintiff's land and injuring the plaintiff's machinery by back-water from the defendant's mill-dam, the plaintiff was allowed to read extracts from a book called "Evans' Millwright's Guide," in his closing argument to the jury, although the defendant objected. The court instructed the jury that extracts read from a scientific work were not even a *prima facie* authority, but, like the argument of counsel, or other thing adduced in illustration, might be satisfactory to the jury, or might not. It was held that in view of the admonition of the court, no ground for new trial was presented. Hovey, J., in giving the opinion of the Supreme Court, said: "Reason is neither more nor less than reason because it happens to be read from a book; and we think we would be adopting a very diffi-

⁹⁵ *Harvey v. St.*, 40 Ind. 516.

⁹⁶ *People v. Wheeler*, 60 Cal. 581,
44 Am. Rep. 70.

⁹⁷ *Hopt v. People*, 7 U. S. Sup. Ct.
Rep. 614; 21 Am. Law Rep. 459.

⁹⁸ 4 Park. Cr. (N. Y.) 297.

⁹⁹ *Yoe v. People*, 49 Ill. 410, 412.

cult rule to enforce if we should attempt to compel counsel to use their own arguments for every position they might assume."¹

§ 1001. **Referring to the Failure of the Prisoner to Testify in His Own Behalf.**—Since the passage of statutes in most American jurisdictions enabling the accused person, in a criminal case, to testify in his own behalf, it has become an important question whether, in case the accused does not avail himself of this privilege, the State's attorney may be permitted to comment upon the fact in his argument to the jury. In some of the States the statutes which thus enable an accused person to testify contain the provision that his neglect or refusal to do so shall not raise any presumption of guilt, nor shall the circumstances be referred to by the State's attorney."² The courts, whether following the express language of statutes or attempting to carry out the analogies of the old law, generally hold that the failure of the accused person, in a criminal trial, to testify in his own behalf, cannot be referred to by the State's counsel in their argument to the jury, and that to permit a reference to it is error for which a conviction will be reversed;³ though if he does

¹ *Cory v. Silcox*, 6 Ind. 39.

² Gen. Stat. Kan. 1909, § 6791; R. S. Mo. 1909, § 5243. The Maine statute recites that the fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be evidence of his guilt. Maine Revised Stat. (1903), p. 970, § 19.

³ *St. v. Brownfield*, 15 Mo. App. 593; *Crandall v. People*, 2 Lans. (N. Y.) 309; *Showalter v. St.*, 84 Ind. 563; *St. v. Mosley*, 31 Kan. 355, 2 Pac. 782; *St. v. Graham*, 62 Iowa, 108, 17 N. W. 192; *Long v. St.*, 56 Ind. 182; *Commonwealth v. Scott*, 123 Mass. 239; *Knight v. St.*, 70 Ind. 375; *Morrison v. St.*, 76 Ind. 335, 338; *St. v. Banks*, 78 Me. 490, 3 New Eng. Rep. 240; *Commonwealth v. Harlow*, 110 Mass. 411. Contra, *Stover v. People*, 56 N. Y. 315; *Price v. Com.*, 77 Va. 393; *St. v. Martin*, 74 Mo. 547; *St. v. Banks*, 78 Me. 490, 3 New Eng. Rep. 240 (superceding the contrary rule in *St. v.*

Bartlett, 55 Me. 200, 220; *St. v. Lawrence*, 57 Me. 574, and *St. v. Cleaves*, 59 Me. 298). For further observations on the policy of statutes admitting prisoners to testify, see *People v. Jones*, 31 Cal. 573; *People v. Farrell*, 31 Cal. 583. In a recent case in Maine, *St. v. Banks*, supra, the history of the practice in that State on this subject is thus given in the opinion of the court delivered by Virgin, J.: "In 1864, for the first time, a person charged with commission of a criminal offense was made, 'at his own request, and not otherwise, a competent witness.' Stat. 1864, ch. 280. After this statute took effect, county attorneys, where the accused did not elect to testify, were allowed, in argument to comment on the fact to the jury. *St. v. Bartlett*, 55 Me. 220; *St. v. Lawrence*, 57 Me. 574; *St. v. Cleaves*, 59 Me. 298. This practice continued for fifteen years, and while it operated favorably for in-

- • take the witness stand, his testimony becomes the subject of *fair comment*, like that of any other witness.⁴

nocent persons, it resulted disastrously to the guilty who would not add perjury to the crime charged. Thereupon the Legislature, believing that the constitutional provision which declares that 'the accused shall not be compelled to furnish or give evidence against himself' (Decl. Rights, § 5), like the rain descending upon the innocent and guilty alike, and looking to a more careful protection of this right, enacted that 'the fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be evidence of his guilt.' Stat. 1879, ch. 92, § 1; Rev. Stat., ch. 134, § 19. We think the intent of the statute is that the jury, in determining their verdict, shall entirely exclude from their consideration the fact that the defendant did not elect to testify, substantially as if the law did not allow him to be a witness. *Commonwealth v. Harlow*, 110 Mass. 411; *Commonwealth v. Scott*, 123 Mass. 241." It has been supposed that the fact that a party does not testify is not a circumstance against him, unless there is sufficient evidence to justify a finding against him. *Horton v. Parsons* (N. Y. Sup. Ct.), 24 Week. Dig. 234; *St. v. Tennessee*, 42 Kan. 330, 22 Pac. 429; *Richardson v. St.*, 33 Tex. Cr. R. 518, 27 S. W. 139; *People v. Cahill*, 147 Mich. 301. 110 N. W. 520. Generally this violation is considered to be of so flagrant a character as to be deemed incurable by rebuke, admonition or instruction, but a new trial is the necessary result thereof. *Sanders v. St.*, 73 Miss. 444, 18 South. 541; *Quinn v. People*, 123 Ill. 333, 15 N. E. 46; *Wilkins v. St.*, 33 Tex. Cr. R.

320, 20 S. W. 409; *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463; *Caesar v. St.*, 125 Ga. 6, 53 S. E. 815. Though there is authority to the contrary. *St. v. Chiswell*, 36 W. Va. 659, 15 S. E. 412; *Johnson v. Com.*, 29 Ky. Law Rep. 675, 94 S. W. 631. In Connecticut, unless the accused moves for the jury's discharge, the error is waived. *St. v. Buxton*, 79 Conn. 477, 65 Atl. 952. The difference between courts on this subject is as to what constitutes forbidden comment. In some of the states the most indirect reference is considered prejudicial. Thus in Texas to ask as to a certain matter testified about which accused must necessarily be cognizant of if true "who has denied it?" *Brazell v. St.*, 33 Tex. Cr. R. 383, 26 S. W. 723; *Smith v. St.*, 87 Miss. 627, 40 South. 229. In Missouri it was held to be no allusion to speak of uncontradicted evidence as being "undisputed, indisputed by any living or unliving witness." *St. v. Ruck*, 194 Mo. 416, 92 S. W. 706. In Texas it is not implied reference to speak of an original document material to the cause as being in defendant's possession. *Counts v. St.*, 49 Tex. Cr. R. 329, 94 S. W. 220. And in cases of possession of stolen property it was held not objectionable to say it was up to defendant to explain. *Walters v. St.* (Tex. Cr. R.), 94 S. W. 1038 (not reported in state reports). See also *Wosten v. St.*, 50 Tex. Cr. R. 151, 94 S. W. 1060.

⁴ *Ante*, §§ 646, 989; *St. v. Miles*, 199 Mo. 530, 98 S. W. 25. His refusal either to answer proper questions or to testify on any material matter may be adverted to and comment made thereon. *St. v.*

§ 1002. **Instances under the foregoing Rule.**—In Ohio and Kansas, it seems to be conceded that the incidental allusion by the prosecuting attorney (not in argument to the jury) to the failure of the accused to take the stand in his own behalf may not, under particular circumstances, require the granting of a new trial.⁵ In Missouri, the statement of the prosecuting attorney, in his argument to the jury in a case of larceny, "that no attempt had been made by the defendant to explain his possession of the property," was not regarded by the reviewing court as referring to the fact that the defendant himself might have been examined as a witness if he had so chosen, and was therefore held not a ground for a new trial.⁶ In

Glove, 51 Kan. 330, 33 Pac. 8; *McFaddin v. St.*, 28 Tex. App. 241, 14 S. W. 128; *Hodge v. St.*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145. Comment may be made on explanation made by accused to a third party. *Lipsey v. People*, 227 Ill. 364, 81 N. E. 348. And upon a *res gestae* statement. *Cravens v. St.*, 55 Tex. Cr. R. 519, 103 S. W. 921. In Missouri, however, the rule seems to be that the latitude of cross-examination being less wide, the privilege of non-testifying is not regarded as wholly abandoned and, therefore, comment is likewise restricted. *St. v. Fairlamb*, 121 Mo. 137, 25 S. W. 895; *St. v. Elmer*, 115 Mo. 401, 22 S. W. 369. Though the fact that he takes the stand opens the way for comment on failure of accused to make explanation of what is in obvious connection with what is testified about. Thus where defendants were on trial for cattle stealing and a witness had testified they rode two horses witness hired to them they failed to say where they went, these being the horses they were seen riding while driving the cattle. *St. v. Grubb*, 201 Mo. 585, 99 S. W. 1083. In many states, and it is perhaps the rule sustained by the weight of authority, it is held im-

proper to comment on failure of defendant to produce evidence as to reputation and moral character. See *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Pollard v. St.*, 33 Tex. Cr. R. 197, 26 S. W. 70; *Thompson v. St.*, 92 Ga. 448, 17 S. E. 265; *Davis v. St.*, 138 Ind. 11; 37 N. E. 397.

⁵ *Calkins v. St.*, 18 Ohio St. 366; *St. v. Mosley*, 31 Kan. 355, 2 Pac. 782. See also *St. v. Seely*, 92 Iowa, 488, 61 N. W. 184. A prosecuting attorney in Mississippi, possibly having in mind Cicero's oration against Cataline committed prejudicial error by saying: "You know the laws of this state permit the defendant to remain silent and it would be improper and cowardly for me to comment on it, and it is not my intention to evade the spirit or the letter of the law," this being said in reply to defendant's counsel as to the state's producing a witness concerning a certain fact. *St. v. Holmes*, 65 Miss. 230, 68 N. W. 11.

⁶ *St. v. Preston*, 77 Mo. 294. See also *St. v. Kelleher*, 201 Mo. 614, 100 S. W. 470. In this state it was said to be an "adroit and insinuating attempt to evade the statute" working prejudicial error, in a case where defendant was on trial for

one jurisdiction the rule is that, if any objectionable comments are made by the State's counsel, upon the failure of the accused to take the witness stand in his own behalf, his remedy is to object to them at the time, and to ask the judge to instruct the jury that they should not be considered by them to his prejudice; that, in such a case, the judge is not required to treat the whole trial as a nullity because of such remarks, and withdraw the case from the jury.⁷ But another court goes to the length of holding that, where counsel for the State, in their argument, are guilty of the highly improper and unprofessional conduct of referring to the fact of the failure of the accused to take the witness stand in his own behalf, such reference being prohibited by statute, a conviction will be reversed, although the court may have interposed and rebuked the impropriety; since in such a case it cannot be known how far the remark may have prejudiced the rights of the accused.⁸ Nor will an instruction admonishing the jury to pay no attention to the remark, cure the prejudice.⁹

§ 1003. **Comments by the Author on the Foregoing Rule.**—The foregoing rule is a striking illustration of the extent to which old ideas, however, foolish, when constantly reiterated by grave and earnest men, will pass unchallenged as the very essence of wisdom,—a thing which is every day illustrated in the idiotic religious creeds which take hold of the beliefs of the most learned men. It is an attempt to invest accused persons with this privilege and at the same

killing his wife, for the prosecuting attorney to say: "They have offered not a word to show how she came by her death. There they are alone; she is in perfect health and in the night she comes to her death suddenly. We say that common honesty, common decency require at the hands of that man, when he sees his neighbors, to tell how she came to her death." *St. v. Moxley*, 102 Mo. 374, 14 S. W. 969. In the federal Supreme Court it was held prejudicial error for the district attorney to say, in effect, that, if he were charged with crime he would not stop at putting witnesses on the stand, but he would also go on the stand and hold up his hand be-

fore high heaven and testify to his innocence. *Wilson v. U. S.*, 149 U. S. 60, 37 L. Ed. 650. In Illinois the cases show an exceeding refinement. See *Watt v. People*, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; *McDonald v. People*, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547. So also as to Indiana. See *Coleman v. St.*, 111 Ind. 563, 13 N. E. 100; *Frazier v. St.*, 135 Ind. 38, 36 N. E. 532; *Davis v. St.*, 138 Ind. 11, 37 N. E. 397.

⁷ *Com. v. Worcester*, 144 Mass. 58, 61.

⁸ *Angelo v. People*, 96 Ill. 209.

⁹ *St. v. Balch*, 31 Kan. 465, 2 Pac. 609.

time to throw around them the shield of the ancient maxim *nemo seipsum accusare tenetur*, thus keeping alive the maxim after the state of things which called it into existence has wholly passed away. The maxim had its origin in times when it was the practice to put accused persons to the torture, for the purpose of compelling them to disclose the guilt of themselves and their accomplices, and its original meaning was that no one should be compelled, *by torture*, or by any other compulsory means, to accuse himself. If we adhere to the maxim in its original meaning, we proceed upon a foundation of common sense and of obvious justice. But there is no sound reason why a prisoner should not be interrogated, as is done in continental countries, in respect of the circumstances surrounding the alleged crime, his answers and his manner of sustaining the examination being fair subjects of consideration by the jury. Far less reason is there for the conclusion that he may avail himself of the privilege of becoming a witness in his own behalf, and yet the triers of the facts are so far to stultify their own understanding as not to draw any unfavorable inference against him if he declines the privilege. In every other situation the rule of reason has its sway. *Contra spoliatorem omnia præsumentur*; and as already seen, where a party in a civil trial fails to produce material witnesses, depositions or documents within his reach, the fact creates a presumption against him and becomes a subject of fair comment in argument to the jury.¹⁰ But here the tenderness of the law toward the criminal classes is so great, that the ordinary methods by which men reason in arriving at truth are to be put aside. A hardened counterfeiter or thief sits in the prisoner's seat, and he above all others could if he would, and would if he could, explain the inculpatory circumstances shown in the evidence against him; but it is his privilege to say not one word; and, lest the jury should draw from his silence that inference which the experience of men draws in every like situation from the failure of him to explain who best can explain, the prosecuting attorney is not to allude to the circumstances in argument, but is to assist, by silence, in *concealing from the jury*, if possible, the fact that the law allows the prisoner to take the witness stand and explain, if he can. Such efforts are not only ineffective, but they are puerile. As the intelligence of the community constantly rises, juries will seldom be assembled to try criminal cases who do not know that the law extends

¹⁰ Ante, §§ 453, 794, 795, 989.

to every accused person the privilege of being a witness for himself. They justly regard it as a privilege which was intended to be the shield of the innocent and not the shield of the guilty. They know that an innocent man, who can explain, will always attempt to do so. They bring to the discharge of their duties the processes of reasoning upon which men proceed in the ordinary affairs of life. They cannot be trained, for the purposes of a single trial, to stultifying common sense, in order that guilt may be screened and crime go unpunished. Any attempt to reach such a result, by withholding from their minds a knowledge of the state of the law on the subject, must be as fantastic as the attempt of the old hen which has hatched a litter of ducks, to keep them from running into the water. There is especially less reason for this rule under modern holdings which limit the cross-examination of the accused to the matters touched upon in his direct examination, and which prohibit the putting of disparaging questions to him touching the circumstances of his past life.¹¹ The privilege of *withholding evidence* and *concealing the truth* is an abomination which must be rooted out of the law.

§ 1004. **Commenting on Failure to call Prisoner's Wife as a Witness.**—The privilege of the defendant in this regard should by analogy, be extended also to him in respect of his wife, where the statute allows him to call her as a witness but prohibits the State from doing it. Accordingly, it has been held in a jurisdiction where there is a statute enabling a husband or wife to testify for each other, that it is an irregularity, for which a conviction will be reversed, that the State's attorney, in his argument to the jury, commented upon the fact that the wife of the accused was not called in the particular case; since, if either marital partner were obliged to call the other, the failure to do so would become evidence, and the sanctities of the marital relation would be thereby broken up, and the policy of the statute defeated.¹² But in Texas, where the

¹¹ Ante, §§ 652, 653.

¹² Johnson v. St., 63 Miss. 313. Following this principle the federal Supreme Court held it not to be a proper subject of unfavorable comment, that defendant should not have his wife in court and thus afford witnesses for the state an additional means for identifying him (under the circumstances of that

case), the statute of the jurisdiction rendering her incompetent as a witness either for or against him. Graves v. U. S., 150 U. S. 118, 37 L. Ed. 1021. In Oregon, where the wife is competent to testify for her husband but not compellable, such a reference is held error. St. v. Hatcher, 29 Ore. 309, 44 Pac. 582. In Michigan the policy is extended

most extreme views are generally taken in favor of the rights of defendants in criminal cases, it has been held not error to allow the prosecuting attorney, in his closing argument, to comment on the failure of the defendant's wife to appear and testify as a witness in his own behalf, the nature of the case being such as to make her an appropriate witness.¹³

§ 1005. **Prisoner's Counsel may enlarge on the Prisoner's Right to be silent.**—Moreover, it has been ruled that, "as there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission so to do, his counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal right in this respect," without the danger of the matter being made the subject of unfavorable comment by the State's counsel.¹⁴

§ 1006. **Illustration of the Foregoing.**—On the trial of a joint indictment against two persons for breaking and entering a dwelling house in the night time for burglary, neither of them testified. Their counsel in his closing argument alluded to this fact, and to the reasons for it, and stated that the fact they did not testify should not raise any presumption against them, and made the following remarks: "What good would the testimony of these people be in proving their innocence? If guilty, would they confess it? If innocent, they are to be proved so by other lips than theirs. I have been endeavoring to discover the real facts in this case, and have never asked Scott or Dunlap or Mrs. Scott about it, and have never spoken to these men, nor heard their voices except as they were challenging the jury. They could add by their word nothing for me, either for or against them. I tell you, gentlemen, I never yet called a prisoner to the stand. I never have been through the farce, and I could not be here to ask that these men might have their shackles taken off and go upon the stand and declare their innocence

to forbid comment on defendant not calling his father, though competent. *People v. O'Brien*, 68 Mich. 468, 36 N. W. 225. Contra, see *Crumes v. St.*, 28 Tex. App. 516, 13 S. W. 808; *Mayes v. St.*, 33 Tex. Cr. R. 33, 24 S. W. 421.

¹³ *Mercer v. St.*, 17 Tex. App. 452, 467; *McMichael v. St.*, 49 Tex. Cr.

R. 422. The Kansas statute (Kan. Laws 1909, § 6791), prohibits the prosecuting attorney from referring to the failure of a wife to testify on behalf of her husband. See also *St. v. Toombs*, 79 Iowa, 741, 45 N. W. 300; *Com. v. Weber*, 167 Pa. 153, 31 Atl. 481.

¹⁴ *Com. v. Scott*, 123 Mass. 239.

to you. Their testimony would be utterly worthless. When Professor Webster was tried for the murder of Dr. Parkman, his two daughters went upon the stand, and delivered important testimony. The lawyers for the government asked no questions, but bowed them graciously from the stand, because they knew that, from the lips of those daughters, pleading for the life of their father, no testimony could come that would weigh with the jurors. And so, gentlemen, as I said before, I could not have these men unshackled to protest their innocence to you. If they went on the witness stand, what could they do but deny the testimony of Edson, that he met them on Lexington avenue and Fiftieth street, or Madison avenue at Red Leary's and Fort Hamilton, or that they came here." The prosecuting attorney, in his closing argument, was proceeding to discuss these reasons, and to argue that other reasons than those suggested were the real reasons for not calling the defendants and Mrs. Scott as witnesses, when the counsel for defendants interrupted, and asked the judge to rule that the fact that the defendants did not testify could not be commented on by the government. But the judge, having first stated the law, that the fact that the defendants did not testify did not create any presumption against them, ruled that, *inasmuch as the matter had been referred to by the defendant's counsel*, the prosecuting attorney had the right to comment on the reasons which the defendants' attorney gave for their not going upon the stand and testifying in their own behalf, and also to give the reasons which, the government contended, really existed for their not testifying, and permitted the prosecuting attorney to proceed in his comments. The defendants having been convicted, on exceptions it was held that this was error. Mr. Chief Justice Gray, in giving the opinion of the court, said: "As there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission so to do, his counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal rights in this respect. When counsel for the defendants in the present case went farther, and referred to his own opinion and practice upon the subject, and to what he supposed to have taken place in other cases, he might well have been checked by the court. But the absolute exemption secured to the defendants by the constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous and irregular suggestions of their counsel in the heat of argu-

ment. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness. The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or a consciousness of the crime charged, and the presiding judge, in permitting such a course of argument, against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their own behalf, and also to give the reasons which the government contended really existed for their not testifying,—committed an error which was manifestly prejudicial to the defendants, and which obliges this court to set aside the verdict and order a new trial.”¹⁵

§ 1007. **Commenting on the Difference between Original and Amended Pleadings.**—Difficulty has been found in dealing with the question whether, where a pleading has been amended, the original pleading can be put in evidence as an admission of the party whose pleading it is.¹⁶ It is too obvious for discussion that it cannot properly be used in final argument, for the purpose of reaching the same result, where it has not been put in evidence.¹⁷

§ 1008. **Suffering the Audience to Applaud the State's Counsel.**—In a case of murder, the following scene took place: Upon the

¹⁵ Com. v. Scott, 123 Mass. 239.

¹⁶ In Massachusetts discarded or abandoned pleadings cannot be thus referred to. They are treated as having been drawn by the counsel for the purpose of laying the merits before the court, and as being hardly the act of the party, and also as being in some sense in the nature of *privileged communications*. Baldwin v. Gregg, 13 Metc. (Mass.) 253; Walcott v. Kimball, 13 Allen (Mass.), 460; Phillips v. Smith, 110 Mass. 61 (under a statute). In Missouri it has been held that an abandoned pleading cannot be read in evidence as an admission against the party, on the trial of the *same case* in which the pleading was

originally filed. Corley v. McKeag, 9 Mo. App. 38, 41; Owens Co. v. Pierce, 5 Mo. App. 576; Breckenkamp v. Rees, 3 Mo. App. 585. But these decisions are *overruled* in the later case of Anderson v. McPike, 86 Mo. 293, 301. It may always be read on the trial of *another case*. Murphy v. St. Louis Type Foundry, 29 Mo. App. 541; Dowzelot v. Rawlings, 58 Mo. 75; Turner v. Baker, 64 Mo. 228, 245. Compare Priest v. Way, 87 Mo. 16, 27, 32; Taussig v. Shields, 26 Mo. App. 318, 326, 327.

¹⁷ Taft v. Fiske, 140 Mass. 250, 54 Am. Rep. 459; Walcott v. Kimball, 13 Allen (Mass.), 460; Phillips v. Smith, 110 Mass. 61.

conclusion of the argument of the counsel who had opened the case for the State, the audience, which was composed of some four hundred people, cheered and applauded the speaker. This was late at night, and further argument was postponed until the next morning. The court did not restrain the audience, or in any way express its disapprobation of the improper demonstration, nor was the jury cautioned against suffering this conduct of the audience to influence their minds in the consideration of the case. On the next morning, counsel for the defendant were permitted, in their addresses to the jury, to comment upon and condemn without restriction the occurrence of the night before. In reply to them, counsel for the State, in the concluding argument, characterized the demonstration as a "spontaneous outburst of approval, by the audience, of this cause, after they had heard it truthfully represented by the State." This remark was not reproved by the court, nor was the jury admonished to guard themselves against being influenced by the popular demonstration. As the conviction was reversed on other grounds, the reviewing court deemed it unnecessary to say whether or not they would have suffered the conviction to stand, if this irregularity had presented the only ground of reversal. But they took occasion to say that the trial court should have taken prompt and decided action on the occasion, and should have endeavored, by its condemnation of the proceeding, and its admonitions to the jury, to prevent any prejudice to the defendant by such reprehensible conduct; and that, in this effort, the counsel for the State should have united.¹⁸

§ 1009. **Civil Responsibility for Words Spoken in Forensic Debate.**—The limits of this chapter do not permit an extended discussion on this most interesting topic. The general rule, upon which modern cases unite, is that words spoken in debate, or written in the regular course of a judicial proceeding, or before a *quasi-judicial* tribunal, by a party or his counsel, which are pertinent to the subject matter of the inquiry, are absolutely privileged, and wholly without reference to the motives which may have prompted them.¹⁹

¹⁸ Cartwright v. St., 16 Tex. App. 473, 489, 49 Am. Rep. 826.

¹⁹ 1 Hawk. P. C., ch. 28, § 8; Cooley's Const. Lim. 443; Hodgson v. Scarlett, 1 Barn. & Ald. 232, 239, 1 Holt N. P. 621; Mackey v. Ford, 5 Hurl. & N. 792; Cutler v. Dixon, 4 Coke, 14b, Dyer, 285; Weston v.

Dobiniet, Cro. Jac. 432; Astley v. Younge, 2 Burr. 807, per Lord Mansfield, C. J.; Brooke v. Montague, Cro. Jac. 90; McMillan v. Birch, 1 Binn. (Pa.) 178; Newfield v. Copperman, 15 Abb. Pr. (N. Y.) (N. S.) 360; Marsh v. Ellsworth, 36 How. Pr. (N. Y.) 532, 1 Sweeny

An idea formerly lingered in the books that, in order to make the words privileged they must have been pertinent to the issues, and not spoken *ex malitia*; ²⁰ but the modern doctrine is that, if the words are material to the issues, the question of malice or motive is an immaterial inquiry. ²¹ The rule, carried to this extent, is deemed absolutely necessary to uphold that freedom of forensic debate which is so essential to the due administration of justice. Where, however, a party or his counsel wanders from the issues, whether in writing or in speaking, maliciously, to asperse and villify another, the case is not within the privilege. ²²

§ 1010. Who entitled to be Heard.—Parties are entitled to appear *in propria persona*, and conduct their own causes, if they are foolish enough to do so; ²³ but a person who is not an enrolled attorney or counselor has no right to appear as such for a party. ²⁴ The wife of a party has no right to appear and conduct his cause at *nisi prius*. ²⁵ A party conducting his own cause may rightfully address the jury as his own advocate, without waiving his right to give evidence as a *witness* in his own behalf. ²⁶ But a party not enrolled as a counselor of the court cannot claim the right to conduct his cause in part by himself and in part by counsel: if he examines his own witnesses, counsel will not be heard in his behalf on points of law. ²⁷ According to a review of the authorities by Mr. Chief Justice Gray, ²⁸ they seem to indicate that *counsel for a deceased party* may be heard as *amicus curiæ* before the full court, “where the exceptions sought to be established have been allowed and entered in his client’s lifetime, because the delay in disposing of them would

(N. Y.), 152; 50 N. Y. 309; *Garr v. Selden*, 4 N. Y. 91; *Ring v. Wheeler*, 7 Cow. (N. Y.) 725; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410; *Gilbert v. People*, 1 Denio (N. Y.), 41; *Hoar v. Wood*, 3 Metc. (Mass.) 193; *Mower v. Watson*, 11 Vt. 536; *Jennings v. Paine*, 4 Wis. 358.

²⁰ *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, 1 Holt N. P. 621.

²¹ *Marsh v. Ellsworth*, 50 N. Y. 309; *Gilbert v. People*, 1 Denio (N. Y.), 41; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410; *Ring v. Wheeler*, 7 Cow. (N. Y.) 725.

²² *Gilbert v. People*, 1 Denio (N.

Y.), 41. Compare *Padmore v. Lawrence*, 11 Ad. & E. 380; *Bromage v. Prosser*, 4 Barn. & C. 247; *Remington v. Congdon*, 2 Pick. (Mass.) 210.

²³ *Hightower v. Hawthorn*, 1 Hempst. (U. S.) 42; *Henck v. Todhunter*, 7 Har. & J. (Md.) 275.

²⁴ Ante, § 209.

²⁵ *Cobbett v. Hudson*, 15 Ad. & El. (N. s.) 988, 14 Jur. 982.

²⁶ *Cobbett v. Hudson*, 1 El. & Bl. 11, 17 Jur. 488; 22 L. J. (Q. B.) 11.

²⁷ *Mosoati v. Lawson*, 1 Mood. & Rob. 454.

²⁸ *Martin v. Tapley*, 119 Mass. 116, 119.

be the act of the court; ²⁹ or if the exceptions had been taken by the party in his lifetime, though not allowed or entered until after his death, because they would be his own exceptions, seasonably alleged and tendered by himself, and the subsequent allowance and entry of them might be treated as mere forms to put them in order for hearing; ³⁰ or if the ruling below had been in his favor, and the questions of law reserved on the motion of the other party; ³¹ or if the questions of law had been reserved by the judge himself at the trial or hearing, and brought before the full court by his report, or by motion pursuant to leave so to reserve." ³² But an *amicus curiæ* cannot take a case up, by a bill of exceptions or otherwise, although he may have been counsel for the deceased party, and his authority may have been revoked by the death of his client. "An *amicus curiæ*," said Gray, C. J., "is heard only by the leave and for the assistance of the court, and upon a case already before it. He has no control over the suit, and no right to institute any proceeding therein, or to bring the case from one court to another, or from a single judge to the full court, by exception, appeal or writ of error." ³³ Where competent counsel are retained in a cause and are present in court, prepared to argue it, the court commits no error in declining to hear counsel not retained in such cause, or in any other pending cause in which a similar question would arise, but who merely expect to have a *similar cause thereafter*. ³⁴ There is no rule of law which prohibits an *attorney of record*, who is a *witness* in a cause, from summing up the case before the court or jury. It seems that there was, however, a rule in California which prohibited it from being done without permission of the court; but where the court gave such permission, no question was presented for review. ³⁵ In Missouri it is held that it is not ground of new trial that an attorney, who had *assisted the prosecuting attorney* by taking the testimony, was allowed to make the opening argument to the jury with a fifteen minutes speech. The court said: "It is wholly im-

²⁹ Citing *Martin v. Tapley*, 116 Mass. 275; *Bridges v. Smyth*, 8 Bing. 29, 1 Moore & S. 93; *Miles v. Williams*, 8 Q. B. 147.

³⁰ *Kelley v. Riley*, 106 Mass. 339.

³¹ *Currier v. Lowell*, 16 Pick. (Mass.) 170.

³² *Springfield v. Worcester*, 2 Cush. (Mass.) 52, 62; *Freeman v. Rosher*, 13 Ad. & El. (N. S.) 780.

³³ *Martin v. Tapley*, *supra*; citing *Yearb.*, 4 H. VI. 16, pl. 16; *Isley's Case*, 1 Leon. 187; *Knight v. Low*, 15 Ind. 374; *Minor's Abr.*, *Amicus Curia*.

³⁴ *Nauer v. Thomas*, 13 Allen (Mass.), 572.

³⁵ *Branson v. Carruthers*, 49 Cal. 375.

material whether the permission was made matter of record or not, nor does it make any difference whether he was employed in the case, or gratuitously assisted the prosecuting attorney. An attorney employed in the case may even make the statement of the case to the jury. The fifth subdivision of section 1908³⁶ cannot be construed so as to require the prosecuting attorney, instead of other counsel engaged in the cause, to make the opening statement."³⁷ The employment of *special counsel* by private prosecutors, to assist the district attorney, is not inhibited by the laws of Texas. The State's attorney should, however, retain the direction of the prosecution, and not resign the same to assistant counsel.³⁸

³⁶ Rev. Stat. Mo. 1909, § 5231.

³⁷ St. v. Rob, 90 Mo. 31, 36; following St. v. Stark, 72 Mo. 38. But see St. v. Coleman, 199 Mo. 112; St. v. Price, 111 Mo. App. 423; Catron v. Com., 140 Ky. 61, 130 S. W. 251.

³⁸ Burkhardt v. St., 18 Tex. App. 699. The court said: "This practice has been known to all the legislatures that have assembled in the state, and if it be an illegal and improper practice, as contended by counsel for defendant, it is indeed strange that it has been so long and so universally tolerated by the law-making power and sanctioned by the courts. It seems that, in some states, this practice is not allowed; but in most of the states it is sanctioned. It is, however, the duty of

the district or county attorney to reserve to himself the direction of the case. This he should never surrender to assistant counsel. Whart. Pl. & Pr., § 555, and cases there cited; 1 Bish. Cr. Pr., § 281. The court did not err in overruling the defendant's objection to permitting the district attorney to avail himself of assistant counsel in the prosecution, both in the conduct and arguing of the case." See Johns v. St. (Neb.), 129 N. W. 247; St. v. Sears, 12 Idaho, 174, 85 Pac. 104; McCue v. Com., 103 Va. 870, 49 S. E. 623; Colbert v. St., 125 Wis. 423, 104 N. W. 61; Ross v. St., 8 Wyo. 351, 57 Pac. 924; People v. O'Farrall, 247 Ill. 44, 93 N. E. 136; Emerson v. St. (Tex. Cr. R.), 114 S. W. 834.

TITLE V.

PROVINCE OF COURT AND JURY: QUESTIONS OF LAW AND OF FACT.

- CHAPTER XXXI.—GENERAL RULES.
- CHAPTER XXXII.—EXISTENCE AND INTERPRETATION OF LAWS,
ORDINANCES, RULES AND CUSTOMS.
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TRACTS.
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VIVE BARRED DEBT.
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CENCE.
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- CHAPTER L.—NOTICE.
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CHAPTER XXXI.

GENERAL RULES.

ARTICLE I.—QUESTIONS OF LAW FOR THE COURT.

ARTICLE II.—QUESTIONS OF FACT FOR THE JURY.

ARTICLE I.—QUESTIONS OF LAW FOR THE COURT.

SECTION

- 1015. The Ends of Judicial Administration.
- 1016. Facts Ascertained, Judge pronounces Conclusion.
- 1017. Judge must declare the Law, and not leave it to Jury.
- 1018. But Error not Reviewed unless Excepted to.
- 1019. Nor unless Prejudicial.
- 1020. Nor where Jury decide Question of Law rightly.
- 1021. Judge decides all Questions on an Agreed Case.
- 1022. But Question reserved should present a Pure Question of Law.
- 1023. Judge Passes upon the Admissibility of Evidence.
- 1024. Decides as to the Competency of Witnesses.
- 1025. Whether he may submit the Question to the Jury.
- 1026. Not bound to hear Objections to Competency and Sufficiency at the same Time.
- 1027. Construes the Pleadings.
- 1028. Decides whether there is a Variance between the Pleadings and Proof.
- 1029. Decides Facts shown by the Records of the Court.
- 1030. Essential Facts Admitted or Undisputed.
- 1031. What is meant by a Mixed Question of Law and Fact.

§ 1015. The Ends of Judicial Administration.—All effort in judicial administration expends itself in two directions: 1. In ascertaining the ultimate or constitutive facts upon which the rights of the parties depend. 2. In applying the law to such facts. In cases at law the jury ascertain the facts, and the judge applies the conclusion of law to them. The conclusion of law applied to the ascertained facts becomes the *judgment* of the court, not its *order* or *com-*

mand, the fiction being that the court pronounces the law, and that it moves forward, by its inherent vigor, to the result. This fiction is expressed in the concluding words of every judgment at law,—*Consideratum est per curiam: it is considered by the court*, that the plaintiff recover of the defendant, or that the defendant go hence, etc.

§ 1016. **Facts Ascertained, Judge Pronounces Conclusion.**—In either case, therefore, where the facts are ascertained beforehand, the judge pronounces the conclusion of the law thereupon. Logically the facts would be ascertained first, and then the conclusion of the law would be pronounced by the judge. This is the case where special verdicts are found, and also where the controversy is submitted upon an agreed state of facts. But where a jury return a general verdict, this embodies a mixed conclusion of law and fact. In such cases the judge pronounces the law to the jury upon all the hypotheses of fact which the evidence substantially tends to prove,—leaving them to determine what hypothesis has been proved, and to apply to it the law thus stated. It must strike the thoughtful mind at once, that the office of deciding difficult questions of fact and applying conclusions of law announced from the bench to the facts so decided, is a difficult one, especially for a body of untrained persons acting in a situation entirely new and strange to them; and so, it is confidently stated, it results in actual practice.

§ 1017. **Judge must declare the Law, and not leave it to Jury.**—The judge decides questions of law; the jury, questions of fact.¹ It is obviously the right of every suitor to have the opinion of the judge upon questions of law, material to the proper determination of his case. The jury are not qualified to determine such questions, and they are calculated to confuse, embarrass and mislead them. The general rule, therefore, is that it is error for the judge to submit questions of law to the determination of the jury.²

¹ Co. Litt. 155, 156; Fost. Cr. L. 255, 256.

² Hickey v. Ryan, 15 Mo. 63, 67; Fugate v. Carter, 6 Mo. 267, 273; U. S. v. Carlton, 1 Gall. (U. S.) 400; Thomas v. Thomas, 15 B. Mon. (Ky.) 178; Ragan v. Gaither, 11 Gill & J. (Md.) 472; South Florida R. Co. v. Rhodes, 25 Fla. 40, 5 South.

633, 23 Am. St. Rep. 506, 3 L. R. A. 733; Ryon v. Starr, 214 Pa. 310, 63 Atl. 701; Martin Brown Co. v. Per-rill, 77 Tex. 199, 13 S. W. 975; Cooper v. Ry. Co., 123 Mo. App. 141, 100 S. W. 494. This proposition is true in a qualified sense. It cannot be said as to all cases, that the judge decides *all* questions of law,

§ 1018. **But Error not Reviewed unless Excepted to.**—But it is no ground for a new trial that the judge left to the jury, as a question of fact, that which he himself should have decided as a question of law, unless the error was objected to at the time.³

§ 1019. **Nor Unless Prejudicial.**—Thus, it has been held that an instruction, leaving it to the jury to determine the question whether the instrument sued on is a promissory note, or not, is bad; but where the instruction was immaterial and technical, it was cured by the statute of jeofails.⁴ And sometimes, where the judge has submitted to the jury a question which involves a conclusion of law, he may cure the error by an additional explanation. Thus, in an action against a railway company for killing hogs, which had strayed upon its track, the judge was asked to instruct the jury that, in order to find for the plaintiff, they must find that the hogs strayed upon the track at a point where the defendant was bound by law to fence its track. It was said that the judge could not properly have given this instruction to the jury, without, at the same time, telling them at what points of its track a railroad company is bound by law to have its track fenced. With such a correction, there would be no question of law left for the jury to decide.⁵

§ 1020. **Nor where Jury decide Question of Law rightly.**—If the judge submits a question of law to the jury and they decide it

and rarely may it be said as to any case that the jury decides all questions of fact. In such a case as libel under Missouri Const., art. II, § 14, the jury are made judges of the law and the fact, but the judge may advise them in general terms as to the law. This gives right to say, write or publish whatever one will, coupled with responsibility therefor. *Marx etc. v. Watson*, 168 Mo. 133; *Ex parte Harrison*, 212 Mo. 88. This does not authorize newspapers to scandalize courts, or libel public officers or private citizens. *St. ex rel. Shepherd*, 177 Mo. 205. In criminal cases they are, in some jurisdictions, only to look to the judge as their adviser in questions of law and not be governed by his instructions. A most admirable discussion of this subject is found in *Preliminary Treatise on Evidence* by Thayer,

pp. 183–262, in which the position is taken that juries merely perform a certain function as to matters of fact, as assistants to the court for its ultimate conclusion, there being still left to the court to answer “a multitude of questions of ultimate fact, or facts which form part of the issue.” Besides these there are also, as we have seen, preliminary questions of fact, which the court must decide, before the jury can have submitted to them a certain fact or series of facts.

³ *Strickland v. Strickland*, 8 C. B. 724; *Cosper v. Nesbit*, 45 Kan. 457, 25 Pac. 866.

⁴ *Lee v. Dunlap*, 55 Mo. 454. See also *Bank v. Gunter*, 108 Ala. 132, 19 South. 14.

⁵ *Hudson v. St. Louis etc. R. Co.*, 53 Mo. 525, 539.

rightly, there is no ground of exception; since it would be absurd to reverse a judgment in order that the judge might decide what the jury rightly decided.⁶

§ 1021. **Judge decides all Questions on an Agreed Case.**—On an agreed case, stated to the court in writing for its decision, the court necessarily draws all inferences, both of law and of fact, from the facts agreed upon, which may be necessary to its judgment. Thus, it has been held that, whether the relation of *landlord and tenant* existed between the parties, and whether the tenancy of the defendant was such as to make a *notice to quit*, or a *demand of possession* requisite to entitle a plaintiff in ejectment to maintain his action, was a question to be determined by the court, upon the consideration of an agreed state of facts.⁷

§ 1022. **But Question Reserved should present a Pure Question of Law.**—But, as appellate judges cannot, in jury cases, draw the conclusions of fact from the evidence, a *question reserved* for the decision of an *appellate court* must be a pure question of law. It cannot be a mixed question of law and fact, for that would necessarily draw to the court that which properly belongs to the jury.⁸ If a point of law is to be reserved, it must be done by stating on the record the facts on which it arises, otherwise the point thus reserved is a mere abstraction.⁹ And these facts must be either admitted on the record or found by the jury; since the court cannot withdraw the decision of the facts from the jury, by reserving as

⁶ *Bernstein v. Humes*, 78 Ala. 134, 141; *Jones v. Pullen*, 66 Ala. 306; *Glenn v. Charlotte etc. R. Co.*, 63 N. C. 510; *St. v. Craton*, 6 Ired. L. (N. C.) 164; *Thornburgh v. Maston*, 93 N. C. 258, 264; *Woodbury v. Taylor*, 3 Jones L. (N. C.) 504; *Consolidated Coal Co. v. Shaefer*, 135 Ill. 210, 25 N. E. 788.

⁷ *Howard v. Carpenter*, 22 Md. 10, 23. As to other illustrations see *Crisman v. Lanterman*, 149 Cal. 647, 87 Pac. 89. But in Massachusetts it is said, that if there is merely an agreed statement of facts, having no provision authorizing the court to draw inferences of fact, plaintiff can only suc-

ceed, where the matters stated entitle him to judgment as a matter of law. *Coffin v. Artesian Water Co.*, 193 Mass. 274, 79 N. E. 262. And in Missouri the Massachusetts theory has been followed. See *Appleman v. Sporting Goods Co.*, 64 Mo. App. 71.

⁸ *Com. v. McDowell*, 86 Pa. St. 377, 379; *McCallin v. Herzer* (Pa.), 7 Atl. 149 (not reported in state reports); *Withers v. R. Co.* (Tex. Civ. App.), 32 S. W. 906 (not reported in state reports).

⁹ *Irwin v. Wickersham*, 25 Pa. St. 316; *Fayette City Borough v. Huggins*, 112 Pa. 1, 4 Atl. 927.

a point, whether, under all the evidence in the case, the plaintiff is entitled to recover. Without this, judgment cannot be entered *non obstante veredicto*.¹⁰ There is only one exception to this rule, and that is said to be a seeming one merely,—where the question is whether *any evidence* has been given of some fact essential to the plaintiff's case or the defendant's defense.¹¹

§ 1023. Judge Passes upon the Admissibility of Evidence.—Within limits already stated¹² the judge passes upon the admissibility of evidence, although his decision involves questions of fact, which may even reach to the decision of the main issue.¹³

§ 1024. Decides as to the Competency of Witnesses.—The question whether a witness is competent to testify concerning the matters in issue is, in all cases, a question of law for the court.¹⁴ And this is so, although the inquiry involves questions which are purely questions of fact.¹⁵ Thus, the question whether a person who is offered as a witness is *insane*;¹⁶ or whether one whose admissions were offered in evidence was a *partner* of the defendant;¹⁷ or

¹⁰ *Wilson v. Steamboat Tuscarora*, 25 Pa. St. 317; *Winchester v. Bennett*, 54 Pa. St. 510; *Wilde v. Trainer*, 59 Pa. St. 439; *Campbell v. O'Neill*, 64 Pa. St. 290.

¹¹ *Wilde v. Trainer*, *supra*; *Campbell v. O'Neill*, *supra*; *Newhard v. R. Co.*, 153 Pa. 417, 26 Atl. 105, 19 L. R. A. 563.

¹² *Ante*, §§ 318, et seq.

¹³ See the observations of Lowry, C. J., as to this function of the judge in *De France v. De France*, 34 Pa. St. 385, 390–392; *Whitney v. Cleveland*, 13 Idaho, 558, 91 Pac. 176; *L'Herbette v. Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354; *Rupert v. Penner*, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322; *Gorgos v. Hertz*, 150 Pa. 538, 24 Atl. 756.

¹⁴ *Chouteau v. Searcy*, 8 Mo. 733; *Reynolds v. Lounsbury*, 6 Hill (N. Y.), 534; *Nave's Admr. v. Williams*, 22 Ind. 368; *Cook v. Mix*, 11 Conn.

432; *ante*, § 323; *Atlantic C. L. R. Co. v. Crosby*, 53 Ala. 400, 43 South. 318; *St. v. Werner*, 16 N. D. 83, 112 N. W. 60; *Crow v. Crow*, 124 Mo. App. 120, 100 S. W. 1123; *St. v. Sherman*, 35 Mont. 512, 90 Pac. 981; *Cleveland v. Rowe*, 99 Minn. 444, 109 N. W. 817.

¹⁵ *Ante*, § 318; *St. v. Simes*, 12 Idaho, 310, 85 Pac. 914; *St. v. Craft*, 118 La. 117, 42 South. 718.

¹⁶ *Holcomb v. Holcomb*, 28 Conn. 177; *Regina v. Hill*, 2 Den. C. C. 259; 5 Cox C. C. 470; 20 L. J. Rep. (N. S.) M. C. 222; 5 Eng. L. & Eq. 547; *Campbell v. St.*, 23 Ala. 44; *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983; *St. v. Cremeans*, 62 W. Va. 134, 57 S. E. 405.

¹⁷ *Harris v. Wilson*, 7 Wend. 75. Or sustains other relation. *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052; *Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 62.

whether an offered witness was incompetent by reason of having a certain amount of negro blood in his veins;¹⁸ or whether he was *interested* in the event of the suit;¹⁹—these and all other like questions are decided by the judge, and are not referred to the jury. This being so, it is error for the judge, after permitting the testimony of a witness to go to the jury, to instruct them to disregard it, if they should find that the witness was interested.²⁰ So, where the competency of a witness is attacked on the ground of insanity, if the court has decided in favor of his sanity, the evidence adduced to the court cannot be submitted to the jury to affect his credibility.²¹ Nor will a court of error revise the decision of the trial judge on the competency of a witness, on the ground that his decision might have been influenced by evidence which he ought not to have considered. The appellate court will not presume that the judge was influenced by such evidence.²² It has been held, however, that the question whether a witness, sane at the time he testifies, was insane at the time of the transaction concerning which he testifies, is a question for the jury, since it goes to his credibility, and not to his competency, and the opposing party may adduce such testimony with his other evidence.²³ In fact, the jury are often required, in estimating the credibility of a witness, to pass on the same evidence which was heard by the judge on the question of his competency.²⁴

§ 1025. **Whether he may submit the Question to the Jury.**—It is said that there are cases where the question involves *complicated facts*, which may be submitted to the jury. Thus, where it became a question whether the statements of a witness, who had been an attorney of one of the parties, was to be excluded on the ground that they were privileged communications, it was held that it was not improper to leave to the jury the question whether, at the time the statements in question were made, the *relation of attorney and client* subsisted between the witness and the party; though, in the particular case, too large a range of exclusion was left to them.²⁵

¹⁸ Nave's Admr. v. Williams, 22 Ind. 368.

¹⁹ Cook v. Mix, 11 Conn. 432; Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395; City Nat. Bank v. Crahan, 135 Iowa, 230, 112 N. W. 793.

²⁰ Chouteau v. Searcy, 8 Mo. 733.

²¹ Campbell v. St., 23 Ala. 45, 75.

²² Ibid.

²³ Holcomb v. Holcomb, 28 Conn. 177; Central of Georgia Ry. Co. v. Harper, 124 Ga. 836, 53 S. E. 391; St. v. Grendahl, 131 Iowa, 602, 109 N. W. 121.

²⁴ Shipton v. Thornton, 9 Ad. & El. 314, per Lord Denman, C. J.

²⁵ Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502. The Texas

It is not, however, to be inferred from this, that there are any cases in which the judge is *bound* to take the opinion of a jury as to the competency of a witness. The doctrine is that he *may* do it; and, where the point depends upon the decision of an intricate question of fact, this is sometimes done.²⁶ In Pennsylvania, it was held that, where one, offered as a witness, is objected to on the ground of *interest*, and parol evidence is given to the court to sustain the objection, if the interest is in the least degree doubtful, the judge may permit the witness to testify, and refer the question of his interest to the jury.²⁷ On grounds already stated,²⁸ we may venture to question the soundness of these views. Experience proves that juries are scarcely capable of deciding properly those questions which the law has clearly committed to them. It will still more embarrass them to compel them to shoulder a part of the burden which properly belongs to the judge.

§ 1026. Not bound to hear Objections to Competency and Sufficiency at the same Time.—"It is undoubtedly true," said Marshall, C. J., "that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time." When, therefore, the counsel for the defendant prayed the opinion and direction of the court to the jury, that the evidence offered by the plaintiff was not admissible, competent and sufficient to be left to the jury as proof of the plaintiff's title to recover, it was held that the judge might properly have refused to give them; for the blending of an objection to the admissibility of evidence, in the same application which questions its sufficiency, is not only unusual, but it confounds propo-

Court of Civil Appeals has stated the rule to be that, where there is an issue or doubt raised as to the accuracy of the predicate laid for the introduction of the evidence of a witness, the court should submit the predicate as a question of fact to the jury for it to pass on before considering the testimony of such witness. *Ozark v. St.*, 5 Tex. Cr. R. 106, 100 S. W. 927. Thus as to the disputed identity of one holding a telephone conversation with an-

other. *Am. Nat. Bank v. First Nat. Bank*, 41 Tex. Civ. App. 392, 92 S. W. 439.

²⁶ 1 Phil. on Ev. (8th ed. by Amos & Phillips), p. 2, note; 1 Greenl. on Ev. §§ 49, 425; *Spencer v. Trafford*, 42 Md. 1.

²⁷ *Hart v. Hellner*, 3 Rawle (Pa.), 407; *Gordon v. Bowers*, 16 Pa. St. 226; *Haynes v. Hunsicker*, 26 Pa. St. 58.

²⁸ Ante, §§ 318, et seq.

sitions distinct in themselves, and is calculated to embarrass the court and the question to be decided.²⁹

§ 1027. **Construes the Pleadings.**—The construction of the pleadings is, of course, always a question for the court.³⁰ It is the province of the court to determine, from the pleadings, what allegations are admitted, and what denied.³¹ It is, therefore, the duty of the court to *state the issues* to the jury, without referring them to the pleadings to ascertain what the issues are.³² For like reasons, the judge should not tell the jury that all the allegations in the petition, not specifically denied in the answer, are to be taken as true; for this refers them to the pleadings, to determine what the allegations are which are not denied. He should inform them specifically what the issues are.³³ It is error to leave the jury to construe and determine the effect of the pleadings.³⁴

§ 1028. **Decides whether there is a Variance between the Pleadings and Proof.**—Whether there is a variance between the pleadings and proof, is likewise a question of law for the exclusive determination of the court.³⁵ Thus, in an action for *slander*, it is for the court, and not for the jury, to determine whether there is such an *identity* between the *words* laid in the declaration and those which have been proved, as will support the action. The jury ascertain what words were spoken, and, if there is a variance between them and those contained in the declaration, they will look to the opinion of the court, in order to be informed whether it is of such a nature as will defeat the action.³⁶

§ 1029. **Decides Facts shown by the Records of the Court.**—These are ascertained by the judge upon an inspection of the records

²⁹ *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25, 44.

³⁰ *Breckenkamp v. Rees*, 3 Mo. App. 585; *Smyth v. Caswell*, 67 Tex. 567, 4 S. W. 848; *Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594.

³¹ *Potter v. Wooster*, 10 Iowa, 334; *McKinney v. Hartman*, 4 Iowa, 154; *Fleischman v. Miller*, 38 Mo. App. 177.

³² *Dassler v. Wisley*, 32 Mo. 498; *Duren v. Kee*, 41 S. C. 171, 19 S. E. 492.

³³ *Missouri Coal & Oil Co. v. Hannibal etc. R. Co.*, 35 Mo. 84.

³⁴ *Hall v. Renfro*, 3 Met. (Ky.) 51; *Sherwood v. Ry. Co.*, 88 Mich. 108, 50 N. W. 101; *Illinois Cent. R. Co. v. Hicks*, 122 Ill. App. 349.

³⁵ *Birch v. Benton*, 26 Mo. 153, 161; *Berry v. Dryden*, 7 Mo. 324; *Isbell v. Lewis*, 98 Ala. 550, 13 South. 335; *Owen v. Meade*, 104 Cal. 179, 37 Pac. 923; *Missouri, K. & T. R. Co. v. Green*, 75 Kan. 504, 89 Pac. 1042.

³⁶ *Ibid.*

of the court, and are not submitted to the jury for their decision. The apparent reason is that the court must, in the nature of things, be more familiar with its records and more competent to judge of their meaning than the jury can be. A familiar illustration of this statement is shown in the rule that a plea of *nul tiel record* is always tried by the court, and not by the jury.³⁷ Thus, in charging the jury, *dates fixed by the records* of the court may be stated to them as facts.³⁸ So, where the law authorizes a *tender* to be made by *paying money into court*, the court will inform itself whether the money has been paid in, and need not submit the question to the jury.³⁹ So, upon the hearing of a motion to enter an *order nunc pro tunc*, the court is to decide whether the order was in fact made, though not entered of record at the time claimed, and is not to submit the question to a jury.⁴⁰

§ 1030. **Essential Facts Admitted or Undisputed.**—Obviously, whenever the facts are all admitted in writing, it is unnecessary for the jury to pass upon them.⁴¹ “Where the facts are undisputed or clear, the court should apply the law and determine the case.”⁴² Thus, the facts being conceded, whether a given act is within the scope of a servant’s employment has been held a question of law for the court.⁴³

§ 1031. **What is Meant by a Mixed Question of Law and Fact.**—The courts frequently speak of mixed questions of law and fact, and, in order to avoid confusion, it is necessary to understand precisely what they mean when they use this expression. It is often said that, in the case of a mixed question of law and fact, the jury are to find the facts, and the court is to pronounce the law upon the facts as

³⁷ *Ridley v. Buchanan*, 2 Swan (Tenn.), 555.

³⁸ *Andrews v. Graves*, 1 Dillon C. (U. S.) 108.

³⁹ *Newton v. Allis*, 16 Wis. 197.

⁴⁰ *Lewis v. Armstrong*, 64 Ga. 645.

⁴¹ *Howard v. Carpenter*, 22 Md. 10, 23; *Page v. Geiser Mfg. Co.*, 17 Okla. 10, 87 Pac. 851.

⁴² *Powell v. Powell*, 23 Mo. App. 365, 373, opinion by Phillips, P. J.; *Mitchell v. R. Co.*, 116 Mo. App. 81, 91 S. W. 111; *Blackburn v. Woodward*, 128 Ga. 226, 57 S. E. 318;

Choctaw O. & G. R. Co. v. Garrison, 18 Okl. 461, 90 Pac. 730. All undisputed facts, however, should not be taken as testimony of facts as to which there is no contradiction, or where there may be different inferences drawn from same facts. See *Harrison v. Franklin*, 126 Mo. App. 366, 103 S. W. 585; *Ross v. Ry. Co.*, 47 Tex. Civ. App. 24, 103 S. W. 708; *Allen v. Beet & Sugar Co.*, 75 Neb. 423, 106 N. W. 469.

⁴³ *Snyder v. Hannibal etc. R. Co.*, 60 Mo. 413.

they may be so found.⁴⁴ This is done in two ways: either by a special verdict, in which case, the jury first find the facts, and afterwards the judge, in rendering judgment, pronounces the law upon them; or, in the form of hypothetical instructions given by the judge to the jury,—he telling them that, if they find from the evidence a given state of facts, the law is for the plaintiff, or for the defendant, as the case may be. The latter practice is now most in vogue in American State jurisdictions.⁴⁵ Accordingly, where the evidence is conflicting, the court, in instructing the jury, declares the law upon the alternate hypotheses of fact presented by the opposing testimony.⁴⁶ Therefore, it is not to be understood that, in the submission to a jury of a mixed question of law and fact, the jury, in any civil case, is to determine what the law is, except as it receives it from the court. Many issues are necessarily so made up as to involve matters of law as well as of fact, and the whole matter is then properly submitted to the jury as a mixed question of law and fact; but, in disposing of the issue, the jury is bound to act upon the law as given to it by the court, and to apply it to the facts, as found, under the guidance of the court.⁴⁷

ARTICLE II.—QUESTIONS OF FACT FOR THE JURY.

SECTION

- 1035. What Evidence was in fact Given.
- 1036. Knowledge of a Witness.
- 1037. Weight, Probative Effect, Sufficiency of Evidence.
- 1038. Credibility of Witnesses.
- 1039. Inferences of Fact from other Facts in Evidence.
- 1040. Particular Questions or Points of Fact.
- 1041. Effect of Contradictory Admissions previously made.
- 1042. Whether a Witness an Accomplice.
- 1043. Sufficiency of Corroborating Testimony.
- 1044. Sufficiency of Impeaching Testimony.
- 1045. Inference from Failure to Produce Evidence.
- 1046. Deductions from the Appearance of Witnesses.

§ 1035. What Evidence was in Fact Given.—Where counsel cannot agree as to the evidence, or misstate it in argument to the jury, it is the province of the jury, and not the court, to determine what

⁴⁴ *Fourth National Bank v. Heuschen*, 52 Mo. 207, 209; *Hines v. Wilcox*, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824; *Teague v. Maddux*, 150 U. S. 128, 37 L. Ed. 1025.

⁴⁵ *Fourth National Bank v. Heuschen*, *supra*.

⁴⁶ *Marshall v. Schricker*, 63 Mo. 308.

⁴⁷ *St. Louis National Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514; *Harrison v. Franklin*, 126 Mo. App.

evidence was actually given.⁴⁸ Where there is no official stenographer present to take down the exact words used by a witness, and the judge has made no minutes of his testimony, if counsel disagree as to what the witness has said on a material matter, the court must submit the question to the jury, even in the face of a motion for a nonsuit on the ground of variance. "What the witness says in his testimony on the trial of a cause, when the exact words have not been taken down as uttered, is a question for the jury; and emphatically so, the sense in which they are used."⁴⁹

§ 1036. **Knowledge of a Witness.**—Where a witness swears positively to a certain fact, it is not for the court to reject his deposition on the ground that, from the terms in which the witness states the fact, the witness had no knowledge of it. Whether or not the witness has knowledge of the fact, is an inference for the jury and not for the court.⁵⁰ Where a witness, in testifying to the best of his knowledge and belief, refers to matters which, in a previous answer, were so stated as to indicate personal knowledge, it is for the jury rather than for the court, to determine whether he is speaking from personal knowledge.⁵¹

§ 1037. **Weight, Probative Effect, Sufficiency of Evidence.**—In all cases, after the judge has determined the preliminary question in favor of the admissibility of the evidence, the weight and probative effect of it become a question for the jury.⁵² This rule is most

366, 103 S. W. 585; *Ricardo v. Wedemeyer*, 75 Md. 10, 22 Atl. 1101; *Atchison, T. & S. F. R. Co. v. Worley* (Tex. Civ. App.) 25 S. W. 478 (not reported in state reports). Take for example a plea of former jeopardy. *St. v. Williams*, 45 La. Ann. 936, 12 South. 932; *People v. Kern*, 8 Utah, 268, 30 Pac. 988.

⁴⁸ *Strauss v. Kansas City etc. R. Co.*, 86 Mo. 421, 432; *St. v. Zumbunson*, 86 Mo. 111; affirming 7 Mo. App. 526.

⁴⁹ *Porter v. Platt*, 57 Vt. 533, 536.

⁵⁰ *Dickinson v. Lovell*, 35 N. H. 9, 17. If, however, it is clear he could not have had such knowledge, the court may so pronounce it and reject it. *Field v. Tenny*, 47 N. H.

513; *Atlanta Glass Co. v. Noizet*, 88 Ga. 43, 13 S. W. 833.

⁵¹ *Toulman v. Swain*, 47 Mich. 82, 10 N. W. 117.

⁵² *Welstead v. Levy*, 1 Mood. & Rob. 138, per Park, J; *Smith v. St.*, 127 Ga. 56, 56 S. E. 116; *Roquemore v. Iron Works Co.*, 151 Ala. 643, 44 South. 557; *Young v. Chandler*, 102 Me. 251, 66 Atl. 539; *Cunniff v. McDonnell*, 196 Mass. 7, 81 N. E. 879; *Williamson v. Transit Co.*, 202 Mo. 345, 100 S. W. 1072; *Anderson v. Walsh*, 189 N. Y. 159, 81 N. E. 764; *Crothers v. Electric Co.*, 218 Pa. 214, 67 Atl. 206; *Quinn v. Rhode Island Co. (R. I.)*, 67 Atl. 364; *Roberts v. Telegraph Co.*, 76 S. C. 275, 56 S. E. 960.

commonly expressed by the bare statement that, where the evidence is conflicting, the *weight* of it is to be determined by the jury.⁵³ Another expression of the same legal conception is that, where there is evidence tending to prove a proposition of fact, whether it is *sufficient* to establish the fact is a question for the jury.⁵⁴ To illustrate: the circumstance that the evidence is *all on one side* does not, it has been held, authorize the court to direct the jury that it proves a fact in controversy; its *sufficiency* is for them.⁵⁵ The jury have the power to *refuse their credit* to parol testimony, and no action of the court, it has been held, should control the exercise of their admitted right to weigh its credibility.⁵⁶ A consequence of this rule is, that a judgment will not be reversed on error or appeal because the evidence is *conflicting*.⁵⁷ This rule is subject to the power of the judge to *limit the effect* of the evidence *by instructions*, where it is admitted for a particular and limited purpose, as hereafter pointed out.⁵⁸

§ 1038. **Credibility of Witnesses.**—The weight of evidence always involves the consideration of the credit to be given to the opposing witnesses; and it is accordingly a rule that this is a question within the exclusive province of the jury.⁵⁹ The rule is the same in

⁵³ Cape Girardeau etc. Co. v. Bruhl, 51 Mo. 144; Moore v. Pieper, 51 Mo. 157; Covey v. Hannibal etc. R. Co., 86 Mo. 635; Brown v. Missouri Pacific R. Co., 13 Mo. App. 462; Newburger Cotton Co. v. York Cotton Mills, 152 Fed. 398, 81 C. C. A. 524; Baker v. Irish, 172 Pa. 528, 33 Atl. 558. Court may not instruct that where witnesses are equally credible preference should be given to those speaking affirmatively. Muncie Pulp Co. v. Keesling, 166 Ind. 479, 76 N. E. 1002. See also Coulter v. Lumber Co., 142 Fed. 706.

⁵⁴ Hudson v. Weir, 29 Ala. 294. Only when the evidence fails wholly to support plaintiff's case may the court withdraw it from the jury. Adams v. Min. Co., 12 Idaho, 637, 89 Pac. 624, 11 L. R. A. (N. S.) 844.

⁵⁵ Charleston Ins. Co. v. Corner, 2 Gill (Md.), 411.

⁵⁶ Ibid.; Milliken v. Thyson Com. Co., 202 Mo. 637, 100 S. W. 604; Alexander v. Blackman, 26 App. D. C. 541.

⁵⁷ St. v. Kinney, 81 Mo. 101; Long v. St., 97 Ala. 41, 12 South. 183.

⁵⁸ Ante, §§ 351, 723; post, § 2416.

⁵⁹ Moore v. Pieper, 51 Mo. 157; Hill v. Sutton, 8 Mo. App. 353; Hitchler v. Voelker, 8 Mo. App. 492; Greenwood v. Harris, 8 Mo. App. 603; Mechanics' Saving Institution v. Potthoff, 9 Mo. App. 574; Meyers v. Union Trust Co., 82 Mo. 237; Rosecrans v. Wabash etc. R. Co., 83 Mo. 678; Coudy v. Iron Mountain etc. R. Co., 85 Mo. 79, 85; Tallon v. Grand Portage Mining Co., 55 Mich. 147, 20 N. W. 878; Curry v. Curry, 114 Pa. St. 367; Lingle v. Ry. Co., 214 Pa. 500, 63 Atl. 890; Beaumont v. Beaumont, 152 Fed. 55, 81 C. C. A. 251; Field v. St., 126 Ga. 571, 55 S.

criminal as in civil cases, and judgments in criminal cases will not be reversed on error or appeal merely because the evidence is conflicting.⁶⁰ The court cannot, on a motion for a nonsuit or a peremptory direction, invade the province of the jury, by attempting to pass upon the credibility of witnesses, to reconcile conflicting statements, or to determine what weight is to be given to the evidence of the respective witnesses.⁶¹ If their testimony presents a conflict or discrepancies, it is the province of the jury to reconcile them if possible, and if not, they may give credence to the witnesses who, in their opinion, are best entitled to it.⁶² Thus, the relative value of contradictory statements made by one when drunk and when sober, presents a question for the jury.⁶³ In equitable actions of ejectment in Pennsylvania, all controverted questions of fact are for the jury.⁶⁴

§ 1039. Inferences of Fact from other Facts in Evidence.—

What inferences are to be drawn from the facts in evidence is, within reasonable limits, a question for the jury.⁶⁵ This is well illustrated by what will be hereafter stated touching the question of

El. 502; *St. v. Hubbard*, 201 Mo. 639, 100 S. W. 586.

⁶⁰ *St. v. Kinney*, 81 Mo. 101; *Seal v. St.*, 28 Tex. 491. It exists as to a witness, though unimpeached, and where there is no evidence to the contrary of his testimony. *First State Bank v. Hammond*, 124 Mo. App. 177, 101 S. W. 677; *Burleson v. Tinnin* (Tex. Civ. App.), 100 S. W. 350; *Dorsett v. Doubleday Page & Co.*, 103 N. Y. S. 792, 53 Misc. Rep. 598.

⁶¹ *Coudy v. Iron Mountain etc. R. Co.*, 85 Mo. 79, 85; *Zander v. Trahsit Co.*, 206 Mo. 445, 103 S. W. 1006; *Jenkins v. Cement Co.*, 147 Fed. 641, 77 C. C. A. 621; *McFarland v. R. Co.*, 127 Ga. 97, 56 S. E. 74; *Zink v. Lobart*, 16 N. D. 56, 110 N. W. 931.

⁶² *Seal v. St.*, 28 Tex. 491; *Houston & T. C. R. Co. v. Davis*, 45 Tex. Civ. App. 212, 100 S. W. 1013; *Bartlett v. R. Co.*, 106 Minn. 51, 117 N. W. 1047, 18 L. R. A. (N. S.) 416.

⁶³ *Finch v. St.*, 81 Ala. 41, 47, 50. So as to a young child making con-

tradictory statements on the stand. *Van Salvellergh v. Traction Co.*, 132 Wis. 166, 111 N. W. 1120. Court should not instruct on the principle of *falsus in uno falsus in omnibus*. *Davis v. St.*, 89 Miss. 119, 42 South. 541; *Com. v. Ieradi*, 216 Pa. 87, 64 Atl. 889.

⁶⁴ *Curry v. Curry*, 114 Pa. St. 367.

⁶⁵ *Howard v. Carpenter*, 22 Ind. 10, 23; *Ross v. Citizens Ins. Co.*, 7 Mo. App. 575; *Bluet v. St.*, 151 Ala. 41, 44 South. 84; *Bennett v. Busch*, 75 N. J. L. 240, 67 Atl. 188; *Greenwood Gro. Co. v. Elevator Co.*, 77 S. C. 219, 57 S. E. 807; *Mahaffey v. Lumber Co.*, 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1260 (1263); *Shelton v. St.*, 144 Ala. 106, 42 South. 30; *Keen v. Keen*, 49 Ore. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Pullman P. Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Dietz v. Ins. Co.*, 168 Pa. 504, 32 Atl. 149. It, therefore, is not allowable for the

negligence, which is often an inference of fact from other facts in evidence.⁶⁶ A limitation of this rule is that, in certain cases, the fact being established, the law conclusively draws the inference, or annexes the conclusion. The inference or conclusion which the law thus pronounces from the established fact is often called a *presumption of law*. Of these, familiar instances are the presumption of *malice*, which the law draws from the making of an assault with a *deadly weapon*;⁶⁷ the presumption of guilt from the recent unexplained *possession of stolen goods*;⁶⁸ the presumption of malice from making a *false accusation* against a person, imputing the commission of an indictable offense.⁶⁹ Accordingly, as already seen,⁷⁰ it is a general rule, subject to exceptions, that the *conclusions or opinions of witnesses* are not admissible in evidence;⁷¹ otherwise the witnesses would usurp either the function of the court of declaring the law, or that of the jury of deciding the facts. It has been said that "in general, whenever an inference is to be drawn by a jury, from the proof of certain facts, it is the duty of the court to state to the jury, in a case calling for it, not only what facts were not sufficient legally to authorize the presumption, but what facts, if proved, will justify it."⁷²

§ 1040. **Particular Questions or Points of Fact.**—It is necessarily a part of the foregoing rule that, where a particular question or

court to tell the jury that, if they believe the evidence, they should find defendant guilty. *St. v. Simmons*, 143 N. C. 613, 56 S. E. 701.

⁶⁶ *Post*, §§ 1663, et seq. But even as to that, if the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict, one may be directed in conformity with such conclusiveness. *Elliott v. R. Co.*, 150 U. S. 245, 37 L. Ed. 1018.

⁶⁷ 1 Greenl. Ev., § 18.

⁶⁸ 1 Greenl. Ev., § 34.

⁶⁹ 1 Greenl. Ev., § 18; 2 Id., § 418.

⁷⁰ *Ante*, §§ 377, 378.

⁷¹ *People v. Wilson*, 3 Park. Cr. (N. Y.) 200, 206; *Scaggs v. St.* (Ark.), 99 S. W. 1104; *Shuler v. St.*, 126 Ga. 630, 55 S. E. 496; *Elliston v. St.*, 50 Tex. Cr. R. 575, 99 S.

W. 999. If a conclusion involves or tends to involve a contradiction, the attention of a witness may be drawn to same on cross-examination. *Holder v. St.* (Tenn.), 104 S. W. 225.

⁷² *Wheeler v. Schroeder*, 4 R. I. 383, 392 (citing *Lecraw v. Boston*, 17 How. (U. S.) 426, 436); *Brickman v. Southern R. Co.*, 74 S. C. 306, 54 S. E. 553; *Lee v. Gorham*, 165 Mass. 130, 42 N. E. 556. But it is often, however, purely a question for the jury what inference is to be drawn from a conceded fact. *McKay v. Telephone Co.*, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59. If only one inference may be drawn from an undisputed fact this course may be

point of fact is disputed, whether it reaches to the merits of the whole controversy or not, it must, in general, be decided by the jury. Thus, where a witness was interrogated respecting a *conversation*, which the witness believed to have taken place in the presence of a party, and gave certain reasons, grounded on *distances* and *tone of voice*, for believing that the party did not hear the conversation,—it was held that the court erred in deciding that the party did not hear the conversation, and in excluding the testimony as to what the conversation was. “It was not for the witness nor the court, but for the jury, to determine from all the circumstances,” whether the party heard what occurred in his presence.⁷³ So, where a remark, made by the defendant to the plaintiff, was material evidence, if made *before* the delivery of a deed, but the evidence was conflicting as to whether it was made *before* or *after*, it was held that all the evidence concerning the remark should have gone to the jury, and that it was for them to determine whether it was made before or after the delivery.⁷⁴

§ 1041. Effect of Contradictory Admissions previously Made.—

So, whether or not certain admissions, previously made by the prosecuting witness in a criminal trial, contradictory to his testimony, will have the effect to impair his credit as a witness, is necessarily a question for the jury.⁷⁵

§ 1042. Whether a Witness an Accomplice.—Whether a witness is an *accomplice* in the commission of a crime for which the defendant is on trial, within the meaning of the rule that his testimony must be corroborated in order to furnish ground for a conviction, is a question for the jury, and not for the court.⁷⁶

§ 1043. Sufficiency of Corroborating Testimony.—It is equally a question for the jury whether such a witness has been corroborated.

taken. *Bluedorn v. R. Co.*, 108 Mo. 439, 24 S. W. 57.

⁷³ *Wilson v. Irish*, 62 Iowa, 260, 264, 17 N. W. 511.

⁷⁴ *Ibid.*

⁷⁵ *St. v. Johnagen*, 53 Iowa, 250, 5 N. W. 176. And so as to other contradictory statements of witnesses. *Liberty v. Haines*, 101 Me.

402, 64 Atl. 665; *Raymond v. People*, 226 Ill. 433, 80 N. E. 996.

⁷⁶ *St. v. Lawlor*, 28 Minn. 217; *Hargrove v. St.*, 125 Ga. 270, 54 S. E. 164; *Porath v. St.*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954. Designating a witness as an accomplice is to assume the existence of a crime. *St. v. Allen*, 34 Mont. 403, 87 Pac. 177.

Thus, where, independently of the evidence of an *accomplice*, there is evidence tending to connect the defendant with the commission of the offense, the question of its *sufficiency* is for the jury.⁷⁷

§ 1044. **Sufficiency of Impeaching Testimony.**—In like manner, as hereafter explained, the sufficiency of impeaching testimony—whether a witness has been successfully impeached—is always a question for the jury.⁷⁸

§ 1045. **Inference from Failure to Produce Evidence.**—As already seen,⁷⁹ the failure or refusal to produce evidence which is within the power of the party, affords ground for an inference unfavorable to him; and where he has purposely destroyed instruments of evidence, the law warrants the making of whatever deductions against him the case fairly admits of, in conformity with the maxim *contra spoliatorem omnia præsumuntur*. Without stopping to consider the extent of this presumption, it will be here said that, in cases tried before juries, it is for them to say what inference is to be drawn from the failure of a party to produce evidence which is accessible to him.⁸⁰ Upon this question it has been held proper, under circumstances, for the judge to decline to rule that it was incumbent on the plaintiff to produce certain evidence, and that the absence of such evidence was to be weighed as discrediting the testimony of a particular witness; and on the other hand, to instruct that, where a party knows that evidence is likely to be introduced at a trial inconsistent with his own claim, and if his claim is well founded, it is in his power to produce other evidence which will control that brought against him, his failure to produce such other evidence should be considered as a circumstance against him,—leaving it to them to say whether this principle applies to the conduct of either party.⁸¹

⁷⁷ *People v. Kunz*, 73 Cal. 313, 14 Pac. 836. Respecting the sufficiency of accomplice testimony, see *People v. Elliott*, 106 N. Y. 288, 12 N. E. 602, and note. As to who is an accomplice within the rule, see *Smith v. St.*, 23 Tex. App. 357, 5 S. W. 219, and note; *St. v. Moore*, 81 Iowa, 578, 47 N. W. 772; *Craft v. Com.*, 81 Ky. 250, 50 Am. Rep. 160.

⁷⁸ Post, § 2426; *Hodgkins v. St.*, 87 Ga. 761, 15 S. E. 695; *Dixon v. St.*, 46 Neb. 298, 64 N. W. 961.

⁷⁹ Ante, §§ 453, 794, 795, 989.

⁸⁰ *Eldridge v. Hawley*, 115 Mass. 410; *Throckmorton v. Chapman*, 65 Conn. 441, 32 Atl. 930; *Leslie v. St.*, 35 Fla. 171, 17 South. 555; *Kirby v. Talmadge*, 160 U. S. 379. California, Georgia and Oregon have statutes making such inferences a rule of evidence.

⁸¹ *Sturtevant v. Wallack*, 141 Mass. 119, 4 N. E. 615.

§ 1046. **Deductions from the Appearance of Witnesses.**—It has been held that a jury may properly be permitted to find, from the appearance of a young man, without other evidence, that he is not twenty-one years of age.⁸² On like grounds, where it was a question, whether a railway company, having the duty of making a proper inspection of cars coming upon its road from other lines, employed a competent person to perform this duty, it might be judged of by the jury from the appearance of the person so employed when testifying as a witness in the case, in addition to evidence that the car which was the source of the injury was defective, and in connection with the general testimony of the inspector.⁸³ On the contrary, it has been ruled in the same court, that the fact that the jury, in most cases where a *view* takes place, acquire a certain amount of information which they may properly treat as evidence, presents no suitable obstacle to the granting of a new trial, on the ground that the verdict is against the weight of the evidence.⁸⁴

⁸² *Com. v. Emmons*, 98 Mass. 6. And court cannot assume, in telling the jury to consider a child's evidence, that he is "a bright boy." *Neville v. St.*, 148 Ala. 681, 41 South. 1011.

⁸³ *Keith v. New Haven etc. R. Co.*, 140 Mass. 175, 3 N. E. 28.

⁸⁴ *Tully v. Fitchburg R. Co.*, 134 Mass. 499, 503. For a controversy on this question, see *ante*, §§ 889, et seq.; especially §§ 900, 901.

CHAPTER XXXII.

EXISTENCE AND INTERPRETATION OF LAWS, ORDINANCES, RULES AND CUSTOMS.

SECTION

- 1050. Judge interprets Written Laws.
- 1051. Illustration of an Application of this Rule.
- 1052. Meaning of Words in Statutes.
- 1053. [Continued.] Whether a Pretended Act of the Legislature was duly Passed.
- 1054. Foreign Laws.
- 1055. Existence of Municipal Ordinances.
- 1056. Interpretation of Municipal Ordinances.
- 1057. Validity of Rules, By-Laws, Regulations, etc., of Corporations.
- 1058. Existence of Particular Usages or Customs.
- 1059. Mining Laws and Customs not enacted by the Legislature.
- 1060. Constitution and By-Laws of a Private Society.
- 1061. The Law of the Particular Case.

§ 1050. Judge Interprets Written Laws.—The interpretation of statutes, constitutional ordinances, municipal ordinances and by-laws, and all other written laws, is for the court, and not for the jury.¹ It has been held that *juries* are not *judges of the law* in criminal cases, in the sense which entitles them to interpret the meaning of words employed in criminal statutes, and that it is error for the court in its charge to submit the meaning of such words to them;² but this subject will be considered hereafter.³

§ 1051. Illustration of an Application of this Rule.—Thus, it is a question of law, who is “a mill owner, within the meaning of the

¹ Barnes v. Mayor of Mobile, 19 Ala. 707; Fairbanks v. Woodhouse, 6 Cal. 433; Peoria v. Calhoun, 29 Ill. 317; Maltus v. Shields, 2 Met. (Ky.) 553; Carleton v. People, 10 Mich. 250; Supervisors v. Heenan, 2 Minn. 330; Denver etc. R. Co. v. Olsen, 4 Colo. 293; Large v. Orvis, 20 Wis. 696; Cooper v. R. Co., 123 Mo. App. 141, 100 S. W. 494; Bedenbaugh v. Southern Ry. Co., 69 S. C. 1, 48 S. E. 53; Dean v. Grimes, 72 Cal. 442, 14 Pac. 173.

² Carpenter v. People, 8 Barb. (N. Y.) 603, 610. For a judge to instruct a jury using technical words found in a statute without defining same is error. Bowles L. S. Com. Co. v. Hunter, 91 Mo. App. 333. For illustrations of construction of such words by court, see Crawford v. Travelling Men's Assn., 226 Ill. 57, 80 N. E. 736, 10 L. R. A. (N. S.) 264; Chicago G. W. Ry. Co. v. R. Co., 75 Kan. 167, 88 Pac. 1085.

³ Post, §§ 2132, et seq.

law relating to mills and mill-dams" in Wisconsin, and this is to be explained to the jury, and not left to them to discuss and settle for themselves. Therefore, an instruction that, in order to maintain a defense in an action under a statute called the Mill-Dam Act, for flowing the plaintiff's land and obstructing the wheel of her mill, on the ground of a prior right as a lower mill-owner on the same stream, the defendant "must have shown himself to be a mill-owner within the meaning of the law relating to mills and mill-dams," was properly refused.⁴

§ 1052. Meaning of Words in Statutes.—It is error for the court to submit to the jury the meaning of a material word in a statute. Thus, in an indictment for unlawfully selling stray animals, it became a question whether the sale was attended by three adult bidders besides the members of the family of the defendant, who had taken up the estray, which was made by the statute,⁵ a prerequisite to the validity of the sale. The court declined a requested instruction as to the meaning of the word "*family*" in the statute, but told the jury that they could put their own construction on it, it being a matter of proof. It was held that this was error, the court said: "What is intended in the statute by the words 'the family of the taker up,' is, when applied to a particular state of facts, a mixed question of law and fact. So far as the fact is governed by law, it belongs to the judge to declare the law; and so far as the fact was one of proof, it was a matter to be ascertained from the evidence, and one not to be left to the personal knowledge of the jury."⁶

§ 1053. [Continued.] Whether a Pretended Act of the Legislature was duly Passed.—Whether what purports to be an act of the legislature of a State was duly passed, with the concurrence of the requisite majority of the members of both houses, as is required by the constitution of the State, so as to become a valid law, is a question of law for the court, and not a question of fact for the jury.⁷ In a subsequent case, one of the questions which was re-

⁴ Large v. Orvis, 20 Wis. 696.

⁵ Sayles' Tex. Civ. Stat. (1897), art. 4967.

⁶ Goode v. St., 16 Tex. App. 411; citing Green v. Hill, 2 Tex. 465. The court defined the word "*family*" to mean, "the collective body of persons in one house under one head or management." See as to the

meaning of the word: Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 469; Arnold v. Waltz, 53 Iowa, 706, 6 N. W. 40, 36 Am. Rep. 248, and note; Wilson v. Cochran, 31 Tex. 677; Howard v. Marshall, 48 Tex. 471, 478; Raco v. Green, 50 Tex. 483.

⁷ South Ottawa v. Perkins, 94 U. S. 260.

garded as settled in the case just cited was thus stated: "Whether a seeming act of the legislature is or is not a law, is a judicial question, to be determined by the court, and not a question of fact to be tried by a jury;" and this doctrine was reaffirmed.⁸ This is in conformity with what was said in an early case in the same court: "Whenever a question arises in a court of law, of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."⁹ In the case first cited it was said: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State, is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges." Further on in the same opinion it is said: "Of course, any particular State may, by its constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question of such existence or non-existence, being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed."¹⁰ In determining this question, it is competent for the judges, upon whom the duty of deciding it is imposed, to resort to the written *records of the legislature*, so far as they disclose the steps which took place in the passage of the statute in question.¹¹

⁸ *Post v. Supervisors*, 105 U. S. 667.

⁹ *Gardner v. Collector*, 6 Wall. (U. S.) 499, 511.

¹⁰ *South Ottawa v. Perkins*, 94 U. S. 260, 267, 269, opinion by Bradley, J.

¹¹ *Gardner v. Collector*, 6 Wall. (U. S.) 499, 510; *Purdy v. People*, 4 Hill (N. Y.), 384; *DeBow v. People*, 1 Denio (N. Y.), 9; *Spangler v. Jacob*, 14 Ill. 297; *Young v. Thomson*, 14 Ill. 380; *Speer v. Plank Road Co.*, 22 Pa. St. 376; *Matter of Wel-*

§ 1054. **Foreign Laws.**—Unless there are statutes enabling courts to take judicial notice of foreign laws, or to ascertain their existence from foreign law books,¹² the existence of a foreign law is proved as a fact, just as any other fact is proved. Yet when the existence of the law is thus established, it is for the court to determine its meaning, just as it is to determine the meaning of a domestic law.¹³ In New Hampshire it is said that evidence of the existence

man, 20 Vt. 653; *Supervisors v. Heenan*, 2 Minn. 330; *Fowler v. Pierce*, 2 Cal. 165; *Post v. Supervisors*, 105 U. S. 668; *People v. Campbell*, 8 Ill. 466; *Prescott v. Trustees*, 19 Ill. 324; *Happell v. Brethauer*, 70 Ill. 166; *Watkins v. Holman*, 16 Pet. (U. S.) 25, 55, 56; *Bryan v. Forsyth*, 19 How. (U. S.) 334; *Gregg v. Forsyth*, 24 How. (U. S.) 179; *Ryan v. Lynch*, 68 Ill. 160; *Miller v. Goodwin*, 70 Ill. 659. In this country there are two lines of decision on the question of whether an enrolled copy of a legislative act is conclusive or not. If it may be attacked, it is well settled that it cannot be shown to be erroneous or invalid by any other evidence than that of the journals. Thus it cannot be assailed by the oral testimony of a member as to its not receiving the requisite number of votes, or readings, etc. See *Crutcher v. Crawford*, 105 Ga. 180, 31 S. E. 139; *Re Granger*, 56 Neb. 260, 76 N. W. 588. It is clear that the question of a spurious law could never get beyond the court under the rule of conclusiveness from enrollment and it is equally clear that, in the other view, only documentary evidence is for consideration. As frequently ruled the construction of all written instruments is for the court except as some ambiguity may require an examination into the surrounding circumstance for an interpretation of words in the document. See *St. v. Brown*, 171 Mo. 477, 71 S. W. 1031.

But such an inquiry as that could not be pertinent to the question of a statute being valid or not. In the case of *Webster v. Hastings*, 56 Neb. 669, 77 N. W. 127, which upholds the conclusiveness of the enrolled copy being conclusive, the court, *arguendo*, speaks "of the issue of fact" being "tried by the triors of fact,—in many cases the jury," but further than this, no hint appears to be given of the submission of such an issue to a jury, but in numerous cases, in which journals were consulted, the court disposed of the matter.

¹² As in *Connecticut. Lockwood v. Crawford*, 18 Conn. 361. This rule was held to apply to the laws of Cuba during the period of its military occupation by the United States, it not being in any sense a part of the United States. *Good-year Tire & Rubber Co. v. Wheel Co.*, 164 Fed. 869.

¹³ *Cecil Bank v. Barry*, 20 Md. 287, 295; *Consequa v. Willings*, 1 Pet. C. C. (U. S.) 225; *Charlotte v. Chouteau*, 33 Mo. 194; 25 Mo. 465; *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.), 280; *Bowditch v. Sclytk*, 99 Mass. 136; *Kline v. Baker*, 99 Mass. 253; *Cobb v. Griffith etc. Co.*, 87 Mo. 90, 94; *Hooper v. Moore*, 5 Jones L. (N. C.) 130. In one of the Circuit Courts of Appeals, the entire matter is ruled to be for the judge, and "expert testimony as to its construction is merely to aid him in his rulings." *Mexican N. R.*

of a foreign law is to be addressed to the court, and not to the jury.¹⁴ And this is the view of Mr. Justice Story,¹⁵ adopted by Prof. Greenleaf,¹⁶ and by the Supreme Court of Maryland.¹⁷ But in Missouri and North Carolina it has been held that the existence of a foreign law is a question of fact for the jury;¹⁸ and it is so held in Massachusetts, with the addition that it is for the jury to determine as a fact, what construction has been put upon the particular foreign law by the courts of the particular country.¹⁹ Outside of the rule, it is the duty of the court to instruct the jury as to its meaning, and it is error to refer the whole question to them without such instructions.²⁰ Statutes of sister States of the American Union are foreign laws within the meaning of this rule; and where the statute of a sister State is given in evidence, it is the duty of the court to expound it to the jury, and it is proper to refuse instructions which commit its exposition of it to them.²¹

§ 1055. **Existence of Municipal Ordinances.**—A *city ordinance*, it has been held, is to be *proved* by evidence addressed to the court, and not to the jury.²²

Co. v. Slater, 115 Fed. 593, 53 C. C. A. 239.

¹⁴ Ferguson v. Clifford, 37 N. H. 86.

¹⁵ Story on Conf. Laws, § 638.

¹⁶ 1 Greenl. Ev., § 486.

¹⁷ Wilson v. Carson, 12 Md. 54, 75; Bank v. Barry, 20 Md. 287, 295; De Sobry v. De Laistre, 2 Harr. & J. (Md.) 192. See Harriman v. Roberts, 52 Md. 64.

¹⁸ Charlotte v. Chouteau, 33 Mo. 194; Moore v. Gwynn, 5 Ired. L. (N. C.) 187; Cobb v. Griffith etc. Co., 37 Mo. 90, 94; Hooper v. Moore, 5 Jones L. (N. C.) 130; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 182. See also, Equitable B. & L. Ass'n v. King, 48 Fla. 252, 37 South. 181; Withers v. Bank, 171 Mass. 425, 50 N. E. 932; Hancock v. Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

¹⁹ Holman v. King, 7 Met. (Mass.) 384. See Mostyn v. Fabrigas, Cowp. 164; Miller v. Heinrich, 4 Camp.

155; Haven v. Foster, 9 Pick. (Mass.) 130. If the foreign law consists of statutes or decisions, the court decides. If decisions are conflicting or inferences of fact may be drawn, it is for the jury. Hancock Nat. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207.

²⁰ Hooper v. Moore, 5 Jones L. (N. C.) 130; Rice v. Rankins, 101 Mich. 378, 59 N. W. 660.

²¹ Cobb v. Griffith etc. Co., 37 Mo. 90, 94. In Ohio it was said that, where decisions were submitted as evidence of a foreign law, the only question before the jury was whether or not they had been rendered. Alexander v. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69. It is the duty of the court to tell the jury when the laws of another state have been established in evidence. Williams v. St., 27 Tex. App. 466, 11 S. W. 481.

²² Roulo v. Valcour, 58 N. H. 347; Hall v. Costello, 48 N. H. 176, 179.

§ 1056. **Interpretation of Municipal Ordinances.**—The interpretation of a municipal ordinance stands on the same footing as that of a statute; it must be made by the court, and an instruction which submits its meaning or legal effect, or its applicability under given circumstances, to the jury, is erroneous.²³ As hereafter seen,²⁴ the *reasonableness* of municipal ordinances is a question for the decision of the court. But it has been ruled, on doubtful grounds, that, whether the cutting down of the sidewalk adjacent to the plaintiff's lot to the level of the street, 15 feet below, was a *construction* of the highway within the meaning of the constitutional provision, was a question of fact for the decision of the jury; and that the court erred in instructing them that the plaintiff was entitled to recover if his property was injured, without regard to the circumstances or character of the alteration.²⁵

§ 1057. **Validity of Rules, By-Laws, Regulations, etc., of Corporations.**—Whether a certain rule of a railway corporation be *reasonable* and therefore valid is a question of law for the court,—the general rule being that the reasonableness of the by-laws, rules and regulations of corporations, whether private or municipal, is to be decided as a question of law, and that such a by-law, rule or regulation, if unreasonable, is to be held void as matter of law;²⁶ and it is improper to submit the question of the reasonableness of such a by-law, ordinance or regulation to the decision of a jury.²⁷ But whether a given rule of a railroad corporation is *adequate* for the safe management of its trains, is a question of fact for the jury.²⁸

§ 1058. **Existence of Particular Usages or Customs.**—Where a usage is set up to vary the terms of a contract, there are generally two questions for the jury: 1. Whether the usage or custom has been

²³ *Pennsylvania Co. v. Frana*, 13 Bradw. (Ill.) 91; *Barton v. Odessa*, 109 Mo. App. 76, 82 S. W. 1119. But upon the theory that there is no material error done in submitting a question of law to a jury where they decide it properly, it was held not error to instruct the jury to determine what an ordinance meant where its terms were plain. *Thomasson v. Southern Ry.*, 72 S. C. 1, 51 S. E. 443.

²⁴ *Post*, § 1057; §§ 1568, et seq.

²⁵ *Montgomery v. Townsend*, 80 Ala. 489, 2 South. 155.

²⁶ *Merz v. Mo. Pa. R. Co.*, 14 Mo. App. 459; *City of St. Louis v. Weber*, 44 Mo. 547; *City of St. Louis v. St. Louis R. Co.*, 14 Mo. App. 221; *post*, §§ 1096, 1097, 1138, 1139.

²⁷ *Neier v. Mo. Pa. R. Co.*, 12 Mo. App. 26.

²⁸ *Chicago etc. R. Co. v. McLallen*, 84 Ill. 109.

proved. 2. Whether the parties contracted with reference to it.²⁹ The existence of a local custom or usage which is not of a character so *general* as to be matter of common knowledge, and therefore the subject of *judicial notice*, is a question of *fact for a jury*,³⁰ but whether a given custom be *valid* or *invalid*, is always a question of law *for the court*, and should not be left to a jury.³¹ The *extent* of the custom—whether it is or is not universally recognized in a particular locality, is also a question of fact for a jury.³² The inference of fact as to whether a party had authority to act in a particular way from another, is a question of fact for the jury, where it depends upon a *course of dealing* between the parties,—as whether a person has been accustomed to draw on a banker, although he had no cash credit in the hands of the banker.³³

§ 1059. **Mining Laws and Customs not enacted by the Legislature.**—At an early day in California the persons engaged in mining the precious metals established certain laws or rules, in order to prevent conflicts among themselves and to settle disputed questions of right. It has been held, in a case depending upon these rules, that they are to be proved as facts, and that the question of their existence is to be submitted to the jury; but that it is for the court,

²⁹ *Burroughs v. Langley*, 10 Md. 248; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220, 247, 277; *Foley v. Mason*, 6 Md. 37; *Dorsey v. Eagle*, 7 Gill & J. (Md.) 321.

³⁰ *Steamboat Sultana v. Chapman*, 5 Wis. 454, 466; *Chesapeake Bank v. Swain*, 29 Md. 483; *Kuhtman v. Brown*, 4 Rich. L. (S. C.) 479, 481; *Parker v. Ibbetson*, 4 C. B. (N. S.) 346; *Steamboat v. Hopkins*, 30 Miss. 703; *Burroughs v. Langley*, 10 Md. 248; *Brig Cadmus v. Matthews*, 2 Paine C. C. 229; *Grave v. Brien*, 1 Md. 438; *Chicago Packing etc. Co. v. Tilton*, 87 Ill. 547. In an action against a railroad company for damages on the ground of negligence, it was held not incumbent on the plaintiff, in opening his case, to show that, by the laws of railroad companies, the defendants were guilty of want of ordinary care. "If he saw fit to trust that question to the good

sense of the jury, he might. It is not one of those mere scientific subjects whose laws, like that of botany, geology, or medicine or surgery, are matters of settled principle or accurate knowledge. If the defendants desired the benefit of the rules of engineering for their exculpation, they might show the custom, and if not unreasonable, of which the jury must judge, it would avail them." *Quimby v. Vermont Central R. Co.*, 23 Vt. 387, 394; *New Roads O. & Mfg. Co. v. Kline Wilson & Co.*, 154 Fed. 296, 83 C. C. A. 1; *Hess Bases & Co. v. Shurtleff*, 74 N. H. 114, 65 Atl. 377.

³¹ *Chicago Packing etc. Co. v. Tilton*, 87 Ill. 547; *City of Austin v. Com. Assn.*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

³² *Ibid.*

³³ *Cumming v. Shand*, 5 Hurl. & N. 95.

upon their being so proved, to instruct the jury as to their proper meaning and application.⁸⁴

§ 1060. **Constitution and By-Laws of a Private Society.**—So, the by-laws of a corporation or other voluntary association or private society, when proved, are to be interpreted by the court; the same as a public law, and it is error to submit the interpretation of them to the jury.⁸⁵ This is illustrated by a case where the *rules of a board of trade* were a part of the contract sued on, and authorized the plaintiff, who was a member of the board, and who, as a commission merchant, had bought produce for future delivery on account of the defendant, to offset and settle such trade by other trades made by the defendant, and to substitute some other person for the one from whom he purchased the property,—thus, in the slang of such institutions, “ringing out the deal.” Acting under this rule, the plaintiff released the seller from his contracts, and, having many similar transactions in his business, proposed to himself to substitute, in place of the contract with the seller, the agreement of such other contractor as might be available for the purpose at the time of settlement, but designated no particular contractor or contract. It was held that it was a question of law for the court whether this was a *substitution* within the meaning of the rule; since it involved merely an interpretation of the rule, which was within the province of the court.⁸⁶

⁸⁴ *Coleman v. Clements*, 23 Cal. 245, 248. This it will be remembered, is in conformity with the rule which relates to foreign laws.

⁸⁵ In an action by the administrators of a deceased member of a *benevolent society* for the benefit alleged to be due from the society on account of his death, it was held that the court properly refused to submit to the jury the question whether certain proceedings, had against the decedent during his life time, were in accordance with the constitution and by-laws of the society. The court said: “Whether any, and if any, what proceedings took place, were proper inquiries for the jury; but whether they were in accordance with the consti-

tution and by-laws of the society or tribe, was a question of law for the court, and not one of fact for the jury.” *Osceola Tribe v. Rost*, 15 Md. 295. The court cite: *Emery v. Owings*, 6 Gill (Md.), 191, 199; *Clark v. Marriott*, 9 Gill (Md.), 331, 337. In all of these organizations the by-laws are held to be a part of the contract, and being such their terms are necessarily for the court's construction. *Wineland v. Knights of Maccabees*, 148 Mich. 608, 112 N. W. 696; *Starnes v. Police R. Assn.*, 2 Ga. App. 237, 58 S. E. 481; *C. H. Albers Com. Co. v. Spencer*, 205 Mo. 105, 103 S. W. 523.

⁸⁶ *Higgins v. McCrea*, 116 U. S. 671.

§ 1061. **The Law of the Particular Case.**—Where, upon a given state of facts, the law has been pronounced by an appellate tribunal and the cause remanded for a new trial, the trial court will, if the same state of facts is again presented by the evidence, declare the law thereupon according to the opinion of the appellate court. Thus, it was ruled in Missouri that, where the Supreme Court had declared a sale void, upon an appeal presenting a certain state of facts, and, on trial anew, the facts presented by the evidence were substantially the same, the trial court should have held the sale void as a question of law.³⁷

³⁷ *Vail v. Jacob*, 7 Mo. App. 571 (not reported in full).

CHAPTER XXXIII.

INTERPRETATION OF PRIVATE WRITINGS.

SECTION

1065. General Rule as to the Interpretation of Writings.
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1095. Whether an Instrument is Sealed or Unsealed.
1096. Validity of Written Instruments.
1097. Whether a Contract is against Public Policy.
1098. Inferences from Writings put in Evidence to show Extrinsic Facts.

§ 1065. General Rule as to the Interpretation of Writings.—As a general rule, the interpretation or construction of written instru-

ments, which are drawn in language so plain as not to require the aid of extrinsic evidence, is a question for the court, and it is error to submit such a question to the jury.¹ An instruction to the jury, as

¹Parker v. Ibbetson, 4 C. B. (N. S.) 345; St. v. Lefalvre, 53 Mo. 470; Edwards v. Smith, 63 Mo. 119; Blakeley v. Bennecke, 59 Mo. 193; Burress v. Blair, 61 Mo. 133; St. v. Donnelly, 9 Mo. App. 520; Brecheisen v. Coffey, 15 Mo. App. 80; Michael v. St. Louis Mutual Fire Ins. Co., 17 Mo. App. 23; Fruin v. Crystal Ry. Co., 89 Mo. 397, 404; Falls Wire Man. Co. v. Broderick, 12 Mo. App. 378; Spalding v. Taylor, 1 Mo. App. 34; Goddard v. Foster, 17 Wall. (U. S.) 123; Lapeer Ins. Co. v. Doyle, 30 Mich. 159; Eyser v. Weissgerber, 2 Iowa, 463; Levy v. Gadsby, 3 Cranch (U. S.), 180; Streeter v. Streeter, 43 Ill. 155; Drew v. Towle, 30 N. H. 531; Shepherd v. White, 11 Tex. 346; Thomas v. Thomas, 15 B. Mon. 178; Smith v. Faulkner, 12 Gray, 251; Warren v. Jones, 51 Me. 146; Cocheco Bank v. Berry, 52 Me. 293; Williams v. Waters, 36 Ga. 454; Illinois Central R. Co. v. Cassell, 17 Ill. 389; Nash v. Drisco, 51 Me. 417; Perth Amboy Man. Co. v. Condit, 21 N. J. L. 659; Rogers v. Colt, 21 N. J. L. 704; Brown v. Hatton, 9 Ired. (N. C.) 319; Roth v. Miller, 15 Serg. & R. (Pa.) 100; Vincent v. Huff, 8 Serg. & R. (Pa.) 381; Moore v. Miller, 4 Serg. & R. (Pa.) 279; Wason v. Rowe, 16 Vt. 525; Collins v. Benbury, 5 Ired. (N. C.) 118; Bedford v. Flowers, 11 Humph. (Tenn.) 242; Gregory v. Underhill, 6 Lea (Tenn.), 207, 211; Louisville etc. R. Co. v. McKenna, 13 Lea (Tenn.), 280, 288; Holman v. Crane, 16 Ala. 570, 580; Welsh v. Duser, 3 Binn. (Pa.) 329, 337; Fowle v. Bigelow, 10 Mass. 379, 384;

Woodman v. Chesley, 39 Me. 45; Harris v. Doe, 4 Blackf. (Ind.) 369; Leviston v. Junction R. Co., 7 Ind. 597; Emery v. Owings, 6 Gill (Md.), 260; Kidd v. Cromwell, 17 Ala. 648; Walker v. Bank of Washington, 3 How. (U. S.) 62; Higgins v. McCrear, 116 U. S. 671, 682; Eddy v. Chace, 140 Mass. 471, 5 N. E. 306; Friend v. Friend, 64 Md. 321; Warner v. Thompson, 35 Kan. 27, 10 Pac. 110; Russell v. Arthur, 17 S. C. 477; Union Bank v. Heyward, 15 S. C. 296; Mowry v. Stogner, 3 S. C. 251, 253; Burke v. Lee, 76 Va. 386; Dixon v. Duke, 85 Ind. 434; Butler v. St., 5 Gill & J. (Md.) 511, 519; Sellars v. Johnson, 65 N. C. 104; Luckhart v. Ogden, 30 Cal. 547, 556; Dunn v. Rothernell, 112 Pa. St. 272; Van Eman v. Stanchfield, 8 Minn. 518, 522; Grady v. Cassidy, 104 N. Y. 147; Atchison T. & S. F. R. Co. v. Dickens, 7 Ind. T. 16, 103 S. W. 750; New York L. Ins. Co. v. Wolfson, 124 Mo. App. 286, 101 S. W. 162; Rheam v. Martin, 26 App. D. C. 181; Banks v. Blades Lumber Co., 142 N. C. 49, 54 S. E. 844; McCullough Bros. v. Armstrong, 118 Ga. 424, 45 S. E. 379. This rule does not prevent the jury from passing upon the identity of the subject matter of a contract. McNealy v. Bartlett, 123 Mo. App. 58, 99 S. W. 767; W. O. Brackett & Co. v. Americus Gro. Co., 127 Ga. 672, 56 S. E. 762. And this applies to deeds also. Walden v. Walden, 128 Ga. 126, 57 S. E. 323. And mortgages. Reade Phos. Co. v. S. Weichselbaum & Co., 1 Ga. App. 420, 58 S. E. 122; Boyes v. Masters, 17 Okl. 460, 89 Pac. 198.

to the legal effect of a written instrument, is not subject to objection as being an instruction upon a question of fact.² The rule is said to be that written instruments should be construed and interpreted by the court *upon inspection only*, unless terms of art or other unusual language be employed, or unless words are employed not in their ordinary signification, and which hence require explanation by extrinsic evidence.³ "The construction of all written instruments," said Baron Parke, "belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words which are to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all, effectually."⁴

§ 1066. Reason of the Rule.—"This," said the Supreme Court of Pennsylvania, "is a matter of very great importance. The security of property depends upon it; for there is no appeal from the decision of a jury. The injured party may indeed move for a new trial, but the court may grant or refuse, at its discretion. It is the right, therefore, of every suitor, to have the opinion of the court on such matters as, by the law of the land, the court is bound to decide; and one of these matters is the construction of written contracts. There may be cases in which extrinsic circumstances are so connected with a writing as to render it necessary to leave the whole to the jury."⁵ "It is," said Le Grand, C. J., "exclusively the province of the court to interpret all written instruments, and to determine the materiality and force of each and all the facts contained in them. Were the jury permitted to do this, there would be no certain legal significance assignable to any paper; for it would depend

² Lucas v. Snyder, 2 G. Greene (Iowa), 499; San Antonio v. Lewis, 9 Tex. 69, 71.

³ Van Eman v. Stanchfield, 8 Minn. 518, 522.

⁴ Baron Parke in Neilson v. Harford, 8 Mees. & W. 823. See also Morell v. Frith, 3 Mees. & W. 406.

⁵ Denison v. Wertz, 7 Serg. & R. (Pa.) 372, 376.

upon the peculiar notions of each particular jury, under whose supervision it might be brought; and thus a recital in a case like the one before us might be deemed material by one jury, and by another, as wholly immaterial and unimportant.”⁶ “It is,” said Mr. Justice Cooley, “for the court to interpret the written contracts of parties; for when they have assented to definite terms and stipulations, and incorporated them in formal documents, the meaning of these, it is supposed, can always be discovered on inspection; nothing which is within the purview of the contract is left in doubt, and there is of course nothing to submit to the jury.”⁷

§ 1067. **What Instruments the Rule Embraces.**—The obligation of the court to expound the meaning of written instruments to the jury, and not to submit such questions to them, embraces every species of writings: contracts,⁸ records,⁹ deeds,¹⁰ wills,¹¹ and all others.¹² So, where a disputed question turns upon the construc-

⁶ *Cook's Lessee v. Carroll*, 6 Md. 104, 111.

⁷ *McKenzie v. Sykes*, 47 Mich. 294, 295, 11 N. W. 164. See also *Thompson v. Richards*, 14 Mich. 172.

⁸ *Cases*, ante, § 1065; post, § 1068.

⁹ *Adams v. Betz*, 1 Watts (Pa.), 425; *Ill. Cent. R. Co. v. Hicks*, 122 Ill. 349; *Gallup v. Fox*, 64 Conn. 491, 30 Atl. 756.

¹⁰ *McCutchen v. McCutchen*, 9 Port. (Ala.) 650; *Seaward v. Malotte*, 15 Cal. 304; *Bonney v. Morrill*, 52 Me. 252; *Venable v. McDonald*, 4 Dana (Ky.), 336; *Hodges v. Strong*, 10 Vt. 247; *Whittlesey v. Kellogg*, 28 Mo. 404; *Hurley v. Morgan*, 1 Dev. & Batt. 425; *Morse v. Weymouth*, 28 Vt. 824; *Addington v. Etheridge*, 12 Gratt. (Va.) 436; *Poage v. Bell*, 3 Rand, 586; *Smith v. Clayton*, 29 N. J. L. 357; *Brown v. Huger*, 21 How. (U. S.) 305; *American Bank v. Inloes*, 7 Md. 380; *Whiteford v. Munroe*, 17 Md. 135; *Dean v. Erskine*, 18 N. H. 81; *Stark v. Barrett*, 15 Cal. 361; *Montag v. Linn*, 23 Ill. 551; *Harris v.*

Doe, 4 Blackf. (Ind.) 369; *Symmes v. Brown*, 13 Ind. 318; *Miller v. Shackelford*, 4 Dana, 264; *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100; *Stevens v. Hollister*, 18 Vt. 294; *Cox v. Freedley*, 33 Pa. St. 124; *Price v. Mazange*, 31 Ala. 701, 709; *Bradish v. Grant*, 119 Ill. 606, 9 N. E. 332; *Rathbun v. Geer*, 64 Conn. 421, 30 Atl. 756.

¹¹ *Magee v. McNeil*, 41 Miss. 17; *Downing v. Bain*, 24 Ga. 372; *Sartor v. Sartor*, 39 Miss. 760; *Willson v. Whitefield*, 38 Ga. 269. So, whether or not a will has been executed with the proper formalities is, of course, a question of law. *Roe v. Tyler*, 45 Ill. 485; *Riley v. Riley*, 36 Ala. 496; *Sullivan v. Honacker*, 6 Fla. 372.

¹² *Kidd v. Cromwell*, 17 Ala. 648; *Earbee v. Craig*, 1 Ala. 607; *Carpentier v. Thirston*, 24 Cal. 268; *Richmond etc. Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Leviston v. Junction R. Co.*, 7 Ind. 597; *Pickereil v. Carson*, 8 Iowa, 544; *Caldwell v. Dickson*, 26 Mo. 60; *Holman v. Crane*, 16 Ala. 570; *Cahoon*

tion of *two or more* written instruments which are to be construed together, it is the duty of the court to construe them and to declare their meaning to the jury, and to direct a verdict, if, in the state of the case, a due construction of the instruments determines the controversy.¹³ *Instances* under the rule could be multiplied almost without number. Thus, the force and effect, as well as the interpretation and construction, of a writing, upon the question *whether it is a lease or not*, is for the determination of the court and not of the jury.¹⁴ So, whether an agreement between parties amounts to an *extension of time* for the performance of a prior contract between them, and if so, what time, are questions of law for the court, and not questions of fact for the jury.¹⁵ So, it was held error to submit to the jury the question whether the terms of a written contract excluded a general *custom of trade*, the existence of which had been proved before then.¹⁶

§ 1068. **Error to submit such a Question to the Jury.**—An instruction which submits to the jury the interpretation of a written contract, which is so plain in its terms that extrinsic evidence is not needed to explain its meaning, is erroneous;¹⁷ if the jury construe it wrongly, the judgment will be reversed; but if they construe it rightly, the error will be immaterial.¹⁸

§ 1069. **Characterization, Interpretation and Effect of Wills.**—This doctrine applies to wills, and all questions touching the opera-

v. Ring, 1 Cliff. (C. C.) 592; Turner v. Yates, 16 How. 14; Moore v. Leseur, 18 Ala. 606; Long v. Rodgers, 19 Ala. 321; Phoenix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; Bliven v. New England Screw Co., 64 U. S. 420, 16 L. Ed. 510.

¹³ Helmholz v. Everingham, 24 Wis. 266.

¹⁴ Dunn v. Rothermel, 112 Pa. St. 272.

¹⁵ Luckhart v. Ogden, 30 Cal. 548, 556.

¹⁶ Parker v. Ibbetson, 4 C. B. (N. S.) 345.

¹⁷ St. v. Lefalvre, 53 Mo. 470; Spalding v. Taylor, 1 Mo. App. 34; Willard v. Sumner, 7 Mo. App. 577;

Brooks v. Standard Fire Ins. Co., 11 Mo. App. 350; Miller v. Dunlap, 22 Mo. App. 97; other cases, ante, § 1065; Rheam v. Martin, 26 App. D. C. 181; Dotson v. St., 88 Ala. 208, 7 South. 259.

¹⁸ Brooks v. Standard Fire Ins. Co., 11 Mo. App. 350; Martineau v. Steele, 14 Wis. 273; ante, § 1020; Cooper v. Nesbit, 45 Kan. 457, 25 Pac. 866. It has been held, upon the assumption that the jury construed plain terms as the court would have construed them, that there was no error in the court directing a jury to determine the meaning of a municipal ordinance where its terms were plain.

tion, construction and effect of *testamentary writings*, are for the court, with the single exception that where there is a latent ambiguity parol evidence may be heard.¹⁹ Whether a will has been *executed* with all the *proper formalities*, is a question of law for the court, and is not to be submitted to the jury.²⁰ Whether a paper tendered in evidence is *testamentary in its character*, to take effect on the death of the maker, and whether, as such, it should be admitted for probate, is peculiarly a question for the court. But, on being so admitted, the questions as to the *testamentary capacity* and free volition of the testator is for the jury.²¹ There is always a presumption, it is said, against an imperfect testamentary paper; and where it is doubtful whether it was intended to operate as a *deed* or as a *will*, it is for the *jury* to decide, on the facts touching its execution and delivery, the declarations of the maker and other circumstances, which way it was intended to operate.²² Although the interpretation of wills is generally a question of law for the court, yet where the question depends upon the *form of attestation*, which may have been the result of ignorance on the part of the testator (the law requiring a different attestation in case of a disposition of real property from that required in case of a disposition of personal property), it has been held, in a contest touching personal property alleged to have been passed by the will, that the question whether the testator intended that the paper should *oper-*

Thomasson v. Southern Ry., 72 S. C. 1, 51 S. E. 443.

¹⁹ Burke v. Lee, 76 Va. 386; In re Snyder's Estate, 217 Pa. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49; Giger v. Busch, 122 Ill. App. 13.

²⁰ Roe v. Taylor, 45 Ill. 485. There is a ruling in one jurisdiction to the effect that, whether a testamentary instrument was signed and attested as required by law are questions of fact for the jury. Watford v. Forester, 66 Ga. 738. If this means anything more than that the question whether the will was in fact executed by the person by whom it purported to be executed, it is an obvious judicial aberration. Hannig v. Hannig (Tex. Civ. App.), 24 S. W. 695 (not

reported in state reports); In re Brannan's Estate, 97 Minn. 349, 107 N. W. 141.

²¹ Watford v. Forester, 66 Ga. 738; Crockett v. Davis, 81 Md. 134, 31 Atl. 710; Knapp v. St. Louis Trust Co., 199 Mo. 640, 98 S. W. 70; Johnson v. Johnson, 105 Md. 81, 65 Atl. 915.

²² Ferguson v. Ferguson, 27 Tex. 339, 344. Compare Herrington v. Bradford, Walker (Miss.), 520; Jones v. Kea, 4 Dev. (N. C.) 301; Lyles v. Lyles, 2 Nott & McC. (S. C.) 531; Wigle v. Wigle, 6 Watts (Pa.), 522; Wareham v. Sellers, 9 Gill & J. (Md.) 98; Witherspoon v. Witherspoon, 2 McCord (S. C.), 520; King's Proctor v. Daims, 3 Hagg. 218.

ate as to the *personal property* unless it could take effect as to the real property, is a question of fact for the jury.²³

§ 1070. **Interpretation of Public Records.**—Whether a certain instrument, for the alteration of which a person has been indicted and put upon trial, is a public record, is a question of law for the court.²⁴ Thus, it is the province and duty of the court to settle, as a question of law, the meaning of the *specification of a patent*; and, if it cannot be ascertained satisfactorily from an inspection of the patent, it is to be declared void for ambiguity. Accordingly, where, in an action on the case for an infringement of letters-patent, it was objected, upon the face of the specification of the patent, which was for improvements in the mode of propelling vessels, that it was uncertain whether the patentee claimed a *wheel* constructed *spirally* or only spiral paddles attached to a wheel, and the court instructed the jury that the question whether the specification was ambiguous in the particular charged was one compounded of law and fact, and that, if the jury should find that a *spiral wheel* and a *spiral propeller* were the same thing in ordinary acceptance, then the specification was sufficiently certain in that respect,—it was held that the instruction was erroneous.²⁵

§ 1071. **Interpretation of Judicial Records.**—The meaning of a judicial record, including the question of its validity, is always a matter to be expounded by the court,—as whether an order granting *letters of administration* is valid or invalid.²⁶ As already stated,²⁷ this rule applies with peculiar force to the records of the particular court. So, it has been held that, where there is a question as to the meaning of an *order of sale* of personal property made by an Orphans' Court, it is not competent to introduce the order book and to show similar orders made by the court in the matter of other estates,—the construction of the particular order being for the court.²⁸ So, where in an action on a contract, the defendant pleads a *decree* of a chancery court, to show a release by the plaintiff of his cause of action, it is for the court to construe the decree

²³ *Fatheree v. Lawrence*, 33 Miss. 585, 628. See also *Jones v. Kea*, 4 Dev. (N. C.) 301.

²⁴ *St. v. Anderson*, 30 La. Ann. Pt. 1, 557.

²⁵ *Emerson v. Hogg*, 2 Blatchf.

(U. S.) 1, 6. Compare *Washburn v. Gould*, 3 Story (U. S.), 122.

²⁶ *Sims v. Boynton*, 32 Ala. 352. 360.

²⁷ Ante, § 1029.

²⁸ *Wyatt v. Steele*, 26 Ala. 639, 649.

and determine from its face, whether it was intended to operate as a release; and a charge which submits this question to the jury is erroneous.²⁹ So, also, the *interpretation of an award* made by arbitrators is for the court; although it has been said that, in construing either the terms of the submission or the language of the award, reference may be had to all the surrounding facts of the case.³⁰

§ 1072. **Interpretation of Contracts by Correspondence.**—Where the evidence adduced to prove the existence of a contract consists wholly of letters which have passed between the parties, it is the office of the court, upon an inspection of the letters, if they are capable of being understood without extrinsic evidence, to declare as matter of law, whether they amount to a proposal and to an unconditional acceptance, so as to constitute a contract,³¹ and, if so, to say what the contract is; ³² and it is error to submit the question

²⁹ Shook v. Blount, 67 Ala. 301.

³⁰ The award of arbitrators is conclusive upon the parties, only in respect of those matters which have been submitted to them for arbitration. If they assume to act on questions not submitted to them, or fail to follow the directions of the submission in a material point, their award in respect of those matters will not be binding, whether the questions be questions of law or question of fact. Squires v. Anderson, 54 Mo. 193. Consult also Pratt v. Hackett, 6 Johns. (N. Y.) 13; Allen v. Galpin, 9 Barb. (N. Y.) 246. Whether the arbitrators had authority to act in reference to any particular subject-matter, or whether their award conforms to the direction and powers given them by the submission, must of course be determined by the court as a question of law, upon a consideration of the terms of the submission. Squires v. Anderson, *supra*; Kanouse v. Kanouse, 36 Ill. 439. And any evidence that may go to the identity

of the subject matter or a judicial record is considered as competent in aid thereof. Jordan v. McDonnell, 151 Ala. 279, 44 South. 101.

³¹ Falls Wire Man. Co. v. Broderick, 12 Mo. App. 378, 385; Luckhart v. Ogden, 30 Cal. 547, 556; Macbeath v. Haldimand, 1 T. R. 172, 180; Slater v. Ins. Co., 133 Mich. 347, 95 N. W. 89. Where various writings are offered to support an alleged contract, which enter into it and all combined is the contract they constitute, if any, these are questions for the court. Telluride Power Com. Co. v. Crane, 208 Ill. 218, 70 N. E. 319.

³² Van Valkenburg v. Rogers, 18 Mich. 180; Hanlan v. Hodges, 52 Fed. 354, 3 C. C. A. 113; Lindsay v. Gas Co., 115 N. C. 212, 20 S. E. 370. But where the proper conclusion depends upon connection with other circumstances, it is proper to submit this to a jury. White v. Lumiere N. A. Co., 79 Vt. 206, 64 Atl. 1121, 6 L. R. A. (N. S.) 807. Court will also determine whether on the whole they disclose a settle-

to the jury.³³ This must, on principle, be qualified with the statement that, where the question of contract or no contract is to be determined from the *acts* as well as the writings, in order that the court shall determine it, the act must be established by uncontroverted evidence, and must be of an unequivocal character. If they admit of different inferences as to the intent, the question is, on principle, one of fact for a jury.³⁴

§ 1073. [Continued.] **Observations on the above Rule.**—In the leading case upon this rule, the question was whether the defendant had contracted as agent for the government or for himself, and it was objected that, whether he had made himself liable or not was a question which ought to have been left to the jury to decide. “But,” said Lord Mansfield, “there was no evidence which was proper for their consideration; for the evidence, consisting altogether of written documents and letters which were not denied, the import of them was matter of law, and not of fact.” Willes, J., said on the same point: “There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. The construction of deeds is a matter of law. but that of letters is proper for the consideration of the jury.” Buller, J., said: “I do not agree with my brother Willes as to the construction of letters. If they are written in so dubious a manner as to be capable of different constructions, and can be explained by other transactions, the whole evidence must be left to the jury to decide upon, for they are to judge of the truth or falsehood of such collateral facts which may vary the sense of the letters themselves. But if they are not explained by any other circumstances, then, like deeds or other written agreements, the construction of them is a mere matter of law.”³⁵ This case must therefore be taken as deciding that the *construction of letters*, not in themselves ambiguous so as to require the aid of extrinsic evidence in their explanation, is for the court and not for the jury.

§ 1074. [Continued.] **An Exception to the above Rule.**—To this rule an exception was stated by the Supreme Court of Ohio, in a case

ment. *Dobbs v. Campbell*, 66 Kan. 805, 72 Pac. 273.

³³ *Lea v. Henry*, 56 Iowa, 662, 10 N. W. 243; *Russell v. Arthur*, 17 S. C. 477; *Ranney v. Higby*, 5 Wis.

62; *McDonough v. Williams*, 77 Ark. 261, 92 S. W. 783.

³⁴ Post, § 1083.

³⁵ *Macbeth v. Haldimand*, 1 T. R. 172, 180, 181, 182.

where F. sued the Franklin Insurance Company upon a policy of insurance. The answer alleged that the loss occurred after the policy had become void because the premium note was not paid when due. The reply charged that the company sent the note after the default to T. for collection; that T. directed the defendant to continue the insurance and guaranteed the payment of the premium, to which the defendant assented. On the trial of this issue, the plaintiff gave in evidence T.'s letter to the defendant, reading, "Continue the policy in force and we will guarantee the payment of the note." The plaintiff also gave evidence showing the course of dealing and correspondence between T. and the defendant. This showed that the defendant made no reply to the letter, but wrote him several letters on other matters during the interval prior to the loss. Upon this evidence the court, on motion of the defendant, took the issue from the jury. It was held that this was error. The letter of T. did not in terms or by necessary implication under all the circumstances, call for a reply if the defendant assented thereto. The court should have submitted, under suitable instruction, to the jury, the question: "Did the defendant assent to T.'s proposal?"³⁶

§ 1075. **Meaning of Ordinary Words and Phrases.**—The meaning of ordinary words and phrases in written instruments is to be interpreted by the court, and not by the jury.³⁷ Thus, the question what is meant by the words of a written contract sued on, "when the walls shall be completed," being a question involving the construction of a contract, has been held a question of law for the court.³⁸ So, it has been held error for the judge to submit to the jury whether the words used in a *warranty* of facts upon which a policy of *insurance* was obtained asserted an existing fact or merely gave an opinion,—the warranty being wholly in writing.³⁹ So, it is said, that what is meant by the use of the words "*insupportable*" and "*outrageous*," in a statute relating to *divorces*, is a question of law; but that the existence and truth of the facts which amount to such outrages are for the jury.⁴⁰ So, in an action for *slander*, where

³⁶ Fry v. Franklin Ins. Co., 40 Ohio St. 108.

³⁷ Brady v. Cassidy, 104 N. Y. 147, 153; Daggett v. Hayward, 95 Mich. 217, 54 N. W. 764. The court decides meaning of words and which of them form part of a contract. So held where there

were marginal words on a writing. Recke v. Sayers, 106 Ill. App. 283.

³⁸ Worcester Medical Institution v. Harding, 11 Cush. (Mass.) 285, 289.

³⁹ Bennett v. Agricultural Insurance Co., 51 Conn. 504.

⁴⁰ Byrne v. Byrne, 3 Tex. 336.

there is no averment that any of the words used had a local or provincial meaning, the jury should be left to judge, from the speaking of the words and the attending circumstances, of the meaning intended to be conveyed by the use of them. Accordingly, it is error in such a trial, to allow witnesses to give their opinions as to the meaning of such words.⁴¹

§ 1076. Meaning of Words not used in their Ordinary Sense.—

In the interpretation of written instruments the words employed are to be understood in their ordinary sense unless it appears doubtful whether they were intended to be understood in that sense, in which case the court may receive extrinsic evidence for the purpose of aiding in the construction,⁴² and may refer the question of the meaning of the words to the jury.⁴³ The rule has been stated thus: "Ordinarily, the construction of written instruments is for the court, and not for the jury; but where a writing contains *technical* (other than legal) *terms*, mercantile abbreviations or phrases, or obscure expressions, the meaning of such terms or expressions is to be ascertained by the jury."⁴⁴ It has been also said that ordinarily, "the meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matter of law, to be construed and passed upon by the court. But language may be ambiguous, and used in different senses; or general words in *particular trades* and branches of business—as among merchants, for instance—may be used in a new, peculiar or technical sense; and therefore, in a few instances, evidence may be received from those who are conversant with such branches of business and such technical or peculiar use of language, to explain and illustrate it."⁴⁵ It is also said that if

⁴¹ *Justice v. Kirlin*, 17 Ind. 588.

⁴² *Hutchinson v. Bowker*, 5 Mees. & W. 535; *Weil v. Schwartz*, 21 Mo. App. 372, 380; *McKenzie v. Wimberly*, 86 Ala. 195, 5 South. 468; *Rodgers v. Cook*, 97 Ala. 722, 12 South. 108; *Hill v. King Mfg. Co.*, 79 Ga. 105, 3 S. E. 445; *Stevenson v. Log Towing Co.*, 103 Mich. 412, 61 N. W. 536; *First Nat. Bank v. Mauser*, 104 Me. 70, 71 Atl. 13. If parol evidence to explain is unobjectioned to, this carries the question

to the jury. *Halsey v. Darling*, 13 Colo. 1, 23 Pac. 913.

⁴³ *Bunce v. Beck*, 43 Mo. 266, 280; *Simpson v. Hargitson*, 35 Leg. Obs. 172; *Weil v. Schwartz*, 21 Mo. App. 372, 381; *Edwards v. Smith*, 63 Mo. 119, 127; *Fagin v. Connolly*, 25 Mo. 94; *McNichol v. Pacific Express Co.*, 12 Mo. App. 401, 407.

⁴⁴ *McNichols v. Pac. Ex. Co.*, supra.

⁴⁵ *Brown v. Brown*, 8 Metc. (Mass.) 573, 576; *Prather v. Ross*, 17 Ind. 495, 499.

the question arises from the obscurity of the writing itself, it is determined by the court alone; but questions of custom, usage, and the actual intention and meaning derived therefrom, are for the jury.⁴⁶ "This," said Mr. Justice Story, "is especially applicable to cases of *commercial correspondence*, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed."⁴⁷ This principle has been frequently recognized and acted upon.⁴⁸

§ 1077. **Instances under this Rule.**—Thus, the meaning of the expression, in a mercantile letter, "Please to give them credit in exchange when the bills are duly honored," was held by Gibbs, C. J., to be, "a question singularly fit for a jury, and one on which they were likely to arrive at a sounder conclusion than the court, because their knowledge of it arises from daily experience." And in this view the other three judges of the common pleas concurred.⁴⁹ So, where a letter remitting a bill contained a request, "which please to honor," and the reply was, "Your bill of £. 100, to W. Johnson & Co., shall have attention,"—it was left to a jury to say whether the words "shall have attention" amounted to an acceptance of the bill.⁵⁰ So, where a factor was directed to sell a consignment of flour "after the receipt of the Atlantic's news," and there had been other correspondence relating to the sale of the flour, it was properly left to the judge, sitting as a jury, to determine, as a question of fact, whether the factor had sold the flour in conformity with the instructions.⁵¹ So, where one merchant instructed another to purchase for him two cargoes of coal "afloat," and there was some dispute as to what was meant by the word "afloat," and testimony was given as to its meaning among merchants, it was held that the court properly submitted the question of its meaning to the jury.⁵² So,

⁴⁶ 2 Phil. Ev. (Cow. & Hill's Notes), § 734.

⁴⁷ Brown v. McGran, 14 Pet. (U. S.) 479, 493.

⁴⁸ See for instance, Fagin v. Connolly, 25 Mo. 94, where this was the only question in the case. See also Heyworth v. Grain & El. Co., 174 Mo. 171, 73 S. W. 498; Ijams v. Life Assn. Soc., 185 Mo. 466, 84 S. W. 51.

⁴⁹ Lucas v. Groning, 7 Taunt. 164.

⁵⁰ Rees v. Warwick, 2 Barn. & Ald. 113. See also Story on Agency, § 75. See also Macbeath v. Haldemand, 1 T. R. 172; Morrell v. Frith, 3 Mees. & W. 402.

⁵¹ Fagin v. Connolly, 25 Mo. 94.

⁵² Law v. Cross, 1 Black (U. S.), 533, 538. "Regular season" shown as understood in theatrical business. Lovering v. Milling, 218 Pa. 212, 67 Atl. 209. And "busy season" and "dull season" as terms in

where the question concerned the meaning of the abbreviation "C. O. D.," it was held proper to submit it to the jury.⁵³ It has been held that the words "*in liquidation*," written after the signature to a note executed in the name of a *partnership*, if proved to have been written when the note was made, and if according to mercantile usage they import a firm dissolved, furnish a circumstance from which the jury may infer that the payee of the note had notice of the dissolution of the firm.⁵⁴ So, it has been held, where the question related to the identity of certain wood which had been levied upon by an officer and which was described in his return as "sixty cords of *soft cord wood*, more or less," that the term "soft wood," not being one to which the law has attached a specific meaning, the court cannot expound it, but that it is properly left to the jury to say what was intended to be embraced in the language used.⁵⁵ So, it has been held that parol evidence is admissible to explain what the parties meant in a written instrument by the phrase "*waste ground*," when used in reference to railroad building.⁵⁶

§ 1078. [Further Illustration.] **Promise to Pay in "Cash Notes."**—Where a promissory note agreed to pay a stipulated amount of money "in cash notes due since the first day of January, 1845," it was held, in an action on the note, a question for the jury, to determine what the parties meant by the use of the words "cash notes." In giving the opinion of the court, Lipscombe, J., said: "The use of the words 'cash notes' creates the presumption that the parties intended to give some effect to them and to designate a payment different from, and more favorable to the party promising, than the payment of money. We believe, at all events, that it should have been left to the jury to decide what was meant by the use of the terms, and also to say, if they meant some other thing, and the value of such thing. I recollect reading, in an opinion of Judge

the fur trade. *Schultz v. Simmons Fur Co.*, 46 Wash. 555, 90 Pac. 917. And that "buffets" in a lease included the word "bars," so as to carry the right in the lessee to sell intoxicating liquors. *Pine Beach Inv. Corp. v. Columbia Amusement Co.*, 106 Va. 810, 56 S. E. 822. For other illustrations see *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 10 N. E. 861; *Converse v. Weed*, 142 Ill. 132, 31 N. E. 314;

White v. McMillen, 114 N. C. 349, 19 S. E. 234; *Preston Nat. Bank v. Purifier Co.*, 102 Mich. 462, 60 N. W. 981.

⁵³ *McNichol v. Pac. Ex. Co.*, 12 Mo. App. 401.

⁵⁴ *Burr v. Williams*, 20 Ark. 172, 188.

⁵⁵ *Darling v. Dodge*, 36 Me. 370.

⁵⁶ *Prather v. Ross*, 17 Ind. 495, 499.

Cowan, on the vexed question of latent and patent ambiguities, that he puts a case that once occurred before him, of a suit being brought on a promise in writing to pay so much money *in deal*. The judge said that he was totally at a loss as to what meaning should be attached to the word *deal*, but, by leaving it to the jury on proof, it was rendered perfectly intelligible. It was to be paid in work in the maker's trade—that is to say, in blacksmith's work, the maker being a smith. No rule of evidence would have been violated; it would not have been altering a written contract by parol; it would have been only showing what the parties really meant. We do not know how much injustice would be done by undertaking to say, that all such promises were absolute for the payment of so much money. The parties may have intended something else, and if so, such intention should not be defeated by an arbitrary rule of construction that would render it senseless and of no effect. It is likely that a man would often be willing to give a much higher price for property, payable in notes due to him, than he would be willing to pay in money. And if so contracted, neither the law, nor reason, would hold him liable to pay the amount in cash. The difference between payments in cash notes and cash can only be ascertained by a jury.’⁵⁷

§ 1079. **View that Jury must declare Meaning of Word, and Court expound Contract.**—There is a modified view, that in such a case, after the jury have declared the meaning of the doubtful or technical word, the court must proceed to interpret the instrument with reference to the meaning so declared, and must expound its effect to the jury.⁵⁸ This view has been thus formulated in an English case: “The construction of all written instruments belongs to the courts alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury.”⁵⁹ Another court has thus stated the rule: “If words of doubtful meaning are employed, or such as have more than one meaning, the question whether their technical sense is different from their ordinary meaning, may be left to a jury; but, in the end,

⁵⁷ Ward v. Lattimer, 2 Tex. 245, 248.

⁵⁸ Hutchinson v. Bowker, 5 Mees. & W. 535; Edelman v. Yeakel, 27 Pa. St. 26.

⁵⁹ Neilson v. Harford, 8 Mees. &

W. 806, 823. This language has been quoted in a case in Missouri as laying down the correct doctrine. Fruin v. Crystal Ry. Co., 89 Mo. 397, 404.

the court must determine the interpretation of the contract, with such light as the verdict may afford on the question submitted to the jury.”⁶⁰ Accordingly, it has been held that, in an agreement reserving the privilege of using all the water of a spring, “the same as it has been formerly *conveyed*,” for the use of a certain paper mill, the word “conveyed” refers to the manner of taking the water, and not to the conveyance of the right; and that the meaning of the word in such a case, was rightly decided by the court, and not submitted to the jury.⁶¹ It is submitted, however, that this rule cannot be conveniently employed in those jurisdictions where special verdicts are not in use; though even there, its application is not necessarily *impracticable*, since the court might, by hypothetical instructions, direct the jury as to the various meanings of the instrument, according to the various meanings which they might give to the disputed word or phrase.

§ 1080. **Technical Terms known only to Experts.**—There is a similar view that, where a contract embraces technical terms known only to experts in a particular art or science, it will be proper to receive the evidence of persons skilled in such art or science, to *enable the court* to determine the meaning of the contract.⁶² In such a case, it has been said that the testimony of experts is admissible in proper cases *to aid the court* in such interpretation,—as where the instrument contains technical terms which are peculiar to a certain art, trade or business and which are not subjects of common knowledge,—such as the words “*slow up*” in railway management.⁶³

§ 1081. **The Meaning which the Parties themselves have Placed upon their Contract.**—It has been well observed: “The rights of parties to put an interpretation upon their own contracts, even to the extent of doing away, practically, with the ordinary and plain meaning of terms, cannot well be denied, so long as their interpretation does not result in a contract which, for some reason, is in itself unlawful; and the cases are numerous and consistent, which permit a resort to the proof of the circumstances or situation of the parties, when their contract was made, and of their transactions under it, when its terms are of doubtful or ambiguous meaning, for

⁶⁰ *Edwards v. Smith*, 63 Mo. 119, 127, opinion by Napton, J.

⁶¹ *Edelman v. Yeakel*, 27 Pa. St. 26.

⁶² *McAvoy v. Long*, 13 Ill. 147, 150.

⁶³ *Louisville etc. R. Co. v. McKenna*, 13 Lea (Tenn.), 280, 288.

the purpose of arriving at the true intention, and, when this is done, the question must be left to the decision of the jury.”⁶⁴

§ 1082. [Continued.] Court to Instruct Jury as to Inferences.—

On what the writer conceives to be an erroneous view, the Supreme Court of Rhode Island held that it was the duty of the court in a case, calling for it, to instruct the jury what inferences might be legally drawn from the words of a written contract, or from the words of receipts, coupled with the conduct of the parties in relation thereto. The court said: “The legal force and effect of the words in written business documents and of the conduct of the parties in exposition of them, are so purely matters of law, that a judge would, in our opinion, fail in his duty, if he neglected to give it in charge to the jury, so far as was necessary for the proper decision of the case before them.”⁶⁵ This language must be taken with two qualifications: 1. The words in business documents may have a technical meaning among merchants, such as will call in parol explanation or evidence of usage in their interpretation,—in which case their meaning is for the jury.⁶⁶ 2. If the acts of the parties, done in respect of writings which have passed between them, are equivocal or susceptible of

⁶⁴ *Reissner v. Oxley*, 80 Ind. 580, 584, opinion by Woods, J. The learned judge cited the following authorities “as more or less in point:” *Bates v. Dehaven*, 10 Ind. 319; *Symmes v. Brown*, 13 Ind. 318; *Bell v. Golding*, 27 Ind. 173; *Conwell v. Pumphrey*, 9 Ind. 135; *Wilcoxon v. Bowles*, 1 La. Ann. 230; *Lowber v. Le Roy*, 2 Sandf. (S. C.) 202; *Williamson v. McClure*, 37 Pa. St. 402; *Prather v. Ross*, 17 Ind. 495; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *Etting v. President*, 11 Wheat. (U. S.) 59; *School District v. Lynch*, 33 Conn. 330; *Watson v. Blaine*, 12 Serg. & R. (Pa.) 131; *Harper v. Kean*, 11 Serg. & R. (Pa.) 280; *Frederick v. Campbell*, 14 Serg. & R. (Pa.) 293; See also 2 Pars. Contr. (6th ed.) 493; *Cook v. Foley*, 152 Fed. 41, 81 C. C. A. 237; *Turner v. Color-type Co.*, 223 Ill. 629, 79 N. E. 306;

Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134; *Dist. Columbia v. Gallaher*, 124 U. S. 505, 31 L. Ed. 526. This rule will be observed, though the language used may more strongly support another construction. *Pittsburg V. P. & B. B. Co. v. Bailey*, 76 Kan. 42, 90 Pac. 803. The words being ambiguous, subsequent acts are competent evidence of a common or mutual interpretation. *Webster v. Clark*, 34 Fla. 637, 16 S. E. 601, 27 L. R. A. 126; *People's Nat. Gas Co. v. Wire Co.*, 155 Pa. 22, 25 Atl. 749; *Hosner v. McDonald*, 80 Wis. 54, 49 N. W. 112. But ambiguity is a necessary predicate to such evidence. *St. Paul & D. R. Co. v. Blackmar*, 44 Minn. 514, 47 N. W. 172.

⁶⁵ *Wheeler v. Schroeder*, 4 R. I. 383, 392.

⁶⁶ *Ante*, § 1076.

different interpretations, the judge manifestly cannot declare the meaning of such acts to the jury.

§ 1083. **Rule Where Parol Evidence is required to explain Ambiguities.**—Where the meaning and effect of written instruments depend, not merely on their construction and language, but on collateral facts *in pais* or extrinsic circumstances, the inferences of fact to be drawn from them should be left to the jury. “An admixture of parol with written evidence draws the whole to the jury.”⁶⁷ This happens where a contract is so ambiguous as to require the aid of parol evidence to ascertain its meaning, in which case the question of its meaning is necessarily left to the jury,⁶⁸ and the court must not, in instructing them, assume to interpret it.⁶⁹ But it is said that the court may give such instructions upon the legal effect of the instrument as will meet the various phases presented by the extrinsic evidence.⁷⁰ For perhaps stronger reasons, where a question arises as to the nature of a contract which subsists between parties, and its solution depends, not only upon the construction of *several written instruments*, but also upon oral evidence, it has been held proper to submit the whole question to a jury. So held, where the question was whether a contract between several parties was a *joint contract* and created a joint liability.⁷¹

§ 1084. **[Illustration.] Where Parol Evidence is admitted to Explain a Will.**—It was said of a will, where such evidence had been introduced to aid its interpretation: “The ascertainment of intention

⁶⁷ Holman v. Crane, 16 Ala. 570, 580; Sewall v. Henry, 9 Ala. 24; Overton v. Tracey, 14 Serg. & R. 311, 330; Watson v. Blaine, 12 Serg. & R. (Pa.) 131, 136; McKean v. Wagenblast, 2 Grant Cas. (Pa.) 462, 466; Turner v. Yates, 16 How. (U. S.) 14; First National Bank v. Dana, 79 N. Y. 108, 116; Gardner v. Clark, 17 Barb. (N. Y.) 538, 551; Etting v. Bank of United States, 11 Wheat. (U. S.) 59; Jennings v. Sherwood, 8 Conn. 122; Foster v. Berg, 104 Pa. St. 324; Vernor v. Henry, 3 Watts (Pa.), 385, 392; Rankin v. Fidelity etc. Co., 184 U. S. 242, 47 L. Ed. 792; San Miguel C. G. M. Co. v. Stubbs, 39 Colo. 359,

90 Pac. 842; Hartwell v. Ins. Co., 84 Me. 524, 24 Atl. 954.

⁶⁸ Bedard v. Bonville, 57 Wis. 270, 275, 15 N. W. 185; Ganson v. Madigan, 15 Wis. 144, 154, 155 (meaning of the word “team”); Jones & Laughlin Steel Co. v. Dredging Co., 150 Fed. 298, Johnson v. Smothers, 79 Ark. 629, 96 S. W. 386.

⁶⁹ Philibert v. Burch, 4 Mo. App. 470.

⁷⁰ Taylor v. McNutt, 58 Tex. 71; Bascom v. Smith, 164 Mass. 61, 41 N. E. 130; Simpson v. Pegram, 112 N. C. 541, 17 S. E. 430.

⁷¹ Bradford v. South Carolina R. Co., 7 Rich. L. (S. C.) 201, 214.

from the will itself falls within the province of the court; and where the sense is incomplete, the deficiency cannot be supplied by extrinsic evidence; a latent ambiguity occurs, and the bequest is void. But a discrepancy, or an accordance, between the whole or particular parts of the description, may be shown by evidence *dehors*, to create, or to destroy an ambiguity which is said to be latent, because it is concealed by the will, and disclosed but by extrinsic circumstances. A legatee is designated by *name* or by *description*, according to his condition or the relation he bears to persons or things; or by both. Where the designation is by a name common to two or more, and without reference to circumstances of description, the question of identity is one purely of fact. Where, however, a description or an addition is inapplicable, not only to the party named, but every one else, its falsity is insufficient to invalidate the designation by the name, the maxim being that *veritas nominis tollit errorem demonstrationis*, and Lord Bacon has some curious observations on this head to show that, next to the actual presence of the donee, a designation of him by name is the more worthy in certainty; whence a legal presumption of fact, in case of a discrepancy, that the falsity is in the description and not in the name."⁷² Applying this principle, where the will read, "I give and bequeath to my nephew, James Vernor Henry, son of my deceased sister, Elizabeth, his heirs or assigns," etc., and James Vernor Henry was not the nephew, but the grand nephew of the testator, and not the son, but the grandson of his sister named Elizabeth, but the testator had a nephew named Robert R. Henry, who made pretension to be the person named in the bequest, it was held a question of fact for the jury which was the person named.⁷³ The court applied the principle that, in the case of latent ambiguity in a will, explanatory declarations made by a testator at the time of its execution are admissible in evidence. So also are previous professions of the testator, indicating a design to give his property in a particular way.⁷⁴

⁷² Citing Bacon's Maxims, Reg. XXV. See also Willard v. Dargh, 168 Mo. 660, 68 S. W. 1023; Second United Pres. Church v. First etc. Church, 71 Neb. 563, 99 N. W. 252. The principle is applied where the question concerns the identity of property devised or bequeathed. In re Snyder's Estate, 217 Pa. 71, 66 Atl. 157, 11 L. R. A.

(N. S.) 49; Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076.

⁷³ Vernor v. Henry, 3 Watts (Pa.), 385, 392.

⁷⁴ Compare Harris v. Bishop of Lincoln, 2 P. Wms. 137; Thomas v. Thomas, 6 T. R. 671; Standen v. Standen, 2 Ves. Jun. 589; Dare v. Geary, cited Amb. 375.

§ 1085. [Continued.] How the Jury Instructed in such a Case.—

From the points which were ruled upon in the case above cited, the following charge to the jury may be constructed, so far as the same applies to the general principles of law applicable in such a case: "The jury are instructed that, the description of the person named in the bequest failing to apply to the plaintiff in every particular but the Christian name, and there being a person claiming this legacy who was in being when the will was made, and known to the testator, who answers this description according to its very letter, a latent ambiguity or uncertainty as to the person intended by the testator to take the legacy is presented." "If the evidence be such as satisfies the jury that the person bearing the name mentioned in this clause of the will, and who is the plaintiff in this suit, was intended by the testator, the inconsistent description will not prevent his recovery. The evidence, by parol or word of mouth, which the plaintiff has been allowed to give for the purpose of dispelling or removing the uncertainty as to the person intended by the testator, need not be conclusive, or such as to remove the ambiguity beyond every doubt, nor is it necessary that it afford a high degree of probability that the plaintiff was the person intended by the testator; but it will be sufficient if it satisfies the minds of the jury that such was the fact."⁷⁵

§ 1086. Contract partly in Writing and partly in Parol.—Where a contract is partly in writing and partly in parol, and the parol evidence is conflicting, or such as to leave the intention of the parties obscure, it is proper to submit to the jury the decision of the question what the contract was.⁷⁶

§ 1087. Receipts for Money Paid.—A written receipt for the payment of money is an admission only, and, though evidence against the person who made it and those claiming under him, is not conclusive evidence, except as to a person who may have been induced by it to alter his condition.⁷⁷ It may therefore be contradicted or explained; and it will be for a jury or other trier of the facts to say, upon such contradictory or explanatory evidence, what the fact was.⁷⁸ But an instrument in writing which acknowledges the receipt

⁷⁵ Vernor v. Henry, 3 Watts (Pa.), 385.

⁷⁶ Edwards v. Goldsmith, 16 Pa. St. 43, 48; post, § 1113; Chicago Cheese Co. v. Fogg, 53 Fed. 72.

⁷⁷ Straton v. Rastall, 2 T. R. 366; Wyatt v. Hertford, 3 East, 147.

⁷⁸ Graves v. Key, 3 Barn. & Ad. 313, 318; House v. Holland, 42 Tex. Civ. App. 502, 94 S. W. 153. In

of a sum of money, in full for damages sustained by the signer in consequence of an injury received from the person paying the money, is not a simple receipt which can be explained or varied by parol evidence, but is in the nature of a *release*, and is a contract which bars an action for the injury, unless shown to have been obtained by fraud. It cannot be explained by parol evidence, but its meaning and conclusive effect must be pronounced by the court.⁷⁹

§ 1088. **Meaning of Words Varied by Evidence of Usage.**—

Words used in a particular relation may have a different meaning from that which attaches to them in their ordinary use. Hence, it is that evidence of usage is sometimes admissible to show that ordinary words, when used with reference to a particular subject, have a peculiar meaning; and in such a case, whether the words have such peculiar meaning is, of course, a question for a jury. Thus, in one case it was held that, in an action on a lease of an estate which included a rabbit warren, evidence of usage was admissible to show that the words "thousand of rabbits" were understood to mean one hundred dozen, that is twelve hundred. The decision was based on the ground that the words "hundred," "thousand," and the like, were not understood, when applied to particular subjects, to mean that number of units; that the definition was not fixed by law, and was therefore open to such proof of usage.⁸⁰ Commenting upon this case, it was said by Chief Justice Shaw: "Though it is exceedingly difficult to draw the precise line of distinction, yet it is manifest that such evidence can be admitted only in a few cases like the above. Were it otherwise, written instruments, instead of importing certainty and verity, as being the sole repository of the will, intent and purposes of the parties, to be construed by the rules of law, might be made to speak a very different language, by the aid of parol evidence."⁸¹ Accordingly, where a town had conveyed a beach, reserving the right to enter and take away "gravel and sand * * * for the making and repairing of their highways," it was held that evidence was admissible to prove what species of material had been

Alabama it is ruled that it must be first shown, that there was fraud or mistake before any such evidence may be received, the terms of the receipt being plain. *Murphy v. Black & Laird*, 148 Ala. 675, 41 South. 877.

⁷⁹ *Coon v. Knapp*, 8 N. Y. 402.

Compare *Egleston v. Knickerbocker*, 6 Barb. (N. Y.) 458; and *White v. Parker*, 8 Barb. (N. Y.) 48.

⁸⁰ *Smith v. Wilson*, 3 Barn. & Ad. 728.

⁸¹ *Brown v. Brown*, 8 Metc. (Mass.) 573, 577.

used as gravel by the town for repairing its highways before the making of the deed, since this must be presumed to have been within the contemplation of the parties; but such evidence was not admissible to prove the meaning of the words "sand and gravel," as generally and usually understood at that town.⁸²

§ 1089. **Mercantile Contracts explained by the Usages of Trade.** This introduces another exception to the general rule above stated,⁸³ which is that, in the case of a mercantile contract, if "the instrument be not clear and unequivocal, evidence of the usage or course of trade which is to be carried into effect, is admissible to explain the meaning and remove the doubt."⁸⁴ It is also reasoned that parol evidence is admissible to show the existence of a custom of trade or business, within the purview of which the contract was made, provided such custom was of such universal practice as to justify the conclusion that it became, by implication, a part of the contract; and the existence and extent of such a custom is a question of fact for a jury,⁸⁵ except in the case of customs of such universality that the courts will notice their existence judicially.⁸⁶ "The principle ap-

⁸² *Brown v. Brown*, supra. An ambiguity arises, resolvable by extrinsic evidence, when taking a word in its ordinary or legal sense the contract becomes wholly inoperative, e. g. "inherit" when dower is referred to. *Kohl v. Frederick*, 115 Iowa, 517, 88 N. W. 1055. And even an apparently opposite meaning may be shown. Thus where an ordinance authorized the use of "noiseless motors" it was allowable to show that the motors intended were not actually noiseless but so called by technical or local usage. *Farnum v. Concord Horse R. R. Co.*, 60 N. H. 569, 29 Atl. 541. See also for illustrations *City of Elgin v. Joslyn*, 36 Ill. App. 301, 137 Ill. 525; *St. Paul & M. Tr. Co. v. Harrison*, 64 Minn. 300, 66 N. W. 980.

⁸³ Ante, § 1065.

⁸⁴ 2 Kent. Com. 556; *Salmon Falls Man. Co. v. Goddard*, 14 How.

(U. S.) 446, 454; *Brown v. Brown*, 8 Metc. (Mass.) 573, 576; *Prather v. Ross*, 17 Ind. 495, 499. Thus what is meant by the words "keeping a set of books." *Western Assn. Co. v. Althelmer*, 58 Ark. 565, 25 S. W. 1067.

⁸⁵ *Branch v. Palmer*, 65 Ga. 210.

⁸⁶ In an action on a contract whereby a defendant undertook to impart to a competent person the information necessary to enable him to operate a sugar factory, it was held a question for the jury, under the evidence, whether such competent person should be an expert in the general business of making sugar, and also whether a competent person, within the meaning of the contract, had been designated by the defendant to receive the information bargained for. *Tansill v. Brinkman*, 16 Mo. App. 557.

plicable to such a case is, that the evidence of usage, and the surrounding circumstances, in explanation and illustration, are for the consideration of the jury,—the province of the court being to instruct them, conditionally or hypothetically, what should be the proper construction or interpretation of the written instrument, as they may find the evidence either to support or not to sustain the purpose for which it has been offered.”⁸⁷ “When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage.”⁸⁸

§ 1090. Instance of an Instruction Erroneous within this Rule.

An instruction was granted, to the effect that a certain entry is a sufficient memorandum in writing of a contract to bind the defendant, provided the jury find that it “either expressly, or according to the sense and signification of its language and figures, under the established custom and usage of merchants in the city of Baltimore, at the time,” etc., “represented truly and fully the terms of and parties to the contract of sale.” It was held that this instruction was erroneous under the above rule, because it authorized the jury to construe the entry or memorandum, without any absolute or conditional construction thereof by the court.⁸⁹

§ 1091. The correct Reading of Written Instruments—Identity of Words—Legibility.—There is a conflict of authority on the question whether the deciphering of illegible writings is for the court or the jury. According to one view, the proper reading of an illegible writing is for the court, and not for the jury,—as for instance, whether a Christian name in an indictment should read David or Daniel.⁹⁰ So, whether the letters “*oix*” in a policy of in-

⁸⁷ Williams v. Woods, 16 Md. 220, 251; Eaton v. Smith, 20 Pick. (Mass.) 150, 156; Neilson v. Harford, 8 Mees. & W. 823.

⁸⁸ Eaton v. Smith, 20 Pick. (Mass.) 150, 156, opinion of the court by Shaw, C. J.

⁸⁹ Williams v. Woods, 16 Md. 220, 253.

⁹⁰ Com. v. Riggs, 14 Gray (Mass.), 377. See also Com. v. Davis, 11 Gray (Mass.), 4.

surance meant "*six*," which would make sense, or "*oix*" which would make nonsense, was erroneously submitted to the jury.⁹¹ But we find the same court deciding in a subsequent case that, while the construction of written instruments is for the court, yet the *identity of a word* in such an instrument,—as, for instance, where it is so written that it may be read either *fifty* or *sixty*,—presents a question of fact for a jury.⁹² Again, in one court we find it decided that it is for the court to decide what are the letters and figures used in an instrument which is offered in evidence and the meaning which is to be attached to them; and, if it be the instrument sued on, whether it *varies* from the one which is described in the declaration.⁹³ In another court, where there was an objection to the admission of a promissory note in evidence, upon the ground of an alleged variance between the date of the indorsement of the note and that of the copy of the note set out in the petition, and the court was unable to determine, because of the peculiar manner in which the figures were made, whether there was a variance or not,—it was held that it was within the *discretion* of the court to submit the question of the variance to the jury, under proper instructions.⁹⁴ Swinging back with the pendulum, we find that where, on the trial of an indictment for perjury, it became a question whether a word in a record which had been produced, which was written above an erasure, was the word "meeting" or the word "mutiny," Lord Ellenborough, C. J., ruled that it was not a question for the jury, but that it was a question within the peculiar province of the court.⁹⁵ But we apprehend that this last decision is unsound in principle; for the reading of a word in a writing is matter of fact, and not matter of law; and although it may properly be committed to the judge in civil cases, yet in a criminal case, where the essential question of *criminal intent* may depend upon it, and consequently where the whole question of guilt or innocence may turn upon it, it is manifestly an invasion of the province of the jury for the judge to withdraw its decision from them. It is scarcely necessary to add that, on the trial of an indictment for the *forgery* of a particular instrument, the question whether it was forged or not, being the essential question

⁹¹ Lapeer Ins. Co. v. Doyle, 30 Mich. 159.

⁹² Paine v. Ringold, 43 Mich. 341, 5 N. W. 421.

⁹³ Riley v. Dickens, 19 Ill. 29.

⁹⁴ Partridge v. Patterson, 6 Iowa,

514. See also Jefferson County v. Savory, 2 G. Greene (Iowa), 238; Converse v. Warren, 4 Iowa, 158.

⁹⁵ Rex v. Hucks, 1 Stark. N. P. 521.

in the case, is exclusively for the determination of the jury; and hence that it is not necessary that this question should be determined prior to the admission of the instrument itself in evidence.⁹⁶

§ 1092. **Blanks in Written Instruments.**—The same contrariety of holding exists in respect of the meaning of written instruments, where blanks have been left unfilled through clerical misprision. According to one view, it frequently presents a case of what is called *patent ambiguity*, which is not explainable by parol, but in which case the court must declare the meaning if it can be done, and if not, to declare the instrument to be void for uncertainty. Many cases are found where essential words have been omitted from such instruments, and where their meaning has been declared as matter of law. Thus, where a paper, given to the plaintiff by the defendant, promised to pay the plaintiff one hundred and twenty-three ——— and 6-100, on demand, and interest, it was held that it was a promissory note, payable in money and for a certain sum, and that the statute of limitations did not apply.⁹⁷ It well might be; for there were prefixed on the upper left-hand margin, as is usual in the case of promissory notes, the figures \$123.06, plainly showing the amount intended. So, where, in the bond of a sheriff as tax collector, the undertaking was to pay “to the treasurer of the district of Tennessee,” and the sheriff was collector for a county within the collection district of West Tennessee, and the law required the sheriffs within that district to pay the moneys collected to the treasurer of West Tennessee, it was held that the court would supply the word “West” before the word “Tennessee,” as as to give effect to the instrument.⁹⁸ So, in an old case, where the obligation read, “I, Phillip Goole, do stand bound [without stating to whom] in the sum of sixteen pounds, and is to be paid to the said John Garnes the elder’s executors,” the court supplied, after the words “do stand bound” the words “to the executors of John Garnes,” that being the manifest sense of the instrument.⁹⁹ So, where a note was made payable “six ——— after date,” it was queried, but it should not have been, whether the meaning of the parties was a question for the court or for the jury. It was a case where the judge sat as trier of the facts, and, the note having been given to an insurance company for a policy, and six months being the usual term of credit,

⁹⁶ Mosier v. St., 14 Ind. 261.

⁹⁸ Kincannon v. Carroll, 9 Yerg.

⁹⁷ Coolbroth v. Purinton, 29 Me. (Tenn.) 11.

⁹⁹ Langdon v. Goole, 3 Lev. 21.

it was ruled that, if there be nothing in the note to indicate a different time, the law would regard it as payable six months after date. The rule applied was that the ambiguity was patent, and hence not explainable by parol testimony; but that the actual intention of the parties might be inferred from the paper itself, in the light of the circumstances in which it was given.¹

§ 1093. [Continued.] Cases where the meaning has been submitted to the Jury.—In an early case in Mississippi the declaration in an action of *assumpsit* described the note sued on as payable twenty-four months after date; but the note itself, when offered in evidence, appeared to read “twenty-four —— after date.” It was held that the note was admissible in evidence without parol explanation, the *jury* being the judges of the fact of the time of payment intended to be stipulated by the parties to the instrument.² So, in an early case in New York the instrument sued on read: “Six months after date, I promise to pay to the order of Phillip Brotherton eight——, for value received,” etc., and, after it had been transferred, the words “hundred dollars” were inserted in the blank without obtaining the indorser’s assent, and parol evidence was given to show that it was intended that the amount of the note should be for eight hundred dollars, and that the words “hundred dollars” were omitted by mistake. It was held that the presiding judge properly left it to the jury to say whether it was the intention of the parties to give and receive a note for eight hundred dollars.³

§ 1094. [Continued.] Blanks in the Descriptive Calls of a Deed.—The meaning of a clerical imperfection in the descriptive calls of a deed, as where a word is accidentally omitted, may be submitted to a jury as a question of fact. It was so held where the word “white,” with a blank following it, was the call for a certain corner, and evidence was given to show that a white oak tree stood nearly in the course indicated in the deed; in which case it was held proper to leave it to the jury to say whether the white oak tree was the corner intended.⁴ This seems to be no more than an application

¹ Nichols v. Frothingham, 45 Me. 220.

² Conner v. Routh, 7 How. (Miss.) 176. In Georgia parol testimony was held competent to fix the actual date of maturity of a note where an uncertain date was

stated. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911.

³ Boyd v. Brotherton, 10 Wend. (N. Y.) 93.

⁴ Dobson v. Finley, 8 Jones L. (N. C.) 495, 499.

of the rule that, where the description in a deed is indefinite and doubtful, and susceptible of more than one application, thus constituting what is known as a latent ambiguity,—the court, to remove such ambiguity, may resort to extrinsic evidence, and thus restrain, confine and apply the description to a single object. In such a case it is said that, “if the court cannot, by a fair and legitimate construction or use of either description, or by all united, locate with sufficient certainty the land conveyed in the several deeds, then the court will resort to extrinsic or parol testimony, and to the aid of a jury, to ascertain the true intent of the parties, and to locate the lands.”⁵

§ 1095. **Whether Instrument Sealed or Unsealed.**—Whether an instrument is sealed or not is a question of law for the court;⁶ but whether the seal is that of a particular party,—as for instance a corporation,—must, in case of dispute, be submitted to the jury.⁷ So, where the issue is presented whether an instrument has been *altered* or not, and if so, when and by whom, by the addition of a seal, this may well be submitted to a jury.⁸

§ 1096. **Validity of Written Instruments.**—Enlarging the same view, where all the evidence concerning the *assignment* of a patent-right was in writing and uncontradicted, it was held the duty of the court to determine the validity of such an assignment, and error to submit the question to the jury.⁹ But where the validity of the instrument depends upon an *extrinsic fact* which is doubtful or disputed,—as whether the obligee was so *intoxicated* at the time of making it, as to be entitled to *rescind* it after becoming sober,—this must, of course, be submitted to the jury.¹⁰ So, it has been held

⁵ Bell v. Woodward, 46 N. H. 315, 332. A condition precedent to such testimony is, that the intent appeared from the writing to be complete and there was some omission of expression—not that it was postponed to be expressed. Thus in a lease where there was a blank for a lot number, parol testimony was allowed because it was “perfectly clear from the lease, considered within itself, that certain particular premises had been selected by the parties.” Marske v. Willard, 169 Ill. 276, 48 N. E. 290.

⁶ Schwarz v. Herrenkind, 26 Ill. 208; Baird v. Reynolds, 99 N. C. 469, 6 S. E. 377; Langsley v. Owens, 52 Fla. 302, 42 South. 457; Phillip v. Stearns, 20 S. D. 220, 105 N. W. 467; Brown v. Com. F. Ins. Co., 21 App. D. C. 325.

⁷ Crossman v. Hilltown Turnpike Co., 3 Grant Cas. (Pa.) 225.

⁸ Schwarz v. Herrenkind, *supra*.

⁹ Snyder v. Kurtz, 61 Iowa, 593, 16 N. W. 722.

¹⁰ Cummings v. Henery, 10 Ind. 109; Reynolds v. Dechaums, 24

that, whether a contract made on *Sunday* was a work of *necessity* or *charity*, within the meaning of a statute, is a question of fact for a jury.¹¹

§ 1097. **Whether a Contract is against Public Policy.**—But where the true meaning of a contract is thus ascertained, the question whether or not it is against public policy, is a question for the court, which it is error to submit to the jury.¹² The reason is that, otherwise there would be no settled rule by which the validity of contracts could be determined, and they would be determined, not according to settled principles of law, but according to the uncertain and fluctuating conceptions of juries as to the proper standard of morality and private and public rights.

§ 1098. **Inferences from Writings put in Evidence to show Extrinsic Facts.**—Where a writing thus put in evidence is not a dispositive instrument, but is merely offered for the purpose showing an *extrinsic fact*, it will be for the jury to say what inference of fact is to be drawn from it.¹³ The reason is that the question which arises in such a case is not the proper interpretation of a writing which disposes of the rights of the parties, but what effect the writing shall have as evidence of a collateral fact,—as for instance, where the question under inquiry is whether payment of an obligation has been made, and a writing (not a receipt) is introduced as evidence, tending to show that payment had been made.¹⁴ “The most authentic documents,” said Scott, J., “when offered for such a purpose, become no more than mere letters or a written correspondence, which, when offered in evidence to prove a fact, are always to be interpreted by the jury.”¹⁵ It is added that “when documents are

Tex. 174; *Hanna v. Phillips*, 1 Grant Cas. (Pa.) 253.

¹¹ *Hooper v. Edwards*, 18 Ala. 280.

¹² *Tallis v. Tallis*, 1 El. & Bl. 391; 22 L. J. (Q. B.) 185; 18 Eng. L. Eq. 151; *Pierce v. Randolph*, 12 Tex. 290, 295, where the question is reasoned at considerable length by Hemphill, C. J. If it is partly in writing, the remainder may be shown by parol for the purpose of proving the entire contract void. *McConnell v. Camers-McConnell Co.*, 152 Fed. 321, 81 C. C. A. 429.

¹³ *Primm v. Haren*, 27 Mo. 205, 211; *Wilson v. Board of Education*, 63 Mo. 137, 142; *McNichol v. Pacific Ex. Co.*, 12 Mo. App. 401, 407; *Reynolds v. Richards*, 14 Pa. St. 205; *McKean v. Wagenblast*, 2 Grant Cas. (Pa.) 462, 466; *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15.

¹⁴ *Reynolds v. Richards*, 14 Pa. St. 205.

¹⁵ *Primm v. Haren*, 27 Mo. 205, 211.

offered for such a purpose, they, like written correspondence, may be interpreted by extrinsic evidence.¹⁶ Accordingly, where the effect of a written instrument, collaterally introduced as evidence, depends not merely upon the construction and meaning of the instrument, but upon extrinsic evidence and circumstances, the inferences of fact to be drawn from it must be left to the jury.¹⁷

¹⁶ *Primm v. Haren*, *supra*.

¹⁷ *Barreda v. Silsbee*, 21 How. (U. S.) 147, 168.

CHAPTER XXXIV.

VERBAL SPEECH: ORAL CONTRACTS.

SECTION

1105. Meaning of the Speakers a Question for the Jury.

1106. Meaning Ascertained, Court to declare the Legal Effect.

1107. [Continued.] Where there is Doubt as to the Meaning of the Language Used.

1108. Rule Restated as to Parol Contracts.

1109. Illustrations of the Foregoing.

§ 1105. Meaning of the Speakers a Question for the Jury.—

Where there is a controversy as to what the parties to a conversation intended, the question is a question of fact for the jury.¹ The rule has been stated, with some variation, as follows: "The interpretation of written contracts is for the court; but where the matter rests in words, and the intention of the parties is to be ascertained from what they have said and done, it is a question for the jury."² "When the words are written, the general rule is that the court shall interpret them; but when they are merely spoken, the sense and meaning intended are for the jury."³ "The rule is undoubted that the meaning of words used in a conversation, and what the parties intended to express by them, is exclusively for the jury to determine."⁴ "It often happens, in conversation and in parol contracts, that the meaning of the parties may be understood, and is in fact intended to be, very different from the literal import of the words employed.

¹ Deming v. Foster, 42 N. H. 165; Murphy v. Bedford, 18 Mo. App. 279. Where terms are used having no accepted legal signification the jury may say in what sense they were used. Becker v. Holm, 89 Wis. 86, 61 N. W. 307.

² Halbert v. Halbert, 21 Mo. 277, 284; Festerman v. Parker, 10 Ired. L. 474; Fowle v. Bigelow, 10 Mass. 379. This seems to be stated so broadly as to be misleading, for many courts go upon the principle that the construction of any con-

tract, verbal or written, is for the court, where its form of expression is undisputed, if the words thereof are plain and unambiguous. Douglas v. Paine, 141 Mich. 485, 104 N. W. 781; Young v. Van Natta, 113 Mo. App. 550, 88 S. W. 123; R. T. Wilson & Co. v. Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250.

³ Warnick v. Grosholz, 3 Grant Cas. (Pa.) 235, per Woodward, J.

⁴ Brubaker v. Okeson, 36 Pa. St. 519, per Strong, J.

What may have been said before or after, the use of figurative expressions, emphasis upon particular words or sentences, reference to other matters, not fully expressed, but well understood by all in hearing, and many other circumstances, are material elements, and often have a controlling influence, in ascertaining the intention of those whose language is reported. Important contracts are made verbally, in terms not well suited to express the design of the parties, if they were used in a written instrument, but are understood by them and others with the utmost precision. Actions of slander are maintained upon words, which, taken literally, indicate no unworthy motive or conduct. In cases, where such evidence is adduced in support of the affirmative or negative of any proposition presented to a jury, it is their province to determine its meaning. To find what the language was, is nothing more than to find the evidence, which they adjudge to be true; the result of that as a fact, it is their duty to find, and the court cannot direct what it shall be; and if the jury omit to find the fact which is involved in the issue, the court have no power to infer it.”⁵

§ 1106. **Meaning ascertained, Court to declare the Legal Effect.**—Where the sense in which the parties understood the language is thus ascertained by the jury, it is for the court to declare its legal effect.⁶ In one view, when a contract is proved by parol evidence, and its terms, as thus established, are distinct and explicit, it is the duty of the court to construe it, and not to submit its meaning to the jury.⁷ The rule, as stated by Professor Parsons and judicially approved, is this: “What a contract means, is a question of law. It is the court therefore that determines the construction of a contract. They do not state the rules or principles of law by which the jury are to be bound in construing the language which the parties

⁵ *Copeland v. Hall*, 29 Me. 93, 95, per Tenney, J.

⁶ *Warnick v. Grosholz*, 3 Grant Cas. (Pa.) 235; *Brubaker v. Oke-son*, 36 Pa. St. 519; *Folsom v. Plumer*, 43 N. H. 469, 472; *Codding v. Wood*, 112 Pa. St. 371, 377; *Dem-ing v. Foster*, 42 N. H. 165; *Islay v. Stewart*, 4 Dev. & Batt. (N. C.) 160; *Belt v. Goode*, 31 Mo. 128; *Judge v. Leclair*, 31 Mo. 127; *De Ridder v. McKnight*, 13 Johns. (N.

Y.) 294; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Short v. Wood-ward*, 13 Gray (Mass.), 86; *Fester-man v. Parker*, 10 Ired. L. (N. C.) 477; *Rhodes v. Chesson*, *Busbee* (N. C.), 336.

⁷ *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621. See also *Ran-ney v. Higby*, 5 Wis. 62; *Mowry v. Wood*, 12 Wis. 413; *Martineau v. Steele*, 14 Wis. 272.

have used, and then direct the jury to apply them at their discretion, to the question of construction; nor do they refer to these rules unless they think proper to do so, for the purpose of illustrating and explaining their own decision. But they give to the jury, as matter of law, what the legal construction of the contract is, and this the jury are bound, absolutely, to take." "Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error, but a misconstruction by the jury cannot be set right at all effectually."⁸ Thus, where, in an action upon an open account, the answer alleged that the account had been settled, and that the plaintiff had executed his promissory note to the defendant for a balance found due on settlement, it was error to instruct the jury to determine the legal effect of the note, that being a question of law for the court.⁹

§ 1107. [Continued.] Where there is Doubt as to the Meaning of Language Used.—It has been ruled that, where a doubt arises upon the meaning, force and construction of language used in oral speech, the language must be interpreted by the court; but where the doubt arises upon the question whether the words used are to be deemed the words of the speaker in his own behalf, or words which the speaker is using as an agent in behalf of his principal, this question of fact depends not so much on the meaning of the words, as on a just consideration of all the facts and circumstances in evidence, bearing upon the question of the agency and the intention and understanding of the parties as to what took place between them. and that the meaning of the language in such a case is for the jury.¹⁰

§ 1108. Rule restated as to Parol Contracts.—Where the terms of a contract are to be gathered from the conversations and conduct of the parties, it is for the jury to determine what their understanding was.¹¹ The rule is said to be that the jury have the right to determine the existence of a parol contract, its extent and limitations.

⁸ 2 Pars. Cont. (6th ed.) 492; Id. (7th ed.) 624. Quoted with approval in *Estes v. Boothe*, 20 Ark. 523, 590.

⁹ *Terry v. Shively*, 64 Ind. 106. See *Alderton v. Wright*, 81 Mich. 294, 45 N. W. 968, where court held that under defendant's version of

an oral contract plaintiff was entitled to a verdict.

¹⁰ *Whitney v. Swett*, 22 N. H. 10, 14; *Willard v. A. Siegel Gas Fixture Co.*, 47 Mo. App. 1.

¹¹ *Tallon v. Grand Portage Copper Mining Co.*, 55 Mich. 147, 20 N. W. 878; *Sines v. Superintendents*

they are to find not only what language was used, but its purport and meaning. In cases of written contracts, it is the duty of the court to define the meaning of the language used in them, but in verbal contracts such duty is confined to the jury. They are not barely to ascertain the words and forms of expression, but to inter-

of Poor, 55 Mich. 383, 21 N. W. 428; *Kingsbury v. Buchanan*, 11 Iowa, 388, 398; *Dennis v. Crooks*, 23 Mo. App. 532; *Carl v. Knott*, 16 Iowa, 379, 384; *Codding v. Wood*, 112 Pa. St. 371, 377; *Houghton v. Houghton*, 37 Me. 72; *Copeland v. Hall*, 29 Me. 93; *Tobin v. Gregg*, 34 Pa. St. 446. See also *Strong v. Saunders*, 15 Mich. 339; *Maas v. White*, 37 Mich. 126; *Estate of Young*, 39 Mich. 429; *Engle v. Campbell*, 42 Mich. 565; *Colgan v. Aymar*, *Lalor Supp. (N. Y.)* 27; *Rhea v. Riner*, 21 Ill. 526; *Bartlett v. Tarbell*, 12 Allen (Mass.), 123. As to when the plaintiff is to be nonsuited under the operation of this rule, there is an interesting case in the New York Court of Common Pleas, where the judges were divided in opinion. It was laid down by the majority that it is not a sound proposition that, upon proof of a contract, whether in writing or by parol, the terms of which are not varied by extrinsic evidence, it becomes necessary to submit the contract to the jury for interpretation as to the intention of the parties. It was held that if there is no dispute about the terms of the contract, it is the duty of the court to pass upon its validity and effect. Whether, under such proof, the plaintiff has, or has not made out a cause of action, is for the court to decide; and if the uncontradicted evidence of the terms of the contract is not sufficient to show the plaintiff's right to recover, the case cannot be strengthened by

submitting the evidence to the jury to ascertain the intentions of the parties making it. But the court were also of opinion that, where the evidence leaves the terms of the contract or any other fact in doubt, then the facts may be found by the jury; but the court did not understand this rule to extend to a case where the construction of a contract is difficult, if there is no conflict in the evidence. From this conclusion Charles F. Daly, J., dissented. Among other things he said: "But I think the court below erred in granting him a nonsuit. Before a nonsuit can be directed, there must be no doubt in respect to what is proved by the evidence. The evidence must not only be taken to be true, but it must be so clear and conclusive, in respect to the facts upon which the conclusions of law are based, that it is in the power of the court to draw every inference which a jury might draw. *Smyth v. Craig*, 3 Watts & Sér. (Pa.) 18. If it is not of that character, the case must be submitted to the jury, under proper instructions from the court in respect to the law. This is especially so where no written agreement or contract is entered into, and a question arises as to the intent of the parties, to be gathered from their acts and declarations. Where the intent follows as the legal and logical conclusion from their acts, it may be passed upon by the court; but where, upon the evidence, it is so uncertain or

pret their sense and meaning.¹² This question, it has been well said, "is *single*, and cannot be separated so as to refer *one part* to the jury, and *another part* to the judge; but in its entirety the question is one of fact."¹³ It is scarcely necessary to add that this question is to be determined from the evidence of what the parties said and did, and not from the *understanding* of *one* of the parties of what he said or did.¹⁴

§ 1109. **Illustrations of the Foregoing.**—Applying this rule, it has been held that it is not for the trial court to rule, as matter of law, that certain words uttered in conversation amounted to an *estoppel in pais*.¹⁵ So, where the action was *assumpsit* to recover the price of a cotton gin, and the defense was the *statute of frauds*, and there was neither the payment of earnest money, nor an acceptance of the article, nor a written contract,—the court held that the plaintiffs could not recover, unless work and labor were to be bestowed on the article which was the subject of the contract; and, as the evidence on this point was very inconclusive, a nonsuit was set aside, in order that a jury might answer, on another trial, whether the parties understood that the contract was for the sale of a gin merely, or for the sale of a gin on which work and labor were to be bestowed before delivery.¹⁶ In an action by an executrix to recover for *professional service* rendered by her testator, as a general

doubtful as to justify a jury in finding either way, then it is not in the province of the court to pass upon the question, but the case must be submitted to the jury." Chapin v. Potter, 1 Hilt. (N. Y.) 366, 370. State of evidence on which it was held error to submit to the jury, as a question of fact, whether there was an *agreement to discharge an indorser*. East River Bank v. Kennedy, 9 Bosw. (N. Y.) 543.

¹² Herbert v. Ford, 33 Me. 90; Copeland v. Hall, 29 Me. 93. If its terms are in dispute there is clearly a question of fact involved. Bloom v. P. Cox Shoe Mfg. Co., 83 Hun, 611, 31 N. Y. S. 517; Watson v. Stromberg, 46 Mo. App. 630. And so when the terms howsoever

shown, are not clear. Gassett v. Glazier, 165 Mass. 473, 43 N. E. 193. But, if the only thing involved is what were the terms and not what they mean, whatever they were, the jury is to be governed by the instructions of the court as to their meaning. Pendleton v. Jones, 82 N. C. 249; Amadall v. Cement & L. Co., 165 Ind. 110, 74 N. E. 893; Folsom v. Plumer, 43 N. H. 469.

¹³ McKenzle v. Sykes, 47 Mich. 294, 296, 11 N. W. 164.

¹⁴ Farley v. Pettes, 5 Mo. App. 262.

¹⁵ Brubaker v. Okeson, 36 Pa. St. 519.

¹⁶ Winship v. Buzzard, 9 Rich. L. (S. C.) 103.

attorney of an estate of which the defendants were the representatives, after the testimony of several witnesses had been received, going to establish that the plaintiff's testator had for several years acted at the instance of the defendants as attorney of the estate, and placing estimates upon those services, it was testified by a witness for the defendants, that the plaintiff had admitted that her testator was employed to collect money due to the estate represented by the defendants on a considerable number of notes which were placed in his hands, and that one of the defendants agreed to give him ten per cent. on all moneys collected. In this state of case, it was held that it should have been left to the jury to determine whether the agreement did not embrace all the notes which the plaintiff's testator had in his possession belonging to the estate, whether collected by means of suit or otherwise.¹⁷ So, in *replevin for a horse* which had been loaned by the plaintiff to the defendant, to be returned at a subsequent date, the controversy turned upon a conversation between the parties, in which the plaintiff had said to the defendant: "Well, sell him and pay me;" or, "pay me and you can sell the horse;" or, "you can sell the horse, pay me, and I guess there will be no trouble." The court instructed the jury that it was for them to determine what language and words were used by the plaintiff; that the words, "pay me and sell the horse," would not imply an authority to sell the horse; but if the words were, "sell the horse and pay me," that they would authorize the defendant to sell the horse; that if the words were, "sell the horse, and there will be no trouble," they amounted to an authority to sell the horse; and that the last clause, "and there will be no trouble," did not alter the sense and made no difference in the effect of the words. It was held that, in giving these instructions, the court erred; since the jury ought to have been allowed to find, not only what language was used, but also the meaning of the language, in view of all the circumstances of the case.¹⁸ In like manner, in an action of *assumpsit* on a promise to pay the bond of another, the following "point" was submitted to the trial court by the defendant: "That if the evidence in this case proves a promise, or has a tendency to prove a promise of any kind, it is a promise to pay both debts of \$400 each, secured by the two judgment bonds and the two judgments entered on the same in consideration of total forbearance; and, plaintiff's having issued execution on one of the judgments and sold all the real estate of Isaac E.

¹⁷ *Broward v. Doggett*, 2 Fla. 49.¹⁸ *Copeland v. Hall*, 29 Me. 93, 95.

Kemp, and purchased the same themselves, cannot recover upon such promise." The answer of the trial court was: "It is not for us to say that the evidence proves or has a tendency to prove a promise as stated on this point; whether it does so is for the jury to say. If it does, however, the law is correctly stated in the point presented." In this the Supreme Court saw "no error, but only a careful demarcation of the line between the provinces of the judge and the jury."¹⁹ So, it has been held proper to submit to the jury the question whether the defendant has contracted as a *common carrier* or as a mere *hirer* for the particular job, after telling them that "a common carrier is one who holds himself forth to the public to carry for hire from place to place," and that, "though the number of instances employed in carrying may be evidence of the character of a common carrier, it is not the rule which constitutes it. The law has fixed no number of instances which shall stamp him with the character. If he holds himself forth to the public to carry for hire, he is a common carrier, as much in his first trip as in his second, third or fourth. Did the defendant undertake as a common carrier? * * * This you will decide on all the evidence. If satisfied the defendant was a common carrier, the next question to be determined by the jury is, whether the contract in this case was one of affreightment as a carrier, or whether the defendant merely chartered and hired his boat, his hands, and himself, to the plaintiffs, placing all in their control, they running the boat on their own account, and only paying him wages for the hire of the boat, himself and hands."²⁰

¹⁹ Kun's Executor v. Young, 34 Pa. St. 60.

²⁰ Fuller v. Bradley, 25 Pa. St. 120.

CHAPTER XXXV.

EXISTENCE AND TERMS OF EXPRESS CONTRACTS.

SECTION

- 1112. Existence of Contracts.
- 1113. Partly in Writing and Partly in Parol.
- 1114. Observations on the Rule that the Existence of a Contract is a Question of Fact.
- 1115. Illustrations.
- 1116. Mistakes in the Terms of a Contract.
- 1117. Illustration.
- 1118. Whether a Contract is Verbal or in Writing.
- 1119. Whether an obligation is Independent or Dependent.
- 1120. Contract Entire or Divisible.
- 1121. Original or Collateral.
- 1122. Quantum Meruit — Value of Work done or Materials Furnished.
- 1123. Collateral Purpose for which a Contract was made.
- 1124. Whether a bill of Sale was intended as a Mortgage.
- 1125. Penalty or Liquidated Damages.
- 1126. Gratification of a Contract.
- 1127. Whether there has been a Novation.
- 1128. Delivery of a Deed.
- 1129. Acceptance of a Deed by the Grantee.
- 1130. Date of the Delivery of a Deed or of the Taking Effect of a Contract.
- 1131. Whether Delivered as an Escrow.
- 1132. Existence of a Partnership.
- 1134. Genuineness of Signature.
- 1135. How Proved.
- 1136. Consideration of a Contract.
- 1137. Whether a Forbearance was the Acceptance of a Promise to pay the Debt of Another.
- 1138. Whether a Written Promise was Founded upon an Illegal Consideration.
- 1139. Whether the Contract is Real or Colorable to Cover up a Gambling Transaction.
- 1140. Whether a Market was "Manipulated" or Fictitious.
- 1141. Performance or Waiver of Performance.
- 1142. Place where a Contract is to be Performed.
- 1143. Whether or not a Contract is Usurious.
- 1144. Further of this Subject.

§ 1112. **Existence of Contracts.**—It will appear from the foregoing that, in every case where the existence of a contract is in issue,

whether it is sought to prove its existence by parol or by a writing, there will be a preliminary question of fact for the jury. If the contract is in writing, and is the instrument sued on, the signature thereto is *admitted*, unless it is denied on oath, under a statutory rule existing in several jurisdictions. In cases outside the operation of this rule, it is necessary to prove first the *execution* (which includes signature) and secondly, the *delivery* of the instrument,—both of which are questions of fact. If it is sought to prove the contract by parol, it is also for the jury, as already seen,¹ to ascertain what the *understanding* of the parties was. Where the execution and delivery of the writing are proved or admitted, then, upon principles already stated,² it is for the court to say, upon an inspection of the instrument, whether or not it constitutes a contract. Where an oral conversation is proved, it is for the jury to say in what sense the language was used and understood, and, this being ascertained, it is for the court to decide,—generally upon hypothetical instructions to the jury,—whether or not it constitutes a contract.³ These questions, in their general bearings, will be considered in this chapter. In relation to contracts of *sale* ⁴ and to certain other contracts,⁵ they will be reserved for separate treatment.

§ 1113. *Partly in Writing and Partly in Parol.*—In like manner where an action is brought upon a contract which is partly oral, and conflicting evidence is introduced in regard to the conversations which are alleged to have resulted in a completed contract, the questions whether a contract was in fact made and, if so, what were its terms are questions for the jury;⁶ and in such a case the legal effect of the contract may properly be submitted to the jury as a mixed question of law and fact,—they finding the facts, and the court directing them as to the legal results which follow.⁷ For perhaps

¹ Ante, §§ 1105, 1108; *Waltheim v. Artz*, 70 Iowa, 609, 31 N. W. 953.

² Ante, §§ 1065, et seq.

³ Ante, § 1106; *Folsom v. Cook*, 115 Pa. 539, 9 Atl. 93.

⁴ Post, §§ 1161, et seq.

⁵ Post, §§ 1195, 1215, 1280, et passim; *Gardner v. Crenshaw*, 122 Mo. 59, 27 S. W. 612; *Mygatt v. Tarbell*, 85 Wis. 457, 55 N. W. 1031.

⁶ *Bolckow v. Seymour*, 17 C. B. (N. S.) 107; *Columbia etc. Co. v. Douglas*, 84 Md. 44, 34 Atl. 1118.

⁷ Ante, § 1086; *Farwell v. Tillson*, 76 Me. 227; *Homans v. Lambard*, 21 Me. 308; *Smith v. Faulkner*, 12 Gray (Mass.), 256; *Haney v. Caldwell*, 35 Ark. 156, 164. In a recent case in Illinois, where the question touched the peculiar jurisdiction of the Supreme Court in cases which have reached it through the intermediate appellate court, it was ruled that where the *terms* of the contract are specifically determined, then the meaning or legal effect of

stronger reasons, where the contract rests partly in *correspondence*, and partly in oral communications, it is held that, whether or not there is a contract, is a question for the jury.⁸

§ 1114. **Observations on the Rule that the existence of a contract is a Question of Fact.**—Loose expressions are frequently found in judicial decisions to the effect that, whether a contract exists is always a question for the jury. It is obvious that it will or will not be a question for the jury, according to circumstances. Where the question rests wholly in parol evidence, or, as in the cases above stated, partly in writing and partly in parol, and there is the further condition that the evidence is conflicting, it will be a question for the jury. So, where the question depends entirely upon parol evidence, adduced by the party sustaining the burden of proof, and there is no conflict in the evidence, it may still be a question for the jury, since it will be for them to say whether they will believe the witnesses. So, where the question depends upon a written instrument, the execution of which is denied, it will be a question for the jury whether the instrument was executed by the party sought to be charged as obligee therein.⁹ But where the execution of the instrument which is offered as evidence of the contract, is either proved or admitted, then it will be the duty of the court to determine from an inspection of it, and to inform the jury whether it is or is not a contract,—whether it is or is not that which fixes the liability

the contract presents a pure question of law, and the court alone is permitted to construe it. But where not only the legal effect of the agreement upon the controversy in hand, is to be determined, but also the terms of the agreement itself are to be ascertained from extrinsic proofs, there is presented a mixed question of law and fact, to be determined by the jury, under proper instructions from the court. It is not necessarily true, that where, in the attempt to establish what were the terms of an agreement by extrinsic proofs, there is no conflict in the testimony, the question becomes purely one of law. Evidence tending to establish a contract may be all on one side, and

yet may be of such a character as to leave the question as to whether a legal contract was in fact made or not, in extreme doubt; and in such case the question as to the making of the contract, and the purport of its terms, together with its legal effect, is a mixed question of law and fact. *St. Louis National Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514; *Zimmerman v. Gerardi*, 74 Fed. 686, 21 C. C. A. 1.

⁸ *Goddard v. Foster*, 17 Wall. (U. S.) 123, 142. Where one of the letters is lost and many of the details are left to inference, it becomes properly a question for the jury. *Holm v. Colman*, 89 Wis. 233, 61 N. W. 767.

⁹ *May v. Burk*, 80 Mo. 675, 680.

sought to be fastened upon the obligee therein.¹⁰ This is no doubt all that is meant by the general expressions found in judicial opinions that the jury are to find whether the contract was in fact made out, while the interpretation of it is for the court.¹¹ So, where the question is not whether the instrument has been executed at all, but whether, in a case requiring technical formality, it has been properly executed, the decision will be pronounced by the judge, upon an inspection of the instrument. Thus, the question whether a deed or mortgage has been properly executed and acknowledged, is a question of law, to be passed upon by the court, and it is error to leave such a question to the jury.¹² So, where a *proposal* for a contract is in writing, it is for the court to construe it; if the *acceptance* which is alleged is verbal, it is a question for the jury whether the offer has been accepted or not, but they cannot decide that it was without evidence.¹³

§ 1115. Illustrations.—This is well illustrated in a case in Texas, where an action was brought on the following instrument of writing, signed by the defendant: "There is a balance due the bearer, \$475.00. C. R. Hopson to H. L. Kinney, August 15, 1852." It was held that this writing imported that the sum mentioned therein was due from the maker to the bearer, and that the law would imply a promise by him to pay such sum. But if the instrument was *addressed to a third person*, it was to be regarded merely as a memorandum of a fact, or as conveying information of a fact, without legal signifi-

¹⁰ Eyser v. Weissgerber, 2 Iowa, 463, 479; Scanlan v. Hodges, 52 Fed. 354, 3 C. C. A. 113.

¹¹ Stokes v. Burrell, 3 Grant Cases (Pa.), 241. That the jury are to find whether the contract was in fact made, but the intent and the obligations of it they must find under the directions of the court, and any mistake in such instructions will be reviewed on error, see Ill. Cent. R. Co. v. Cassell, 17 Ill. 389, 394. See also Cunningham v. Cambridge Savings Bank, 138 Mass. 480. Thus it has been held that it was for the jury to say whether certain services were intended as a gratuity. Lillard v. Wilson, 178 Mo. 145, 77 S. W. 74.

¹² Bullock v. Narrott, 49 Ill. 65.

¹³ Wagner v. Egleston, 49 Mich. 218, 13 N. W. 522. In a case in Tennessee the evidence tended to show that a parol contract had been agreed upon in the first instance, and afterwards a written contract had been signed, and it was held that the plaintiff had the right to have the question whether the written contract embraced all the terms of the previous parol agreement, submitted to the jury. Cobb v. Wallace, 5 Coldw. (Tenn.) 539. But this was probably a misapplication of the rule; for the rule which is generally applied in such cases is that the subsequent writing merges the preceding parol negotiations.

cance until explained, and was not, of itself, a contract for the payment of money; and it was for the jury to say what the fact was, of which the writing was a memorandum, or of which the writing was intended to convey information, or of which it was an acknowledgment, as the case might be. It was accordingly held that the court erred in refusing to instruct the jury as requested by the defendant, "that if they believed, from the evidence, that the plaintiff was employed by H. L. Kinney, or his agent, to work for him, and the writing sued on was a mere memorandum, informing Kinney of the amount due by him on such hiring, then they should find for the defendant."¹⁴ A. and B. enter into a verbal contract by which A. undertakes to sell and deliver to B., at a certain time and place, fifty bales of cotton, for which B. is to pay A. at the rate of ten cents a pound. About the time fixed for the performance of the contract, the parties agree that the time for its performance shall be postponed to another named day, and that it shall be reduced to writing,—which, however, is never done. On the day last appointed, B. and the agent of A. meet at the place designated for the delivery of the goods, and B. takes the agent of A. aside and says to him that A. ought to release B. from the contract. But the agent of A. proceeds nevertheless to tender to B. the cotton, which B. refuses to accept and pay for. Here, there is question of fact for a jury, whether the parties intended by the second agreement that the original contract should be *no longer binding unless reduced to writing*, or whether they intended merely that it should be reduced to writing, with the view of having more certain evidence of what the contract was.¹⁵ It has been held a question of fact, to be determined from all the evidence bearing upon the case and the conduct of the parties, whether a *subscription to the capital stock* of a railway company, was made under the provision of the charter of the company, granted by a special act of the legislature, or under a provision of the general law of the State relating to railway companies.¹⁶ In an action by a railway company upon a contract of *subscription to its capital stock*, it appeared that the contract provided that the money so subscribed should be expended in the construction of the road from St. Johnsbury to "Derby Line," and also that it should not be binding until the whole road from St. Johnsbury to Derby

¹⁴ Hopson v. Brunwankel, 24 Tex. 607.

¹⁶ Mastin v. Pacific R. Co., 83 Mo. 634.

¹⁵ Adams v. Davis, 16 Ala. 748.

Line should be put under contract for grading. The defendant having given evidence tending to show that the words "Derby Line" meant, in common usage, a village of that name in the town of Derby, it was held that it became a question of fact, for the jury to decide, whether the use of this term in the contract meant the north line of the town (or township) of Derby, or the village named Derby Line. The court said: "The more full and perfect the proof, the greater the probability of satisfying the jury and obtaining a verdict; but no amount of testimony on a point of this character could have the effect to change this question of fact to one of law, so as to warrant the court in taking it from the jury and deciding it as a matter of law. Indeed, all the evidence as to the general understanding of the meaning of this expression in the vicinity, has no direct application on the real question in issue. It bears only on the probabilities of the case; and if it had been proved, beyond all question, that, prior to the making of this contract, this expression had never been used with reference to the town line, it would not have been conclusive. The expression being a proper one to use in that connection, the parties may have used it in that sense in this contract for the first time. The question would still be open for the jury to say in what sense the parties *in fact* used it."¹⁷ It has been held, in the case of a written contract which was the subject of parol explanation, that, whether it was an *absolute purchase* of a half interest in a mortgage, or an *assignment pro tanto* of the legal right, in consideration of a part payment, such as would toll the statute of limitations, should be left to the jury upon all the evidence.¹⁸

§ 1116. **Mistakes in the terms of a Contract.**—Whether a clause in a written contract was inserted by a mutual mistake of the parties, is a question which cannot generally arise in an action at law; since the reformation of mistakes in contracts is one of the peculiar heads of equity jurisdiction.¹⁹ But in cases where public policy is con-

¹⁷ Connecticut etc. R. Co. v. Baxter, 32 Vt. 805, 812.

¹⁸ Blair v. Lynch, 105 N. Y. 636, 11 N. E. 947; reversing 35 Hun, 663.

¹⁹ Gray v. Hornbeck, 31 Mo. 400. It was said in a case in New York that, where an issue is raised by an answer in *ejectment* upon the question whether a deed should be *reformed* (no issues having been set-

tled with direction to try by jury), it should either be tried by the court prior to the trial of the principal issue, or reserved from the jury on submission of the jury issues; and if in such a case a trial occurs upon all the issues made, it is not error for the judge to refuse to submit the question of the reformation of the deed to the jury, under the

cerned in relieving against the hard features of certain classes of contracts, the question goes to the jury. This, it is assumed, is the case in regard to onerous provisions in contracts of *insurance*, and it has been held to be the rule in the case of clauses in contracts made with *public carriers* which limit the liability of the latter.²⁰

§ 1117. [Illustration.]—Thus, in an action by a shipper against a carrier for damages to goods in transit, it has been held competent to submit to the decision of the jury the question whether a clause in the bill of lading, limiting the responsibility of the carrier was not inserted by a mistake,—the court no doubt meaning mutual mistake. The court below submitted the question to the jury upon an instruction which told them that the burden of showing the mistake was on the plaintiffs; that they must satisfy the jury of the mistake; and instructing them as to the difference between the liability of the defendant in case they should find that no mistake had been made in the bill of lading, and in case they should find that the words were inserted through mistake. This judgment was affirmed, the Supreme Court, in an opinion given by Jeremiah Black, C. J., said among other things: “It is of the utmost importance to the commerce of the country that carriers should be held to strict accountability. Gross wrongs would be practiced every day if the laws on this subject were relaxed. Slight evidence ought to be sufficient to set aside any special provision in the bill of lading, which is intended to relieve the carrier from his ordinary legal responsibility. And this not only because public policy requires that carriers should have the strongest interest in the performance of their duties, but also on account of the manner in which such stipulations are generally made. Goods are commonly sent by the owner to the carrier’s place of busi-

evidence upon that issue. *Olendorf v. Cook*, 1 Lans. (N. Y.) 37; *Cook v. Sterling Elec. Co.*, 150 Fed. 766, 80 C. C. A. 502.

²⁰ Post, § 1863. So ruled as to a bill of lading, the judge deeming it was a document calculated to mislead men of ordinary intelligence. *Sellers v. Atlantic C. L. R. Co.*, 77 S. C. 361, 57 S. E. 1102. See also *Cincinnati N. O. & T. R. Co. v. Hudson*, 29 Ky. Law Rep. 721, 96 S. W. 434. In a condemnation proceeding this

was allowed, on the theory that to take advantage of a certain error would be so unconscionable as to amount to a legal fraud. *Getzen-daner v. Trinity & B. V. Ry.* (Tex. Civ. App.), 102 S. W. 161. Also it was allowed, in a case where possession was taken under an oral lease, that an omission to state one of the reservations in the written lease could be shown. *Cage v. Patton*, 41 Tex. Civ. App. 248, 91 S. W. 311.

ness, where they are received, and the bill of lading made out by the carrier or his clerk. It is often not seen by the owner until it is too late to insist on a change in the terms. It can hardly be called a contract, for a contract requires the assent of both parties. The better rule perhaps would be, to treat all provisions of this kind as void, unless inserted by the express consent of the employer.”²¹

§ 1118. **Whether a contract was verbal or in Writing.**—It has been held that, where the whole evidence in a case presents a disputed question of fact, whether the contract by which the rights of the parties are governed, was in parol or in writing, evidence may be given by them, both as to the precise question, and as to the verbal declarations and acts of the parties, which are claimed to have constituted the alleged parol contract, and also as to the contents of the alleged written instrument; and that it may then be left to the jury to say whether the contract was in writing or in parol, with instructions that, if they first find that it was reduced to writing, they must afterward, in determining the terms of the contract, consider only that part of the evidence which tends to show the contents of such writing.²²

§ 1119. **Whether an Obligation is Independent or Dependent.**—It has been held, in an action to enforce the specific performance of a contract to convey land, that the obligation upon which the action is predicated may be shown by parol evidence to be dependent upon the payment of a note given for the purchase-money, although the bond makes no reference to the note, nor the note to the bond. But the facts which show the interdependency of the two obligations must be both averred and proved; and it will be a question for the jury whether they were dependent, and the court ought not to assume that they were so as a fact.²³

§ 1120. **Contract Entire or Divisible.**—Whether a contract by which an attorney engaged to prosecute a petition for divorce was entire, and whether he was to be paid for his services before or after the contract was fully performed, have been held, under circumstances, to be questions of fact.²⁴

²¹ Choteaux v. Leech, 18 Pa. St. 224, 232.

²² Jenness v. Berry, 17 N. H. 549. 555. It is also for the jury to say, this being disputed, whether a subsequent contract, either oral or written, supersedes a prior contract,

either oral or written. Union Cent. L. Ins. Co. v. Howell, 101 Mich. 332, 59 N. W. 599; Gallandett v. Kellogg, 133 N. Y. 671, 31 N. E. 337.

²³ Younger v. Welch, 22 Tex. 417, 425.

²⁴ Dodge v. Janvrin, 59 N. H. 16.

§ 1121. **Original or Collateral.**—If an undertaking to answer for the debt, miscarriage or default of another is not in writing, it is void under the *statute of frauds*, unless it assume the character of an original undertaking. Thus, if A. is unable to get credit from a merchant, and B. goes to the merchant and says, "Credit A. for what goods he wants, and I will pay for them, if A. does not," this is a collateral undertaking to answer for the default of A., and is void unless in writing. But if B. says to the merchant, "Sell and deliver to A. such and such goods, and charge the same to me, and I will pay for them," this is an original undertaking, and B. is answerable for it, although not in writing. Whether an agreement is original or collateral, also arises in respect of the *discharge of, sureties*. Thus, if A. is indebted on a promissory note which is past due, upon which the liability of B. as an indorser has become fixed, and C. says to the payee, "Extend the time of payment to A., and I will pay the note if A. does not," this undertaking is void under the statute of frauds, unless in writing, and does not operate to discharge the indorser, because it is not binding upon the maker; it leaves him at liberty to sue upon the note at any time. But if C. enters into an arrangement with the holder of the note to pay it, in consideration of his giving time to A., this engagement will be an original undertaking, and not within the statute of frauds, and the agreement of forbearance will furnish a good consideration for it; and therefore such an agreement for extension will prevent the holder from suing upon the note before the expiration of the time so agreed upon, and, if made without the consent of the indorser, will discharge him. In these and like cases, it may be a question whether the contract is original or collateral, and also whether the question is to be decided by the court or by the jury. Professor Parsons seems to have obscured the question, or rather straddled it, by stating: "Whether a contract is collateral or original may be a question of construction, and then it is for the court; but it is often regarded as a question of fact, and then it is for the jury."²⁵ Of course, if it is a question of construction, it is for the court, and if it is a question of fact, it is for the jury. In a case in Texas, although the promises were in writing, yet it was held, that the proper construction of the contract would be a question for the jury, unless the terms of the several promises in writing relied upon were such as to allow of a liability on the part of the defendants as either col-

lateral or original undertakings on their part, accordingly as the facts which attended and formed a part of the contract would show them to be the one or the other. The court reasoned that the written terms which were used, being in themselves doubtful, suggested that there might be something in the transaction which gave rise to them, which would explain and render clear their meaning, and thus afford light for the interpretation of the contract as it was really intended. In this view, parol evidence would be admissible to explain it, and of course this would carry the question of its meaning to the jury.²⁶ Another court has held that, where a written instrument is so ambiguous in its terms that it may be considered either as a *guaranty* or as a *direct undertaking*, according to the circumstances under which it was given, and the testimony as to those circumstances is conflicting, it is error to give instructions based upon the assumption that it was a direct undertaking; but the question whether it was a direct undertaking or a guaranty should be submitted to the jury under proper instructions.²⁷

§ 1122. *Quantum Meruit*—Value of Work done or Materials Furnished.—In an action for what is termed a *quantum meruit*, or *quantum valebat*, that is, for the reasonable value of work done or goods furnished by the plaintiff to the defendant, at the request of the latter, the question what is the *reasonable value* of the services or the goods, is, of course, a question for the jury.²⁸ In such a case the true question for the decision of the jury is, what was the *ordinary price* for such work and materials, charged by other persons in the same business. In such an action, it is therefore erroneous to charge the jury: "It is not your province to say how much profit ought to be charged by the plaintiffs." But the court should content itself with saying: "You are not to set yourselves up as judges of what locomotive engine builders ought to charge as profits, but

²⁶ *Hueske v. Broussard*, 55 Tex. 201. The engagement concerning which this was held was an indorsement on the back of a note of the words: "Accepted, payable ninety days from Jan. 13th, 1870, with interest at ten per cent. per annum." *Ibid.*; *Howard v. Atkins*, 167 Ind. 184, 78 N. E. 665.

²⁷ *Philibert v. Burch*, 4 Mo. App. 470.

²⁸ *Becker v. Hecker*, 9 Ind. 497; *St. Louis Steel R. Co. v. Kline-Drummond M. Co.*, 120 Mo. App. 438, 96 S. W. 1040; *Charles Holmes M. Co. v. Chalkley*, 143 N. C. 181, 55 S. E. 524; *Jenney Elec. Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

simply whether the charges in the plaintiff's bill are the usual charges in the trade."²⁹

§ 1123. Collateral Purpose for which a Contract was made.—

A branch of the doctrine that *purpose* and *intent* are questions of fact,³⁰ is found in a ruling to the effect that, while the interpretation of a deed of conveyance is a question for the court, yet the purpose for which it was given,—as in the case of an ordinary *quit-claim deed*,—may be a *question of fact* for the jury, in the determination of which, parol evidence, not contradicting or varying the terms of the deed, may be heard.³¹

²⁹ Baumgardner v. Burnham, 93 Pa. St. 88.

³⁰ Post, § 1333.

³¹ Huth v. Carondelet etc. Co., 56 Mo. 202. The rulings upon questions of this nature are generally in recognition of the principle stated, but its application seems to lie very largely in judicial discretion, as instances of rejection or acceptance of the proffered evidence show. Thus Browne v. Sherrill, 143 N. C. 381, 55 S. E. 799 (evidence to show profits on resale of land to go to vendor, allowed); Evans v. Freeman, 142 N. C. 61, 54 S. E. 847 (note to be paid out of proceeds of a certain article, evidence allowed); Mumford v. Tolman, 157 Ill. 258, 41 N. E. 617 (Semble, excluded); Stein v. Fogarty, 4 Idaho, 702, 43 Pac. 681 (note to be paid in labor, evidence excluded); Roe v. Bank, 167 Mo. 406, 67 S. W. 303 (note to be credited with any deposit by maker in payee bank, evidence received); Bennett v. Tillman, 18 Mont. 28, 44 Pac. 80 (note to be paid by account-counterclaim, evidence received); Lerch v. Times Co., 91 Iowa, 750, 60 N. W. 611 (written lease and agreement to put in steam heat, evidence rejected); Hawley D. D. Furnace Co. v. Hooper, 90 Md. 390, 45 Atl. 456 (guaranty in sale of furnace as to per cent of fuel saved, under-

standing as to how ascertained, evidence received); Patek v. Waples, 114 Mich. 669, 72 N. W. 995 (written stipulation for discontinuance without costs, evidence of oral agreement to pay counsel fees, received); Hand v. Drug Co., 63 Minn. 539, 65 N. W. 1081 (contract for credit on certain terms, oral agreement for similar credits on other terms, evidence received); Tuttle v. Burgett, 53 Ohio St. 498, 42 N. E. 427 (contract to furnish support, evidence of oral agreement that promisee should live at a certain place, evidence excluded); Lewis v. Lumley, 97 Tenn. 197, 36 S. W. 87 (deed, oral agreement for transfer of insurance policies, evidence received); Sun P. & P. Assn. v. Edwards, 113 Fed. 445, 51 C. C. A. 279 (contract for superintendent mentioning salary and powers, oral agreement to furnish certain subordinates, excluded); Long v. Perine, 41 W. Va. 314, 23 S. E. 611 (sale of fruit land, oral agreement for buyer to take fruit from adjoining land until his trees began to bear, excluded); Morgan v. S. M. L. V. Co., 97 Wis. 275, 72 N. W. 872 (grantee's agreement to pay mortgage, evidence allowed). And so many other illustrations from cases might be cited.

§ 1124. **Whether a Bill of Sale was Intended as a Mortgage.**—

The rule is now believed to be settled in all English and American jurisdictions, that, in a suit in equity, the object of which is to have a bill of sale of chattels or a deed of land, absolute on its face, declared to be a mortgage merely, and to let in the right of the vendor or grantor to redeem, it may be shown that the intention of the parties, notwithstanding the conveyance is couched in absolute language, was merely that it should stand as a security for money lent. Within the meaning of this rule, the intention of the parties to the instrument, outside of the language of the instrument itself, becomes a *question of fact* to be decided by the chancellor upon extrinsic evidence;³² and in many cases the question will arise in actions at law, in which cases the real intent of the parties to the instrument will be a question of fact for the jury.³³ In those jurisdictions where legal and equitable remedies are blended, it should seem that this should be regarded merely as a *rule of evidence*, and not as a rule of procedure depending upon the form of the action.³⁴ Accordingly, we find that it has been held, in an action brought to recover the possession of a slave, which the defendant held under an instrument of writing purporting to be an absolute bill of sale, that the plaintiff might show that the instrument was a mortgage

³² *Parish v. Gates*, 29 Ala. 254, 261; *English v. Lane*, 1 Porter (Ala.), 328; *Kennedy v. Kennedy*, 2 Ala. 571, 589; *Eiland v. Radford*, 7 Ala. 724; *Bishop v. Bishop*, 13 Ala. 475; *Sledge v. Clopton*, 6 Ala. 589; *Turnipseed v. Cunningham*, 16 Ala. 501; *Locke v. Palmer*, 26 Ala. 312; *Brantley v. West*, 27 Ala. 542; *West v. Hendrix*, 28 Ala. 226; *McCarron v. Cassiday*, 18 Ark. 34, 49; *Johnson v. Clark*, 5 Ark. 321; *Scott v. Henry*, 13 Ark. 119; *Bishop v. Williams*, 18 Ill. 101; *Shreve v. McGowin*, 143 Ala. 665, 42 South. 494; *Leger v. Leger*, 118 La. 322, 42 South. 951; *Libby v. Clark*, 88 Me. 32, 33 Atl. 657; *Kellogg v. Northrup*, 115 Mich. 327, 73 N. W. 230; *Barry v. Colville*, 129 N. Y. 302, 29 N. E. 307. In a few of the states it has been held, that this can only be done where fraud or mistake is

made the ground of relief. *Crockett's Gdn. v. Waller*, 29 Ky. Law Rep. 1155, 96 S. W. 860; *Eckford v. Berry*, 87 Tex. 415, 28 S. W. 937; *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. 762. In Missouri it was held, in an ejectment case, that it could be shown as against plaintiff, where the dispute was as to boundary line, the plaintiff being a third person at the time of the transaction. *Stumpe v. Kopp*, 201 Mo. 412, 9 S. W. 1073.

³³ *Bemis v. Phelps*, 41 Vt. 1, 4; *Cook v. Fire Ins. Co.*, 67 Cal. 369, 371; *Wilson v. Shoenberger*, 31 Pa. St. 295; *McCoy v. Lassiter*, 95 N. C. 88; *Wood v. Matthews*, 73 Mo. 477, 481.

³⁴ *Quick v. Turner*, 26 Mo. App. 29; *Bassett v. Glover*, No. 3895, St. Louis Ct. of App.

merely, and that this question might be submitted to the jury. The court said: "This question was to be decided by the jury, upon the evidence, independently of the form of the instrument, or the phase sought to be put upon the transaction, by representations and admissions of the parties."³⁵ In determining whether a bill of sale, given in consideration of a pre-existing debt, is a mortgage, the question to be settled is whether the intention of the parties was to cancel the pre-existing debt, or to secure its payment; and this is a question of fact for a jury in all cases, depending upon the negotiations had at the time and the subsequent acts of the parties.³⁶ In Pennsylvania a mortgage, though in the form of a conveyance of title, is in reality not only in equity but also at law, only a security for the payment of money or for the performance of other collateral contract. It is none the less so, because the defeasance, instead of appearing in the original deed, is contained in a contemporaneous or subsequently executed instrument. If an absolute deed, if other instruments operating as a defeasance be *simultaneously executed*, it is a conclusion of law that they constitute together a mortgage, and it is the duty of the court to declare that such is their legal effect. But if the alleged defeasance be *executed subsequently*, it is a question of fact for the jury, where the action is an action at law, whether the transaction was intended as a sale or merely as a security for money loaned.³⁷

§ 1125. **Penalty or Liquidated Damages.**—The Supreme Court of Pennsylvania, after reviewing several decisions,³⁸ concluded that the question whether the amount stated in a conditional bond or contract is to be taken as a penalty, or as a liquidation of damages

³⁵ *Horne v. Puckett*, 12 Tex. 201, 205. See also *Simpson v. McKay*, 12 Ired. L. (N. C.) 144; *Stamper v. Johnson*, 3 Tex. 1; *Luckett v. Townsend*, 3 Tex. 119; *Stephens v. Sherrod*, 6 Tex. 294.

³⁶ *Cook v. Fire Ins. Co.*, 67 Cal. 369, 371.

³⁷ *Wilson v. Shoenberger*, 31 Pa. St. 295. In *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, the question whether a conveyance, absolute on its face, was intended as a deed of sale or as a security for money, was submitted to the jury as a question

of fact, because the defeasance was not executed at the same time with the deed, but a few weeks later. See also *Jacques v. Weeks*, 7 Watts (Pa.), 261; *Kerr v. Gilmore*, 6 Watts (Pa.), 405; *Rankin v. Mortimore*, 7 Watts (Pa.), 372.

³⁸ *Taylor v. Sandiford*, 7 Wheat (U. S.) 13; *Robeson v. Whitesides*, 16 Serg. & R. (Pa.) 320; *Burr v. Todd*, 41 Pa. St. 212; *Streeper v. Williams*, 48 Pa. St. 450; *Shreve v. Brereton*, 51 Pa. St. 175; *Bagley v. Peddie*, 5 Sandf. S. C. (N. Y.) 192; *Gillis v. Hall*, 2 Brewst. (Pa.) 342.

arising from a breach of the condition, is to be determined by the *intention of the parties*, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and that, in this examination, the court must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction. The concurrent declarations of the parties are inadmissible, except to show mistake or fraud. Evidence, outside the contract, may in some cases be required to explain the subject-matter and exhibit the surroundings, and, in the investigation of the transaction in its various phases, the testimony of witnesses may be admitted for other purposes, affecting the enquiries already stated. The truth of the facts thus shown is for the jury, but their legal effect is for the court.³⁹

§ 1126. **Gratification of a Contract.**—While the meaning of a written contract is thus to be determined by the court, what is sometimes termed its *gratification*, is matter for the jury. This, as hereafter seen,⁴⁰ is most frequently illustrated in applying a deed of conveyance to the land itself. Whether a given monument was intended by the deed, is, for instance, a question of fact for the jury. It is further illustrated in controversies in respect of the *identity* of things which are the subjects of written contracts, where, upon ascertained facts, the question may become one of *interpretation*, and hence for the court. Thus, it has been laid down that, whether certain property, *appurtenant* to the engine and machinery of a mill, passed to a mortgagee as after-acquired property under the terms of the *mortgage*, was a question of law for the court on the facts proved.⁴¹ Extending the same idea, where a contract was *accepted conditionally*, to be paid upon the happening of a *contingency*, whether the contingency had happened was deemed a question for the court.⁴²

§ 1127. **Whether there has been a Novation.**—Closely allied to the proposition that the existence of a contract is a question of fact

³⁹ March v. Allabough, 103 Pa. St. 335, 341.

⁴⁰ Post, §§ 1461, et seq.

⁴¹ Hancock v. Whybark, 66 Mo. 672.

⁴² Nagle v. Homer, 8 Cal. 353, 358.

for the jury, is another proposition, which is, that whether there has been, by the act of the parties to a contract, a *release* of the obligor therein and an *assumption* by a third person of the obligation of performing it, is a question of fact for a jury, under proper instructions.⁴³ "The existence of such agreement, like any other fact of kindred import, may not be susceptible of direct proof, but it is to be determined by the jury from all the facts and circumstances in evidence."⁴⁴

§ 1128. **Delivery of a Deed.**—A deed is not operative until it is delivered. When, therefore, a deed is offered as evidence of a contract, the question whether or not the contract exists will depend upon the fact whether the deed has been delivered. This, where all the facts are undisputed, has been held a *question of law* for the court.⁴⁵ On the contrary, it has been ruled that whether, upon a given state of facts, it was the *intention* of a party who had executed a deed to deliver the deed, is a *question of fact* for a jury.⁴⁶ On the same subject another court has said: "The delivery of a deed is a question of fact. The law has prescribed no particular form in which it shall be made. When the question rests upon the attendant circumstances and the intention of the parties; the facts of their existence and their effect are peculiarly within the province of the jury. It is error, then, for a judge to tell the jury there is no evidence of a delivery, when any circumstances are proved from which it may be inferred, no matter how slight or inconclusive they may be. The party relying upon them has a right to have them submitted to the jury for their consideration."⁴⁷ A third view is that, what constitutes the delivery of a deed is a *mixed question of law and fact*.⁴⁸ In another court this view has been elaborated thus: "What constitutes a delivery of a deed is often a mixed question of law and fact. An arbitrary rule ought not to be laid down. Each case must stand more or less on its peculiar facts. The intent to

⁴³ *Brown v. Kirk*, 20 Mo. App. 524; *Trudeau v. Poutre*, 165 Mass. 81, 42 N. W. 508; *Brown v. Neidhold*, 108 Mich. 485, 66 N. W. 349.

⁴⁴ *Ibid.* 529, opinion by Philips, P. J.

⁴⁵ *Rogers v. Carey*, 47 Mo. 232; *Orr v. Clark*, 62 Vt. 136, 19 Atl. 929.

⁴⁷ *Crain v. Wright*, 36 Hun (N. Y.), 74, 77; *Crain v. Wright*,

114 N. Y. 307, 21 N. E. 401; *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957.

⁴⁷ *Floyd v. Taylor*, 12 Ired. L. (N. C.) 47, opinion by Nash, J.; *Whitman v. Shingleton*, 108 N. C. 193, 12 N. E. 1027; *Huff v. Crawford*, 89 Tex. 214, 34 S. W. 606.

⁴⁸ *Jackson v. Phipps*, 12 Johns. (N. Y.) 418, 421; *St. v. Knowles*, 185 Mo. 141, 83 S. W. 1083.

convey is evidenced by the act of making out and duly executing and acknowledging a deed. The delivery may be evidenced by any act of the grantor, by which the control or dominion or use of the deed is made available to the grantee. It is not necessary it should be handed over actually to the grantee, or to any other person for him. It may be delivered under certain circumstances, though it remain in the possession of the maker. Where, however, there is not an actual transfer from the grantor to the grantee, it should affirmatively appear from the circumstances, acts or words of the parties, that the intention to pass a title really existed.”⁴⁹ In a case in New York, Spencer, J., used the following striking language: “It is requisite in every well made deed that there be a delivery of it. This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing; or it may be both. But by one or both of these it must be made; for otherwise, though it be ever so well sealed and written, yet is the deed of no force.”⁵⁰ In another case, the only infallible test was said to be, has the grantor divested himself of all dominion and control over the conveyance?⁵¹ But it is obvious that this is not the only infallible test; for in many cases where there is plain evidence of an intent that the deed shall become presently operative, although remaining in the custody of the grantor, a delivery may be found to have taken place. Thus, it has been ruled, “that, when a deed to a minor child is absolute in form and beneficial in effect, and the father (and grantor) voluntarily causes the same to be recorded, acceptance by the grantee will be presumed, and such facts constitute, *prima facie*, a delivery, and afford reasonable presumption that the grantor intended to part with the title, and clear proof should be made that a person who, under such circumstances, has

⁴⁹ *Burke v. Adams*, 80 Mo. 504, 512; *Sappingfield v. King*, 49 Or. 102, 89 Pac. 142; *Chew v. Jackson*, 45 Tex. Civ. App. 656, 102 S. W. 427. The mere physical act of the delivery of an insurance policy has been held open to parol explanation. *Waters v. Security L. & A. Co.*, 144 N. C. 663, 57 S. E. 437.

⁵⁰ *Jackson v. Phipps*, 12 Johns. (N. Y.) 418, 421. This language has been four times quoted with approval by the Supreme Court of Mis-

souri. *Huey v. Huey*, 65 Mo. 689, 693; *Turner v. Carpenter*, 83 Mo. 333, 336; *Miller v. Lullman*, 81 Mo. 311, 316; *Burke v. Adams*, 80 Mo. 504, 512. Where one of the grantees obtained possession by fraud, this did not enable her to convey to a bona fide purchaser for value. *Burns v. Kennedy*, 49 Or. 588, 90 Pac. 1102.

⁵¹ *Huey v. Huey*, 65 Mo. 689, 694; *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997.

executed and acknowledged and caused a deed to be recorded, before the court would be warranted in declaring that he did not intend to part with his title.”⁵² Another court has held that the act of taking the deed to the *recorder of deeds*, for the purpose of having it recorded, may, under circumstances, be a sufficient delivery, although the deed be not in fact recorded.⁵³ Another court has stated what seems to be the better rule under this head, that, while the *recording* of a deed is not in itself a delivery of the deed, yet it is *evidence* from which a delivery may be found, and is therefore an assurance by the grantor of the title in the grantee.⁵⁴ From the foregoing, it would appear that the delivery of a deed may be established by *circumstances*, as well as by *direct proof*, and that, when it is sought to be proved by circumstantial evidence, the court should submit the circumstances, with proper instructions, to the jury for their finding upon the question.⁵⁵

§ 1129. **Acceptance of the Deed by the Grantee.**—In the case of a *deed poll*, conveying land to a grantee for a consideration recited to have been paid, an acceptance by the grantee will generally be *presumed*, since an acceptance is manifestly for the interest of the grantee. But there are cases where the question has been submitted to juries. Thus, it has been held, under circumstances, that the facts should have gone to the jury, for them to say whether the grantee had knowledge of a deed of bargain and sale made to him, and whether he gave his assent thereto, directly or otherwise; and

⁵² *Tobin v. Bass*, 85 Mo. 654, 658. The cases cited in support of this dictum were: *Cecil v. Beaver*, 28 Iowa, 242; *Robinson v. Gould*, 26 Iowa, 89; *Masterson v. Cheek*, 23 Ill. 72; *Mitchell v. Ryan*, 3 Ohio St. 377; *Akers v. Shoemaker*, 31 Ky. Law Rep. 482, 102 S. W. 842; *Elston v. Comer*, 108 Ala. 76, 19 South. 324; *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. 379.

⁵³ *Burt v. Cassety*, 12 Ala. 734.

⁵⁴ *Blight v. Schenck*, 10 Pa. 289. Compare *Miller v. Lullman*, 81 Mo. 311; affirming 11 Mo. App. 419; *Gregory v. Walker*, 38 Ala. 26, 33; *McLure v. Colclough*, 17 Ala. 96; *Morris v. Warner*, 32 Ala. 499;

Bjmerland v. Eley, 15 Wash. 101, 45 Pac. 730. And must be so found, unless there be evidence of a contrary intention. *Lewis v. Watson*, 98 Ala. 479, 13 South. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297. In Missouri it was ruled that filing by grantor, without any knowledge thereof by grantee, a deed in settlement of a debt to grantee, not in pursuance to any arrangement, is no delivery. *Cravens v. Rossiter*, 116 Mo. 338, 22 S. W. 736, 38 Am. St. Rep. 606.

⁵⁵ *Van Hook v. Walton*, 28 Tex. 59; *Hunt v. Swayze*, 55 N. J. L. 33, 25 Atl. 850; *Huff v. Crawford*, 89 Tex. 214, 34 S. W. 606.

that the court did not err in refusing to rule that the deed had never been delivered, nor in instructing the jury, at the instance of the plaintiff, that, assuming the facts which the evidence tended to prove, there was no delivery of the deed.⁵⁶ In another case it has been ruled that, whether a deed of conveyance of real estate has been accepted by the grantee, so as to pass the title and oblige him to seek his remedy, if any he has, for a failure of title, on the covenants in the deed, or go without any, if those covenants were without authority and void,—is a *mixed question of law and fact*, to be settled by the jury, under the advice of the court.⁵⁷

§ 1130. **Date of the Delivery of a Deed or of the taking Effect of a Contract.**—In the absence of any evidence as to the date of the delivery of a deed, the *presumption* is that it was executed and delivered at the time when it bears date.⁵⁸ This principle is held to apply, both in respect of the question of the date of the execution, and the date of the delivery of the deed.⁵⁹ But this is not a conclusive presumption. It is what Mr. Best calls a *prima facie presumption*, and it has been said that, even where the evidence is free from doubt in the mind of the court, the question of the date at which a deed was delivered is to be submitted to the jury.⁶⁰ But where the indorsement on a deed was all the evidence offered as to the time when it had been admitted to record, it was said that the trial court did not err in refusing to submit that question to the jury; though, if countervailing proof had been offered, the jury would have been the proper tribunal for its determination.⁶¹ But this presumption does not hold in relation to deeds in fee, unattested and unacknowledged.⁶² Whether such a deed was actually executed and delivered at the time it bears date, or not, is a question of fact for the jury, which must always be submitted to them where the evidence is conflicting.⁶³ The question which of two instruments

⁵⁶ *Bensley v. Atwill*, 12 Cal. 231, 236; *Vaughan v. Godman*, 103 Ind. 499, 3 N. E. 257.

⁵⁷ *Earle v. Earle*, 20 N. J. Law. 348, 363; *Braun v. Monroe*, 11 Ky. Law Rep. 324.

⁵⁸ *Best on Presumptions*, 181.

⁵⁹ *Smith v. Battens*, 1 Mood. & Rob. 341; *Stone v. Grubham*, 1 Rolle Rep. 3, pl. 5; *Osley v. Hicks*, Cro. Jac. 263; *Barry v. Hoffman*, 6 Md. 79, 86.

⁶⁰ *Barry v. Hoffman*, *supra*.

⁶¹ *Budd v. Brooke*, 3 Gill (Md.), 198, 221. See also *Trasher v. Everhart*, 3 Gill & J. (Md.) 234.

⁶² *Elsey v. Metcalf*, 1 Denio (N. Y.), 323; *Genter v. Morrison*, 31 Barb. (N. Y.) 155.

⁶³ *Genter v. Morrison*, *supra*; *Kendrick v. Dellinger*, 117 N. C. 491, 23 S. E. 438.

was *first executed*, they not referring to each other, and one of them being undated, is a question of fact.⁶⁴

§ 1131. **Whether delivered as an Escrow.**—A deed or other written obligation is said to be delivered as an *escrow*, when it is delivered to a third person, upon condition that it shall not take effect until a future date, or the happening of a future event. Whether a deed was so delivered, must generally be a question of fact for a jury.⁶⁵ Thus, where a contract in duplicate was left by the parties with a third person, and the evidence as to the arrangements for its subsequent delivery and the terms upon which it was to become operative, was conflicting,—it was held that the question of the terms and conditions upon which it was to become operative was one of fact for a jury, depending upon the *intention* of the parties, to be gathered from the *whole transaction*, and that the court was right in refusing to instruct the jury that delivery in a particular mode was essential.⁶⁶ A party who purports to be bound by a written instrument,—as for instance, a promissory note, may show *by parol* that it was delivered as an *escrow*, or that it was delivered to be held upon a condition to be performed before the rights of the holder could attach.⁶⁷ But upon this subject it has been said: “A deed can only be delivered as an escrow to a *third person*. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not, is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. To allow a deed, absolute on its face, to be avoided

⁶⁴ Coons v. Chambers, 1 Abb. App. Dec. (N. Y.) 439.

⁶⁵ Where, upon the trial of a cause, it is doubtful, upon the evidence, whether a written contract for the sale of goods signed by the vendor, and delivered to the purchaser, was delivered absolutely or conditionally, the question must be submitted to the jury. Scott v. Pentz, 5 Sandf. S. C. (N. Y.) 572.

⁶⁶ Jaquith v. Hudson, 5 Mich. 123.

⁶⁷ Ricketts v. Pendleton, 14 Md. 321, 329; Bell v. Ingestre, 64 Eng. C. L. 317; 12 Ad. & El. (N. S.) 317; Soldenberger v. Gilbert's Admr., 86 Va. 778, 11 S. E. 789. It cannot be shown that a note absolute in form was delivered merely as an escrow. Garner v. Fite, 93 Ala. 403, 9 South. 367.

by such evidence, would be a dangerous violation of a cardinal rule of evidence."⁶⁸

§ 1132. **Existence of a Partnership.**—It is frequently said that the question whether a partnership exists is a question of fact.⁶⁹ But this is an example of the inconsiderate manner in which legal propositions are frequently stated by the courts. What constitutes a partnership, that is, what amounts to a partnership in contemplation of law, is a question of law for the court;⁷⁰ whether a partnership exists in a particular case, will be a question for the decision of the judge or of the jury, accordingly as the facts are established or in dispute. If they are established, the judge will declare their legal effect and will determine whether or not they show the existence of a partnership; if not, the conclusion will be for the jury, under the instructions of the court. Therefore, where an issue is raised as to whether a partnership exists, and the evidence is conflicting or the inferences to be drawn from the facts in evidence are not clear, it is the duty of the judge to explain to the jury what will constitute a partnership, and leave it to them to say whether the testimony adduced is sufficient to establish the facts necessary to the existence of a partnership.⁷¹

§ 1134. **Genuineness of Signature.**—The genuineness of a signature, when disputed, is, of course, a question of fact for a jury.⁷²

⁶⁸ *Lawton v. Sager*, 11 Barb. (N. Y.) 349, 351, opinion by Harris, J.; citing *Gilbert v. North American Fire Ins. Co.*, 23 Wend. (N. Y.) 43; *Ward v. Lewis*, 4 Pick. (Mass.) 518; *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, per Platt, J., *arguendo*; *Hendy v. Smith*, 49 Hun, 510, 2 N. Y. S. 535; *Haley v. Johnson* (Tex. Civ. App.), 28 S. W. 382 (not reported in state reports.)

⁶⁹ *McDonald v. Matney*, 82 Mo. 358, 363; *McMullan v. MacKenzie*, 2 G. Greene (Iowa), 368; *Doggett v. Jordan*, 2 Fla. 541, 549. Accordingly, it was ruled that a finding by a judge, sitting as a jury, that there was no partnership between the plaintiff and the defendants, was

not a conclusion of law, but of fact. *Kahn v. Central Smelting Co.*, 2 Utah, 371, Borman, J., dissenting.

⁷⁰ *Cumpston v. McNair*, 1 Wend. (N. Y.) 457, 463; *Fargo v. Peterson*, 75 Iowa, 768, 39 N. W. 891; *John Bird Co. v. Hurley*, 87 Me. 579, 33 Atl. 164.

⁷¹ *Dulany v. Elford*, 22 S. C. 304, 308; *McDonald v. Clough*, 10 Colo. 59, 14 Pac. 121; *Hallstead v. Coleman*, 143 Pa. 352, 22 Atl. 977, 22 L. R. A. 370.

⁷² *Magee v. Osborn*, 32 N. Y. 669. It has been held to be a question for the court whether a coin is genuine. *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055.

§ 1135. **How Proved.**—A signature may be proved by the evidence of a witness who has seen the person write. "It is held sufficient for this purpose that the witness has seen him write but once, and then only his name. The proof in such case must be very light, but the jury will be permitted to weigh it."⁷³ Such evidence will take the question to the jury.⁷⁴ So, a witness who has seen a party make his signature *by a mark* on several occasions, has been held competent to testify as to the genuineness of his signature.⁷⁵ Where, however, the knowledge of the handwriting has been obtained by the witness from seeing the party write his name, *for that purpose*, after the commencement of the suit, the evidence has been held inadmissible.⁷⁶ In an action on a promissory note, the defendant having denied the genuineness of his signature, called his son as a witness, who testified that certain words in another note, which his father had actually given, were written by the witness himself. On cross-examination, the witness was required to *write* the same words *in the presence of the jury*, for their inspection and comparison with the note in controversy. It was held that this was competent evidence and proper on cross-examination.⁷⁷ In respect of the proof of handwriting by comparison, the rule at common law as

⁷³ 1 Greenl. Ev., § 577; Marcy v. Pierce, 4 N. W. Terr. (Can.) 246; Diggins' Estate, 68 Vt. 198, 34 Atl. 696; Riggs v. Powell, 142 Ill. 453.

⁷⁴ Garrells v. Alexander, 4 Esp. 37; Magee v. Osborn, 32 N. Y. 669, 682; Eagleton v. Kingston, 8 Ves. 464, 473; Powell v. Ford, 2 Stark. 164; Lewis v. Sapio, 1 Mood. & Malk. 39; Com. v. Levy, 2 Wheel. Cr. Ca. 246; Utica Ins. Co. v. Badger, 3 Wend. (N. Y.) 102; Mudd v. Suckermore, 5 Ad. & El. 730. By a divided court it was held that an illiterate person could not be admitted to testify on this subject. People v. Corey, 148 N. Y. 476, 42 N. E. 1066. But having seen the person write need not be recently. Wilson v. Van Leer, 127 Pa. 377, 17 Atl. 1097; Renshaw v. Bank (Tenn.), 63 S. W. 194 (not reported in state reports). Nor need it have been more than the surname. Smith v. Walton, 8 Gill 83.

⁷⁵ George v. Surrey, 1 Mood. & Malk. 516; St. v. Stair, 87 Mo. 268, 56 Am. Rep. 449. See Greenleaf on Ev. (16th ed.) § 576.

⁷⁶ Stranger v. Searle, 1 Esp. 14. Compare Mudd v. Suckermore, 1 Nev. & P. 32, 56, 5 Ad. & El. 703; Titford v. Knott, 2 Johns. Cas. (N. Y.) 211; Com. v. Hammond, 2 Maine. 33; Cunningham v. Hudson River Bank, 21 Wend. (N. Y.) 557; Williams v. Davis, 1 Penn. (N. J.) 177; Handy v. St., 7 Har. & J. (Md.) 42; Dakota v. O'Hare, 1 N. D. 44, 44 N. W. 1003. This, however, has been held to be discretionary. Tucker v. Hyatt, 148 Ind. 471, 42 N. E. 1047. The fact that the writing is subsequent in date to the writing in dispute, if before suit, does not make the evidence objectionable. Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887.

⁷⁷ Huff v. Nims, 11 Neb. 364; ante, § 620.

stated by Prof. Greenleaf, is this: That the general rule is that handwriting cannot be proved by a comparison of the disputed signature with signatures admitted to be genuine; but that this rule has been relaxed in two cases: 1. When the writings are of such *antiquity* that living witnesses cannot be had, and yet are not so old as to prove themselves. 2. When other writings, *admitted to be genuine*, are already in the case. Here, the comparison may be made by the jury, with or without the aid of experts.⁷⁸ The reason assigned for the second exception to the rule is that, as the jury are entitled to look at the writings for one purpose, it is better to permit them, under the advice and direction of the court, to examine them for all purposes, than to embarrass them with impracticable distinctions to the peril of the cause.⁷⁹ In Missouri,⁸⁰ the rule was held to apply in the case of the *cross-examination* of a witness, under the common law, as in the case of his direct examination; and accordingly it was held error to introduce certain fictitious signatures on the cross-examination of an expert witness, for the purpose of testing his knowledge as to the handwriting of the plaintiff. According to Wagner, J.: "The strongest and best reason in support of the rule for rejecting evidence founded on

⁷⁸ Greenleaf on Ev. (16th ed.) §§ 575-579; Brune v. Rawlings, 7 East, 282; Hickory v. U. S., 158 U. S. 303, 38 L. Ed. 170; St. v. Clinton, 67 Mo. 380; St. v. Scott, 45 Mo. 302; St. v. Thompson, 132 Mo. 301, 34 S. W. 31; First State Bank v. Hyland, 53 Hun, 108, 6 N. Y. S. 37; Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047; Gilbert v. St. (Ind.), 93 N. E. 448 (not reported in state reports); Rogers on Expert Testimony (2d ed.) 133. In England and in several American states statutes have been enacted providing that extraneous writings may be proven genuine for the sole purpose of forming the basis for comparison with a disputed writing. 17 & 18 Vict., ch. 125, § 127; Gen. L. N. Y. 1906, Vol. II, p. 534; Supp. Code Iowa, 1907, § 4620; R. S. Mo. 1909, § 6382. See Holmes v. Goldsmith, 147 U. S. 150, 37 L. Ed. 118; Rior- don v. Guggerty, 74 Iowa, 688, 39

N. W. 107; Coppock v. Lampkin, 114 Iowa, 664, 87 N. W. 665; People v. Molineux, 168 N. Y. 264; Farrell v. Ry. Co., 178 N. Y. 596; People v. Truck, 170 N. Y. 203. Degree of proof in civil and criminal cases distinguished. Matter of Hopkins, 172 N. Y. 360. In St. v. Thompson, supra, the trial court admitted extraneous writings upon proof of their genuineness for the sole purpose of comparison with disputed writings. For this error the case was remanded. Before a second trial the legislature passed an act providing for such proof for the purpose of comparison and the evidence was admitted at the second trial. Held, not ex post facto. St. v. Thompson, 141 Mo. 408, 42 S. W. 949, aff'd 171 U. S. 380.

⁷⁹ 1 Greenl. Ev., § 578; St. v. Scott, supra.

⁸⁰ Rose v. First Nat. Bank, 91 Mo. 399, 2 S. W. 441.

comparison of handwritings in ordinary cases, is that the writings, intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best subserve his purpose; and that they are not likely, therefore, to exhibit a fair specimen of the general character of handwriting."⁸¹ Another reason is that, to permit the introduction of such papers, would embarrass the case by the trial of an indefinite number of *collateral issues*.⁸²

§ 1136. Consideration of a Contract.—It is scarcely necessary to say that, where the want of consideration of a promissory note, which is the foundation of the actions, is pleaded, or where, under the practice in some jurisdictions, notice is given that proof of consideration will be required at the trial, and there is conflicting evidence on the question, it will be a question for the jury to determine whether a consideration has been satisfactorily proved.⁸³

§ 1137. Whether a Forbearance was the Acceptance of a Promise to Pay the Debt of Another.—It has been held that a promise to pay the debt of another cannot be rendered binding by proof that it was in consideration of forbearance, unless there be something to show, not only that it was made for the purpose of obtaining time, and that time was actually given, but that the indulgence thus accorded was in pursuance of the request implied by the promise; and that the *question* is one of *fact*, which can not be found affirmatively in the absence of proof.⁸⁴ By parity of reasoning, it is held that, whether actual forbearance, following a promise to pay interest upon interest for the forbearance, is evidence of an acceptance of the promise, is a *question of fact*.⁸⁵ Upon this subject, the Supreme Court of Illinois have said: "If, under all the circumstances in evidence throwing light upon the question, it is

⁸¹ *St. v. Scott*, supra. Contra, under certain circumstances, see *Hoag v. Wright*, 174 N. Y. 36.

⁸² *St. v. Scott*, supra; *Rose v. First Nat. Bank*, supra.

⁸³ *Swain v. Ettling*, 32 Pa. St. 486; *Threshing Mach. Co. v. Otis*, 78 Neb. 233, 110 N. W. 550; *Bank v. Foster*, 124 Mo. App. 344, 101 S. W. 685; *Pelton v. Lumber Co.*, 132 Wis. 219, 112 N. W. 29.

⁸⁴ *Edgerton v. Weaver*, 105 Ill. 43, 46; *Snyder v. Leibengood*, 4 Pa. St.

305; *Cobb v. Page*, 17 Pa. St. 469; *Shupe v. Galbraith*, 32 Pa. St. 10; *Young v. Hill*, 67 N. Y. 167; *Gilman v. Ferguson*, 116 Ill. App. 347. A complaint which fails to allege clearly the fact of the promise to pay being based on the fact of a promise to forbear is demurrable. *Blumenthal v. Tibbits*, 160 Ind. 70, 66 N. E. 159.

⁸⁵ *Edgerton v. Weaver*, 105 Ill. 43, 47.

reasonable to believe the party acted upon the faith of, and pursuant to the promise, a jury would be justified in finding that he so acted; otherwise not. But it is a mere matter of reasoning about human affairs, in which the individual knowledge and experience of the reasoner as to the motives of human action become a factor. It is finding a fact from circumstantial evidence, or, as is said by some writers on evidence, a principle fact from subordinate evidentiary facts. If the question were, whether there was an express acceptance by words, there could be no difficulty in perceiving the question to be purely one of fact; yet the only difference between that and the present question is that between direct and circumstantial evidence. There the proof is direct, and it is only to determine whether it shall be believed; here it is indirect, and requires reasoning as well as perception and memory. But the conclusion is all the time one of fact,—in the one case, from evidence directly to the point; in the other case, from evidence more remote, but, it may be, equally convincing.”⁸⁶

§ 1138. **Whether a Written Promise was founded upon an Illegal Consideration.**—The rule seems to be that, in an action upon a written promise, where the defense is that it was given for a *wagering consideration*, it is the duty of the court, if the writing contains evidence of its invalidity upon its face, to exclude it from the jury; but if there is not sufficient upon its face to render it void, extrinsic evidence should be admitted to show the real nature of the agreement and the consideration upon which the promise was executed; and it should be left to the jury to determine the question of the legality of the consideration, under an instruction that, if they find it was given upon a wager, or that the whole or any part of the consideration was for money or property laid or staked upon a bet or wager, the promise is absolutely void, even in the hands of an innocent purchaser.⁸⁷ Where the facts speaking upon this question are undisputed, obviously it is for the court to say whether the instrument was valid or not, and in such case the court may

⁸⁶ Edgerton v. Weaver, 105 Ill. 43, 47, opinion by Scholfeld, J.; Lansing Nat. Bank v. Coleman, 117 Mich. 117, 75 N. W. 624; Waters v. White, 75 Conn. 88, 52 Atl. 401.

⁸⁷ Craig v. Andrews, 7 Iowa, 17, 22; Danforth v. Evans, 16 Vt. 538. See also W. T. Joyce & Co. v. Rohan, 134 Iowa, 12, 111 N. W. 319; Smith

v. Bowen, 45 Tex. Civ. App. 222, 100 S. W. 796. Fraud also may be shown, not as contradicting the terms of a contract, but as showing the contract void at its inception. Threshing M. Co. v. Otis, *supra*. See also Metropolitan L. & Z. M. Co. v. Webster, 193 Mo. 351, 92 S. W. 79.

direct the verdict;⁸⁸ but obviously where the facts which are offered in evidence to impeach the instrument are disputed, the question must go to the jury, upon proper instructions as to the conclusions of law upon the facts, as the jury may find them. Thus, it has been held, in a case where the evidence was conflicting and doubtful as to the consideration of a note which promised to pay \$160.00, with 10 per cent. interest, "on and after the election of James Buchanan to the presidency,"—that the question whether it was given upon a wager, or whether the whole or any part of the consideration was for money or property laid or staked upon a bet or wager, should be submitted to the jury, with the instruction that, if it was so given, it was absolutely void, and no recovery could be had upon it against the maker, even in the hands of an innocent purchaser.⁸⁹

§ 1139. **Whether the Contract is Real or Colorable to cover up a Gambling Transaction.**—What are called "*option deals*," that is, contracts, usually made upon the floor of merchants' exchanges, and in smaller establishments of the same kind called "bucket shops," are, it is well known, void as against *public policy*, where no delivery of the article ostensibly contracted for is contemplated. but where the intention of both parties is merely to bet upon the future state of the market, and to settle, or to "ring out the deal" (to use the slang of this species of gambling) by the payment of "differences,"—are void as against public policy.⁹⁰ These contracts are generally evidenced by a written memorandum, and are valid in form, and *presumptively* so in law. It is, therefore, held that the *burden* is upon the party assailing the validity of such a contract, to show that actual *delivery* was *not intended* by the parties to it, but that it was a mere cloak to cover up a gambling transaction. This may, of course, be shown by extrinsic

⁸⁸ Porter v. Havens, 37 Barb. (N. Y.) 343.

⁸⁹ Craig v. Andrews, 7 Iowa, 17.

⁹⁰ Waterman v. Buckland, 1 Mo. App. 45; Kent v. Miltenberger, 13 Mo. App. 503; Williams v. Tiedemann, 6 Mo. App. 269; Fareira v. Gabell, 89 Pa. St. 89; Smith v. Bouvier, 70 Pa. St. 325; Bruas's Appeal, 55 Pa. St. 294; Lehman v. Strassburger, 2 Woods (U. S.), 554; Sawyer v. Taggart, 14 Bush (Ky.), 729;

Barnard v. Backhaus, 52 Wis. 593; Tenney v. Foot, 4 Bradw. (Ill.) 594; affirmed, 95 Ill. 99; Hibblewhite v. McMorine, 5 Mees. & W. 462. Many of the foregoing cases hold the sales under consideration valid; and, although they are not harmonious, several of them lay down clear distinctions between valid sales for future delivery and mere wagering contracts.

evidence; and whether the evidence adduced is sufficient to establish the fact will, in many cases, be a question of fact for a jury.⁹¹

§ 1140. Whether a Market was "Manipulated" or Fictitious.—In dealing with a case of this kind, where there was a by-law of the exchange regulating sales for future delivery and providing that nothing therein should be construed "as authorizing unjust or unreasonable claims based upon manipulated or fictitious markets," it was held that the court could not determine, as a matter of law, that prices produced by speculation in articles of trade were unreal or fictitious prices, but that the question as to whether the prices, at which the settlement of such a contract was required to be made on a given day, were fictitious, as based upon a manipulated market, or were the true values for the purpose of consumption or manufacture,—was a question of fact for the jury; and that the finding of the jury on this question would not be disturbed on appeal, where there was any substantial evidence to support it.⁹²

§ 1141. Performance or Waiver of Performance.—Whether a contract has been *performed*, or its performance *waived*, will be in most cases a question of fact for a jury. The court in instructing the jury will tell them whether specific acts which the evidence tends to show do or do not amount to a performance or a waiver.⁹³

§ 1142. Place where a Contract is to be Performed.—It is said to be a principle of universal law that, in every forum, a contract is governed by the law with a view to which it was made.⁹⁴ It is

⁹¹ Ream v. Hamilton, 15 Mo. App. 577; Overbeck Star & Cooke Co. v. Roberts, 49 Ore. 37, 87 Pac. 158; King v. Zell & Merceret, 105 Md. 435, 66 Atl. 279; Allen v. Caldwell Ward & Co., 149 Ala. 293, 42 South. 855.

⁹² Kent v. Miltenberger, 15 Mo. App. 480, 489, 491. The question is reasoned at considerable length.

⁹³ Spaulding v. Hollenbeck, 39 Barb. (N. Y.) 80, 84; post, §§ 1250, et seq.; Juntilla v. Calumet & H. Min. Co., 145 Mich. 618, 108 N. W. 1076; Levy v. Redfern, 102 N. Y. S. 494, 52 Misc. Rep. 575. So aban-

donment of performance is ordinarily a jury question. Koerper v. Royal Ins. Co., 102 Mo. App. 543, 77 S. W. 307.

⁹⁴ Wayman v. Southard, 10 Wheat. (U. S.) 1, 48, per Marshall, C. J. In North Carolina it was held that the law of the place of its making governs. Cannaday v. Atlantic C. L. Co., 143 N. C. 439, 55 S. E. 836. Where to be performed partly in one state and partly in another, the parts respectively are as the law of each state requires. Midland Valley Ry. Co. v. Moran etc. Mfg. Co. (Ark.), 97 S. W. 679.

well settled that the validity of a contract is to be determined by the law of the place of performance. Suppose, in the case of a written contract, it is so framed that the place of performance is left in doubt: Shall the court decide, as a matter of law, where it was to be performed, or submit the question to a jury? In one case it was held that the question, being one of *intent*, should be submitted to a jury. The action was upon a promissory note made by a husband and wife, who resided in Indiana, to a payee, who resided in Ohio. The husband being indebted to the payee, it was agreed that a note should be given for the amount due, signed by him and his wife, and that the latter should charge her separate estate with its payment. The note in suit was accordingly given, and a clause so binding the property of the wife was inserted. The note was made and delivered in Indiana, but dated in Ohio, and the place of payment was left in blank. By the laws of Indiana such a note was not binding on the wife, but by the laws of Ohio it was. It was held that the plaintiff was entitled to have the question *submitted to the jury*, as to the place where the parties intended that the contract should be performed, and whether they contracted with reference to the law of Indiana, or the law of Ohio.⁹⁵

§ 1143. **Whether or not a Contract is Usurious.**—Whether or not a contract is usurious has been held a *question of law*;⁹⁶ and, upon hypothetical or established facts, the court is to say, in instructing the jury, whether it is usurious or not. But this is true only where the question is one of *interpretation*, arising on the terms of a written instrument, or upon a state of conceded facts. In most cases it will be a mere question of *intent*, whether the amount reserved or agreed to be paid in excess of the legal rate of interest was *understood* by the parties to be a compensation for forbearance or for the use of money, or whether it was intended as a compensation for some other service.⁹⁷ It is, therefore, *in most cases, a question of fact* for the jury.⁹⁸ “The taking of usury,” says Monell, J.,

⁹⁵ *Shillito v. Reineking*, 30 Hun (N. Y.), 345.

⁹⁶ *Belden v. Gray*, 5 Fla. 504, 3 Fla. 110.

⁹⁷ *Ante*, §§ 1105, 1108; *post*, § 1333; *Barry v. Parranto*, 97 Minn. 265, 106 N. W. 911. Parol evidence is always competent to show a contract is a cloak for usury. *Camp-*

bell v. Connoble, 98 N. Y. S. 231; *Stein v. Stevenson*, 46 Minn. 360, 46 N. W. 55, 24 Am. St. Rep. 234; *Smith v. Stevens*, 81 Tex. 461, 16 S. W. 986.

⁹⁸ *Andrews v. Pond*, 13 Pet. (U. S.) 77; *Mix v. Madison Ins. Co.*, 11 Ind. 117, 120; *Williams v. Reynolds*, 10 Md. 57; *Durant v. Banta*,

"must be in pursuance of a corrupt agreement, express or implied; and it is difficult to conceive of a case, tried before a jury, where the judge would be justified in depriving a party of the right of having it passed upon by them, whether there was such corrupt agreement, especially when it is to be made out from circumstances. and must be determined in a great degree by the intent of the parties."⁹⁹ It is scarcely necessary to add that, in order to warrant the court in submitting the question whether a particular transaction was a device to evade the statute against usury, there must always be some *evidence prima facie* raising such inference.¹ But such evidence may be wholly *circumstantial*. Thus, where there was no direct evidence that an usurious agreement was made at the time of the loan, but it was proved that, twenty-two days thereafter, the borrower paid and the lender received, for the use of the money from the time of the loan to that date, a sum equal to the interest at a rate much greater than the lawful rate,—it was held a *question for the jury* whether or not the loan was made upon an usurious agreement. This holding was under a rule that a note given upon an usurious consideration is void.²

§ 1144. **Further of this Subject.**—It is said to be quite immaterial in what manner or form, or under what pretense, an usurious contract is cloaked; if the *intention* is to receive a greater rate of interest than the law allows for the use of money, this will taint the contract with usury;³ and whether the transaction is so in-

27 N. J. L. 625, 637; Cuyler v. Sanford, 8 Barb. (N. Y.) 225, 232; Tucker v. Wilamouicz, 8 Ark. 157; Chase v. Mortg. Loan Co., 49 Minn. 111, 51 N. W. 816; Davis v. Myers, 86 Hun, 236, 33 N. Y. S. 352.

⁹⁹ Chatham Bank v. Betts, 9 Bosw. (N. Y.) 552, 557. To the same conclusion is Robbins v. Dillaye, 33 Barb. (N. Y.) 77, 80; Ayrault v. Chamberlain, 33 Barb. (N. Y.) 229. Compare White v. Stillman, 25 N. Y. 541. Thus, it was properly left to the jury to decide, on all the facts, whether a commission charged for the sale of produce in connection with a loan of money, was a cover for usury. Hollis v. Swift, 74 Ga. 595; Cockle v. Flack, 93 U. S. 344.

¹ Williams v. Reynolds, 10 Md. 57, 67; Ayrault v. Chamberlain, 33 Barb. (N. Y.) 229, 236; White v. Stillman, 25 N. Y. 541.

² Catlin v. Gunter, 11 N. Y. 368.

³ "In order to constitute usury, there must be a corrupt intent to take more than the legal rate for the use of money loaned." Tyler on Usury, 98, 103, 108. See Bush v. Buckingham, 2 Vent. 83; Nevison v. Whitley, Cro. Car. 501; Buckley v. Guildbank, Cro. Jac. 678; New York etc. Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664, 667; Murray v. Harding, 2 Wm. Bl. 859, 865; Nourse v. Prime, 7 Johns. Ch. (N. Y.) 77; Bank of U. S. v. Waggener, 9 Pet. (U. S.) 378, 399; Button v. Down-

tended, when valid on its face, is a question of fact for a jury.⁴ Where, however, the question depends merely upon the *interpretation* of a written instrument, it may be a question for the court.⁵ It is said that whether the lender *intended* to take more than the legal rate of interest is a *question of fact*, and if it be found that he did, the law annexes to the intention the element of corruption; for ignorance of the law will not excuse in such cases any more than in others.⁶ The distinction is well stated by Mr. Justice Story thus; "In construing the usury laws, the uniform construction in England has been (and it is equally applicable here), that, to constitute usury within the prohibitions of the law, there must be an *intention*, not only to contract for, but to take usurious interest; for if neither party intended it, but acted *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, if the intention is apparent; *res ipsa loquitur*. But where the contract

ham, Cro. Eliz. 643; Bedingfield v. Ashley, Cro. Eliz. 741; Roberts v. Trenayne, Cro. Jac. 507; Floyer v. Edwards, Cowp. 112; Hammett v. Yea, 1 Bos. & Pul. 144; Doe v. Gocch, 3 Barn. & Ald. 664; Solarte v. Melville, 7 Barn. & Cres. 431; Lloyd v. Scott, 4 Pet. (U. S.) 205, 224; Condit v. Baldwin, 21 N. Y. 219; De Forrest v. Strong, 8 Conn. 513, 519; Beckwith v. Windsor Manf. Co., 14 Conn. 594, 606; Belden v. Lamb, 17 Conn. 441, 453; Trotter v. Curtis, 19 Johns. (N. Y.) 161; Deak v. Snapp, 1 Coldw. (Tenn.) 180, 185; Judy v. Gerard, 4 McLean (U. S.) 360; Marvine v. Hymers, 12 N. Y. 223, 231, 236; N. Y. Fireman's Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; Archibald v. Thomas, 3 Cow. (N. Y.) 289; Heath v. Cook, 7 Allen (Mass.), 59; Childers v. Dean, 4 Rand. (Va.) 406; Stockett v. Elliott, 3 Gill & J. (Md.) 123; Gibson v. Stearns, 3 N. H. 185, 187; Busbee v. Finn, 1 Ohio St. 409; Otto v. Durege, 14 Wis. 574; Fay v. Lovejoy, 20 Wis. 407; Hayward v. Le

Baron, 4 Fla. 404; Horton v. Moot, 60 Barb. (N. Y.) 27.

⁴ Andrews v. Pond, 13 Pet. (U. S.) 72, 76; Mitchell v. Napier, 22 Tex. 120, 128; Fleming v. Mulligan, 2 McCord (S. C.), 173; Crane v. Hendricks, 7 Wend. (N. Y.) 569, 635; Beckwith v. Windsor Manf. Co., 14 Conn. 594, 606; Belden v. Lamb, 17 Conn. 441, 453; Seymour v. Marvin, 11 Barb. (N. Y.) 80, 83; affirmed, sub nom. Smith v. Marvin 27 N. Y. 137; Thurston v. Cornell, 38 N. Y. 281, 283; Barretto v. Boughton, 5 Wend. (N. Y.) 181; Robbins v. Dillaye, 33 Barb. (N. Y.) 77, 80; Horton v. Moot, 60 Barb. 27; Tyler on Usury, 98; Stevens v. Staples, 64 Minn. 3, 65 N. W. 959.

⁵ Levy v. Gadsby, 3 Cranch (U. S.), 180. In South Carolina this is ruled to be a "mixed question of law and fact." Exchange Bank v. McMillan, 76 S. C. 561, 57 S. E. 630.

⁶ Maine Bank v. Butts, 9 Mass. 49.

on its face is for legal interest only, then it must be proved that there was some corrupt agreement, or device, or shift, to cover usury, and that it was in the full contemplation of the parties.

* * * The *quo animo* is, therefore, an essential ingredient in all cases of this sort." "It is true, that here, as in cases of negligence, and indeed in other cases, the court will be able to say, in certain states of the evidence, that there is *no evidence* tending to show usury.⁸ On the other hand, in many cases, where the evidence is undisputed, or where the case depends upon the construction of an instrument of writing, the court will be able to say that the transaction was usurious *per se*.⁹

⁷ Bank of U. S. v. Waggener, 9 Pet. (U. S.) 378, 399; quoted with approval in Condit v. Baldwin, 21 N. Y. 219, 221.

⁸ Stockett v. Ellicott, 3 Gill & J. (Md.) 123.

⁹ Ante, § 1142. Where a writing exacts unusual things, lying ordinarily outside of the nature of a

contract, the jury may consider whether or not it is a mere device to obtain usury. See Calloway v. Butler, 79 Ga. 356, 7 S. E. 224. See also White v. Guilmartin, 83 Ga. 640, 10 S. E. 444, where a cotton factor made cotton requirements about shipments and penalty per bale for failure to ship a certain number.

CHAPTER XXXVI.

IMPLIED PROMISES.

SECTION

- 1147. Three General Propositions Stated.
- 1148. Proposition 1: That a Contract will not be Implied Contrary to the Real Understanding of the Parties.
- 1149. Exception No. 1.
- 1150. Exception No. 2.
- 1151. Commentary on the Foregoing Proposition.
- 1152. Proposition 2: That a Moral Obligation will not of Itself support an Implied Promise.
- 1153. Illustrations.
- 1154. Proposition 3: That a Request is Necessary to raise an Implied Promise.
- 1155. Observations on this Proposition.
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§ 1147. Three General Propositions Stated.—The following propositions are often met with in the books, either stated in terms or assumed as the basis of decision: 1. That a promise will not be implied *contrary to the real understanding* of the parties.¹ 2. That a *moral obligation* will not support an implied promise,² and per-

¹ Page v. Marsh, 36 N. H. 305; Maltby v. Harwood, 12 Barb. (N. Y.) 473; Harney v. Owen, 4 Blackf. (Ind.) 337; Fitch v. Peckham, 16 Vt. 150; Griffin v. Potter, 14 Wend. (N. Y.) 209; Livingston v. Ackeston, 5 Cow. (N. Y.) 531; Urie v. Johnston, 3 Pa. (Penr. & W.) 212; Alfred v. Fitzjames, 3 Esp. 3; Williams v. Hutchison, 3 N. Y. 312; Williams v. Finch, 2 Barb. (N. Y.) 208; Olney v. Myers, 3 Ill. 311; Robinson v. Cushman, 2 Denio (N. Y.), 149; Guild v. Guild, 15 Pick. (Mass.) 129; Andrews v. Foster, 17 Vt. 556; Swires v. Parsons, 5 Watts & S. (Pa.) 357; Guenther v. Birkicht, 22 Mo. 439; Gillett

v. Camp, 27 Mo. 541; Coleman v. Roberts, 1 Mo. 97; Morris v. Barnes, 35 Mo. 412; Hart v. Carsley Mfg. Co., 221 Ill. 444, 77 N. E. 897; Newmarket Mfg. Co. v. Coon, 150 Mass. 566, 23 N. E. 380; Minneapolis M. Co. v. Goodnow, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202.

² Atkins v. Banwell, 2 East, 505; Edwards v. Davis, 16 Johns. (N. Y.) 281; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28; Dunbar v. Williams, 10 Johns. (N. Y.) 28; Dunbar v. Williams, 10 Johns. (N. Y.) 249; Rensselaer Glass Factory v. Reed, 5 Cow. (N. Y.) 587, 602, per Colden, Senator; Ibid. 620, per Spencer, Senator; Wennall v. Ad-

haps not an express promise.³ 3. That a *request* is necessary to raise-

ney, 3 Bos. & P. 247; Newby v. Wiltshire, 2 Esp. 739; Brooks v. Read, 13 Johns. (N. Y.) 380; Everts v. Adams, 12 Johns. (N. Y.) 351; Mumford v. Brown, 6 Cow. (N. Y.) 475; Doane v. Badger, 12 Mass. 65; Loring v. Bacon, 4 Mass. 575; Frear v. Hardenburg, 5 Johns. (N. Y.) 272.

³ It should seem that, upon a question so elementary and so necessary to be understood by all men, the law ought to be well settled; but there is an irreconcilable conflict of opinion among the highest courts and the ablest judges, whether a moral or a conscientious obligation is of itself a sufficient consideration to support an express promise. In favor of the proposition that it is, we find the distinct opinions of Lord Mansfield (Lee v. Muggeridge, 5 Taunt. 36, 46), Lord Ellenborough (Atkins v. Banwell, 2 East, 505), and Chief Justice Kent. Stewart v. Eden, 2 Caines (N. Y.), 150. These opinions are supported by considerable dicta and perhaps by some express decisions. Adkins v. Hill, Cowp. 288; Hawkes v. Saunders, Id. 290; Trueman v. Fenton, Id. 544; Scott v. Nelson, 1 Esp. N. P. 95; Watson v. Turner, Bull. N. P. 147; Doty v. Wilson, 14 Johns. (N. Y.) 378; McMorris v. Herndon, 2 Bail. Law (S. C.), 56, 21 Am. Dec. 515; Cardwell v. Strother, Lit. Sel. Cas. (Ky.) (S. C.) 429, 12 Am. Dec. 326. Contrary conclusions are to be drawn from the following cases: Bret v. J. S., Cro. Eliz. 755; Harford v. Gardener, 2 Leon. 30; Ehle v. Judson, 24 Wend. (N. Y.) 97; Smith v. Ware, 13 Johns. (N. Y.) 257; Hunt v. Bate, Dyer, 272; Frear v. Hardenburg, 5 Johns. (N. Y.) 272; Barnes v. Hedley, 2 Taunt.

184; Thorne v. Deas, 4 Johns. (N. Y.) 84; Kelbourn v. Bradley, 3 Day (Conn.), 356, 3 Am. Dec. 237; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Nixon v. Vanhise, 2 South. (N. J.) 491, 8 Am. Dec. 618; Greenbaum v. Elliott, 60 Mo. 25. The inquirer who curiously pursues the subject will find it either elucidated or confounded by a comparison of the following decisions: Bessich v. Coghill, Palmer (K. B.), 559; Butcher v. Andrews, Carthew, 446; Church v. Church, cited in Sir T. Raym. 260; Hayes v. Warren, 2 Strange, 933; Style v. Smith, cited in 2 Leon. 111; Barber v. Fox, 2 Saund. 136; Hunt v. Swain, 1 Lev. 165, Sir T. Raym. 127; 1 Sid. 248; Loyd v. Lee, 1 Strange, 94; Cockshott v. Bennett, 2 T. R. 763; Peck v. Peck, 77 Cal. 106, 19 Pac. 227, 11 Am. St. 244; Valentine v. Bell, 66 Vt. 280, 29 Atl. 251. What appears to be the generally accepted principle is, that a mere moral obligation will not support a promise, but if there is an antecedent liability enforceable at law or in equity, the moral obligation will support a promise to revive the old liability. Thus a debt discharged in bankruptcy may be so revived. Willis v. Cushman, 115 Ind. 100, 17 N. E. 168; Succession of Andrieu, 44 La. Ann. 103, 10 South. 388; Craig v. Seitz, 63 Mich. 727, 30 N. W. 348; Murphy v. Crawford, 114 Pa. 496, 7 Atl. 142. So as to one barred by statute of limitations. Walker v. Henry, 36 W. Va. 100, 14 S. E. 440. But if a debt has been voluntarily discharged or released it cannot be thus re-established. Ingersoll v. Martin, 58 Md. 67, 42 Am. Rep. 322. It has been held, however, that a promise to pay past gratuitous serv-

an implied promise.⁴ It is proposed to consider what these propositions mean and how far they are true.

§ 1148. **Proposition 1: That a Contract will not be implied contrary to the Real Understanding of the Parties.**—I shall show:

1. That this proposition however understood, is not universally true. 2. That it is not true in any case in the full sense which the words in which it is couched import. (1.) Whether this proposition is understood in a strict sense according to the import of the words in which it is couched, or in the loose sense which I shall hereafter point out, it is not universally true. Two exceptions cut in upon it so extensively as almost to destroy its character as a rule. The first exception is, that it does not apply where the act out of which the promise is implied is in itself a *tort*. The second is, that it does not apply in the case of *building contracts*.

§ 1149. **Exception No. 1.**—The first of these exceptions introduces the well-known principle that where A. unjustly, by force or by fraud,⁵ gets from B. that which belongs to B., B. may either sue A. for the tort and recover the damages which he may have suffered, including special or consequential damages where such damages are pleaded and proved, and, in aggravated cases, exemplary damages given by way of punishment and example; or he may *waive the tort* and recover, as upon a contract, in some cases, the money

ices of value to promisor is supported by a good consideration. *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 438. Contra: *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358.

⁴ *Infra*, § 1154; *Schmidt v. Smith*, 57 Mo. 135; *Price v. St. Louis Life Insurance Co.*, 3 Mo. App. 262; *Sloan v. St. Louis etc. R. Co.*, 58 Mo. 220; *Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77.

⁵ *Magoffin v. Muldrow*, 12 Mo. 512; *Walker v. Davis*, 1 Gray (Mass.), 506; *Boston R. Co. v. Dana*, 1 Gray (Mass.), 83; *Howe v. Clancy*, 53 Me. 130; *Redel v. Missouri Valley Stone Co.*, 126 Mo. App. 163, 103 S. W. 568; *New York Market Gardener's Assn. v. Adams D. G. Co.*,

115 App. Div. 42, 100 N. Y. S. 596. An exception to this exception was reasoned out in a case from Wisconsin the facts of which were quite out of the ordinary. Defendant left with an artist two photographs of his deceased wife to enable him to paint a portrait therefrom. The artist, after completing his engagement, painted a second portrait without the consent and authority of defendant and on his refusal to return same sued for its value. It was held that, because of the breach by plaintiff of an implied contract to use the photographs only for the purpose intended, his action should fail. *King v. Sheriffs*, 129 Wis. 468, 109 N. W. 656, 7 L. R. A. (N. S.) 362.

which A. has received for the thing taken, and in other cases its reasonable value. Thus, if a man wrongfully takes my goods and chattels and converts them into money, albeit through a larceny,⁶ I can waive the tort, sue him on an implied promise and recover the money.⁷ A man forcibly abducts, or entices away, or know-

*Howe v. Clancey, 53 Me. 130; Boston R. Co. v. Dana, 1 Gray (Mass.), 83.

7 Hambley v. Trott, Cowp. 373; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Cummings v. Noyes, 70 Mass. 433; Glass Co. v. Walcott, 2 Allen (Mass.), 227; Boston etc. R. Co. v. Dana, 1 Gray (Mass.), 83; Mann v. Locke, 12 N. H. 246; White v. Brooks, 43 N. H. 402; Smith v. Smith, Id. 536; Balch v. Patten, 45 Me. 41; Shaw v. Coffin, 58 Id. 254; Howe v. Clancey, 53 Id. 130; Lord v. French, 61 Id. 420; Rand v. Nesmith, Id. 111; Pearsoll v. Chapin, 44 Pa. St. 9; Goodehow v. Snyder, 3 Greene (Iowa), 599; Moses v. Arnold, 43 Iowa, 187; Fratt v. Clark, 12 Cal. 89; Halleck v. Mixer, 16 Id. 574; Crow v. Boyd, 17 Ala. 51; Pike v. Bright, 21 Id. 332; Staat v. Evans, 35 Ill. 455; Center Turnpike Co. v. Smith, 12 Vt. 212; Stearns v. Dillingham, 22 Vt. 624; Randolph Iron Co. v. Elliott, 37 N. J. L. 184; Budd v. Hiler, 27 Id. 43; Hutton v. Wetherald, 5 Harr. (Del.) 38; Watson v. Stever, 25 Mich. 386; Norden v. Jones, 33 Wis. 600; Stockett v. Watkins, 2 Gill & J. (Md.) 326, 20 Am. Dec. 428. The doctrine seems to be in great confusion, as will appear by a learned note of Mr. Freeman in 31 Am. Dec. 242, et seq. The incongruity of the common law is such that if a man tortiously gets possession of my house, and holds it adversely to me, I cannot waive the tort and recover on an implied promise for use and occupation. Lloyd v. Hough, 1

How. (U. S.) 160; Stockett v. Watkins, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; Smith v. Stewart, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; Fitzgerald v. Beebe, 7 Ark. 305, 46 Am. Dec. 285; Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 500; Hayes v. Acre, Cam. & M. 19; Stuart v. Fitch, 2 Vroom (N. J.), 17; Hall v. Southmayd, 15 Barb. (N. Y.) 32; Moore v. Harvey, 50 Vt. 297; Osgood v. Dewey, 13 Johns. (N. Y.) 240; Gunn v. Scovil, 4 Day (Conn.), 228; Couch v. Briles, 7 J. J. Marsh. (Ky.) 257; Estep v. Estep, 23 Ind. 114; Nance v. Alexander, 48 Id. 516; Dalton v. Landahn, 30 Mich. 349; Edmondson v. Kite, 43 Mo. 176; Sylvester v. Rawlston, 31 Barb. (N. Y.) 286; Newby v. Vestal, 6 Ind. 412; Redden v. Barker, 4 Harr. (Del.) 179; Williams v. Hollis, 19 Ga. 313; Dudding v. Hill, 15 Ill. 61; McNair v. Schwartz, 16 Id. 24; Dixon v. Haley, Id. 145; Boston v. Binney, 11 Pick. (Mass.) 1; Scales v. Anderson, 26 Miss. 94; Cohen v. Kyler, 27 Mo. 122; Brewer v. Craig, 18 N. J. L. 214; Stewart v. Fitch, 31 Id. 17; Hurd v. Miller, 2 Hilt. (N. Y.) 540; Campbell v. Renwick, 2 Bradf. (N. Y.) 80; Coit v. Planer, 4 Abb. Pr. (N. s.) (N. Y.) 140; LaForge v. Park, 1 Edm. Sel. Cas. (N. Y.) 223; Pierce v. Pierce, 25 Barb. (N. Y.) 243; Espy v. Fenton, 5 Ore. 423; Langford v. Green, 52 Ala. 108; Folsom v. Carl, 6 Minn. 420; Ryan v. Marsh, 2 Nott & M. (S. C.) 156; Wiggins v. Wiggins, 6 N. H. 298; Richey v. Hinde, 6 Ohio, 371; Howe v. Russell, 41 Me. 446; Sampson v.

ingly harbors and conceals my child (the same being my servant) or my apprentice; I can maintain an action for the tort⁸ and recover, not only direct compensatory damages, but also indirect or consequential damages where the same are laid and proved,⁹ and also exemplary damages given as a punishment and for mental suffering;¹⁰ or I can waive the tort and sue as upon a contract for the value of the services of the child or apprentice while so kept away.¹¹ In all these cases the law raises the implication of a contract, although no contract was intended by either party. It raises it on the principle of an estoppel. It allows the plaintiff to assert it, and prohibits the defendant from denying it, although it is not true. It will not permit the defendant to deny it, because it will not permit him to avoid a right of action founded in plain justice, by proving his own wrong.¹²

§ 1150. **Exception No. 2.**—The second exception, that which arises in the case of *building contracts*, is equally marked. A. contracts with B. to build a house upon the land of the latter, according to certain plans and specifications. A., endeavoring in

Shaeffer, 3 Cal. 196; O'Connor v. Corbitt, Id. 370; Cincinnati v. Walls, 1 Ohio St. 222; Wharton v. Fitz Gerald, 3 Dall. (U. S.) 503; Byrd v. Chase, 10 Ark. 602; Eastman v. Haward, 30 Me. 58; Curtis v. Treat, 21 Id. 525; Crosswell v. Crane, 7 Barb. (N. Y.) 191; Watson v. Brainard, 33 Vt. 88; Ramirez v. Murrey, 5 Cal. 222; Southern Ry. Co. v. City of Atalla, 146 Ala. 653, 41 South. 664; McCullough v. Ford Natural Gas Co., 213 Pa. 110, 62 Atl. 521; Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176.

⁸ Gilbert v. Schwenck, 14 Mees. & W. 488; Magee v. Holland, 27 N. J. L. 86; Plummer v. Webb, 4 Mason (U. S.), 380; Steele v. Thatcher, 1 Ware (U. S.), 91; Evans v. Walton, L. R. 2 C. P. 615, 36 L. J. (C. P.) 307; Stowe v. Haywood, 7 Allen (Mass.), 118; Wood v. Coggeshall, 2 Met. (Mass.) 89; Caughey v. Smith, 47 N. Y. 244; Blake v. Lanyon, 6

T. R. 221; Sykes v. Dixon, 9 Ad. & El. 693; Pilkington v. Scott, 15 Mees. & W. 657; Hartley v. Cummings, 5 C. B. 248.

⁹ Gunter v. Astor, 4 J. B. Moore, 12; Flemington v. Smithers, 2 Car. & P. 292; Wilt v. Vickers, 8 Watts (Pa.), 227; Magee v. Holland, 27 N. J. L. 86.

¹⁰ Magee v. Holland, 27 N. J. L. 86; Stowe v. Haywood, 7 Allen (Mass.), 118.

¹¹ Lightly v. Clauston, 1 Taunt. 112.

¹² Lightly v. Clauston, 1 Taunt. 112. Where a bailee lawfully obtains possession of property, the tort arising out of his breach of duty gives also a right of action, as an election of remedy, upon his implied promise to discharge his duty in respect of the bailment. De Loach Mill Mfg. Co. v. Standard Saw Mill Co., 125 Ga. 377, 54 S. E. 157.

good faith to complete the contract, fails to complete it, or fails to complete it according to the specifications, or fails to complete it within the time agreed upon. Nevertheless, as B. has received benefit from the labor and materials of A., the law *implies a new promise* on his part to pay to A. what they are reasonably worth,¹³ less the *damage* which B. may have sustained through the breach of the express contract which subsisted between the parties;¹⁴ which contract, breach, and consequent damage, may be

¹³ Haywood v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Smith v. First Congregational Meeting House, 8 Pick. (Mass.) 178; Jewell v. Schroepel, 4 Cow. (N. Y.) 564; - Hayden v. Madison, 7 Me. 78; Lee v. Ashbrook, 14 Mo. 378, 55 Am. Dec. 110; Marsh v. Richards, 29 Mo. 105; Lowe v. Sinclair, 27 Mo. 310; Lamb v. Brolaski, 38 Mo. 53; Creamer v. Bates, 49 Mo. 525; Yeates v. Ballentine, 56 Mo. 530; Cullen v. Sears, 112 Mass. 299, 308; Walker v. Orange. 16 Gray (Mass.), 193; Cordell v. Bridge, 9 Allen (Mass.), 355; Powell v. Howard, 109 Mass. 192; Moulton v. McOwen, 103 Mass. 587; Bragg v. Town of Bradford, 33 Vt. 35; Dyer v. Jones, 8 Vt. 205; Brackett v. Morse, 23 Vt. 354; Morrison v. Cummings, 26 Vt. 486; Hubbard v. Belden, 27 Vt. 645; Barker v. Troy etc. R. Co., Id. 780; Swift v. Harri-man, 30 Vt. 607; Kettle v. Harvey, 21 Vt. 301; Corwin v. Wallace, 17 Iowa, 378; Tait v. Sherman, 10 Iowa, 60; Phelps v. Sheldon, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; Norris v. School District No. 1, 12 Me. 293, 28 Am. Dec. 182; Merrill v. Ithaca etc. R. Co., 16 Wend. (N. Y.) 586; Shipton v. Casson, 5 Barn. & Cres. 378; Sinclair v. Bowles, 9 Barn. & Cres. 92. Mr. Freeman, the learned editor of the American Decisions, has contributed a valuable note on the subject of these contracts (19 Am. Dec. 272, 282) in which he concludes that

"this doctrine seems to be recognized, or to be growing in favor. Where, under a special contract, a party has in good faith bestowed some labor or parted with some articles to the benefit of another, who has as a matter of fact enjoyed the benefit of the labor or the articles, whether voluntarily or involuntarily, and where the incomplete performance has not been the result of the party's own provoking, or of causes which he might, with ordinary diligence, have provided against, the one receiving such benefit must pay therefor." Limerick v. Lee, 17 Okl. 165, 87 Pac. 659; Richards v. Richman, 5 Pen. (Del.) 558, 64 Atl. 238. One cannot abandon work arbitrarily and sue on a quantum meruit. Poynter v. U. S., 41 Ct. Cl. 443; Douglas v. Lowell, 194 Mass. 268, 80 N. E. 510. But, if the owner commits first breach a right of action immediately accrues. Peet v. East Grand Forks, 101 Minn. 518, 112 N. W. 1003; Bailey v. Marden, 193 Mass. 277, 79 N. E. 257. And so of any obstacles interposed by owner to prevent compliance. Davis v. Coal Co., 21 S. D. 173, 110 N. W. 113.

¹⁴ Sickles v. Pattison, 14 Wend. (N. Y.) 257, 28 Am. Dec. 527; Pettie v. Tenn. Manufacturing Co., 1 Sneed (Tenn.), 386; Crouch v. Miller, 5 Humph. (Tenn.) 586; Stump v. Estill, Peck (Tenn.), 175; Irwin v. Bell, 1 Tenn. 485; Yeats

pleaded by B. as a *counter-claim* to the action of A.¹⁵ This principle is extended in some jurisdictions to contracts to perform labor or furnish materials other than building contracts,¹⁶ and in some jurisdictions it is denied as to building contracts.¹⁷ It is perceived that, where the rule as to building contracts prevails, it results in this: That the law allows a party to recover upon an implied promise which did not exist in fact, and which is distinctly variant from the terms of a written contract which did exist.

§ 1151. **Commentary on the foregoing Proposition.**—Having thus shown that the proposition that a contract cannot be implied contrary to the real understanding of the parties is not universally true, I shall next show that the proposition is not true in any case in the full sense which the words in which it is couched import. Indeed, this must be apparent from what has just been said with regard to building contracts. Here the parties have entered into a contract in which everything which is to be done is specified with minute detail. There is no defect in the real understanding of the parties. The contract is not performed as made, and yet a recovery is allowed for a partial performance. But it does not follow that the law has allowed a recovery upon an implied promise which is *totally opposed* to the intention of the parties; for such contracts do not import that if, after a *bona fide* effort at performance, something is left undone, nothing shall be paid for what has been done. This is not what the rule means. It means that no recovery can be had upon an *implied assumpsit* which is entirely opposed to the understanding of the parties. It means that, where the parties have made one contract for themselves, the law cannot make a totally different contract for them, and one which would lead to

v. Ballentine, 56 Mo. 530; Williams v. Porter, 51 Mo. 441; Eyerman v. Mt. Sinai Cemetery Asso., 61 Mo. 489; Ahern v. Boyce, 19 Mo. App. 552; Austin v. Keating, 21 Mo. App. 30.

¹⁵ Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713. Compare Marshall v. Jones, 11 Me. 54.

¹⁶ Porter v. Woods, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153; Eldridge v. Rowe, 7 Ill. 91, 43 Am. Dec. 41; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713; McClay v.

Hedge, 18 Iowa, 66. Compare Larkin v. Buck, 11 Ohio St. 568; Moore v. Mfg. Co., 113 Mo. 98, 20 S. W. 975.

¹⁷ Smith v. Brady, 17 N. Y. 173 (compare Glacius v. Black, 50 N. Y. 145; Sinclair v. Talmadge, 35 Barb. (N. Y.) 602; Phillip v. Galant, 62 N. Y. 256, 264); Erwin v. Ingram, 24 N. J. L. 519; Haslack v. Mayers, 26 N. J. L. 284; School Trustees v. Bennett, 27 N. J. L. 513; Brown v. Fitch, 33 N. J. L. 418; Whiting v. Derr, 121 App. Div. 239, 105 N. Y. S. 852.

results totally opposed to those which they contemplated. This is well illustrated by a class of cases where persons occupy towards each other, by consent, the relation of *parent and child*. A father is not liable at law to support his adult son or daughter, nor entitled to his or her services. The same may be said of a step-father in respect of his step-child, of an uncle in respect of his nephew or niece, and so on; and yet, if the latter come to live with the former, and live in his family for years as a child lives with its parents, rendering services, and receiving in return shelter, clothing and subsistence, without any distinct contract as to wages, the latter cannot hereafter recover wages of the former, or of his executor or administrator, although the value of the services rendered may have been greater than the value of the shelter, clothing and subsistence received; and the reason is that, for the law to raise such a promise would be to raise a promise directly opposed to the obvious understanding of the parties.¹⁸ So, where a *slave* voluntarily continues in his master's service after being entitled to his freedom, and renders services and is supplied with necessaries, without an understanding that he is to receive wages, he cannot recover them on an implied *assumpsit*,¹⁹ though it is otherwise where he is held involuntarily.²⁰ So, it has been held that, if an *apprentice* continue in the service of his master under voidable indentures he cannot thereafter recover wages contrary to the covenants of the indentures.²¹ But this is very doubtful; for an "understanding" with an

¹⁸ Robinson v. Cushman, 2 Den. (N. Y.) 149; Guild v. Guild, 15 Pick. (Mass.) 129; Fitch v. Peckham, 16 Vt. 150; Andrus v. Foster, 17 Vt. 556; Williams v. Hutchinson, 3 N. Y. 312. Contrary to this principle, it has been held in Massachusetts that a man who support his wife's child by a former husband may maintain an action against such child, upon an implied *assumpsit*, for necessities furnished the latter. Freto v. Brown, 4 Mass. 675, per Parsons, C. J.; Worcester v. Marchant, 14 Pick. (Mass.) 510. But this is denied in Missouri. Gillett v. Camp, 27 Mo. 541. And see Cooper v. Martin, 4 East, 76; Gay v. Ballou, 4

Wend. (N. Y.) 403. Under special circumstances, a widowed mother has been allowed to maintain a like action against her daughter for support during her minority. Worcester v. Marchant, 14 Pick. (Mass.) 510.

¹⁹ Griffin v. Potter, 14 Wend. (N. Y.) 209; Livingston v. Ackeston, 5 Cow. (N. Y.) 531; Urie v. Johnston, 3 Pa. (Penr. & W.) 212; Alfred v. Fitzjames, 3 East, 3.

²⁰ Peter v. Steel, 3 Yeates (Pa.), 250.

²¹ Maltby v. Harwood, 12 Barb. (N. Y.) 473; Harney v. Owen, 4 Blackf. (Ind.) 337. See, in support of this principle, Weeks v. Leighton, 5 N. H. 343; McCoy v.

infant, is not the same as an understanding with a person who is *sui juris*. It is the privilege of infancy to avoid contracts not clearly for the infant's benefit; and, accordingly, the better opinion seems to be that the infant may, in such a case, disaffirm the contract of apprenticeship, abandon the service, and sue for the reasonable value of his services.²²

§ 1152. **Proposition 2: That a Moral Obligation will not of itself Support an Implied Promise.**—It must occur to the philosophical mind, that in any correct system of laws, no substantial distinction should exist between moral and legal obligations, but that, whatever a man is bound in conscience, or according to good morals or good usage, to do for the reparation of another the law ought to compel him to do at the suit of that other. It is, perhaps, the greatest reproach upon the common law, which was made by our ancestors when they were barbarians, that it exhibits in many instances a wide divergence between legal and moral obligations. It traveled in narrow and unbending grooves; its rigid technicality expelled conscience from the administration of justice, and created the necessity for another court and a supplementary system of jurisprudence, which should find the means to compel the doing of right, where the common law sanctioned or permitted the doing of wrong. The doctrine that a moral obligation is not of itself sufficient to raise an implied promise, is laid down again and again in books of the common law. I recall but one case where it has been distinctly

Huffman, 8 Cow. (N. Y.) 84 (overruled in *Medbury v. Watrous*, 7 Hill (N. Y.), 110).

²² *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Moses v. Stevens*, 2 Pick. (Mass.) 332. See also *Corpe v. Overton*, 10 Bing. 252 (overruling, it seems, *Holmes v. Blogg*, 8 Taunt. 508, 2 J. B. Moore, 552; dictum of Lord Mansfield in *Drury v. Drury*, 2 Eden, 39; *Wilmot's Opinions*, 226, note a; *Olney v. Myers*, 3 Ill. 311. The nature of implied promises is curiously illustrated by the rule that, while an *infant* can, with certain exceptions, avoid his express contract, he cannot avoid his implied promise; which shows that an implied prom-

ise is no contract at all. Thus, an infant's tort can be waived and assumpsit maintained against him under the same circumstances as in case of an adult. *Elwell v. Martin*, 32 Vt. 217; *Shaw v. Coffin*, 58 Me. 254; *Walker v. Davis*, 1 Gray (Mass.), 506. A further exception lies in account stated, that is to say, if an account is rendered and retained without objection for an unreasonable length of time, an implied assent to be charged arises, making the account assailable only for fraud or mistake. *Little & Hays Inv. Co. v. Pigg*, 29 Ky. Law Rep. 809, 96 S. W. 455; *McMullin v. Reid*, 213 Pa. 338, 62 Atl. 924.

denied. A master drove his female slave from his house half naked, shockingly beaten, and having an iron weighing fifteen pounds attached to her foot. The plaintiff, from motives of humanity, took the slave to his house, clothed, fed, cared for and cured her, against the protests of the master, who declared that he would not pay the plaintiff for his services, but would sue him for harboring his slave. Nevertheless, the plaintiff sued the master in assumpsit and recovered the value of his services, on the ground that the moral obligation of the master to provide for his slave was sufficient to raise an implied promise to indemnify the plaintiff, although contrary to his express declarations.²³ This was a *nisi prius* decision, and not of high authority. It undoubtedly reached the right result, but gave an erroneous reason for it. The true reason was, that a master is bound to furnish necessities for his slave, just as a father is for his child, or a master for his apprentice; that this obligation is not only a moral but a legal obligation; and that it is the legal obligation which raises the promise and not merely the moral obligation. These suggestions, perhaps, conduct us to the true rule; it is, that a moral obligation is not a sufficient ground in law for implying a promise, except in those cases where the legal obligation moves forward to the line of the moral obligation and concurs with it. The rule then is, that *a moral obligation which is not a legal obligation* is not sufficient to support an implied promise. This rule is necessarily and universally true; for the reason that an implied promise is nothing more or less than a legal obligation, and therefore the moral obligation which will raise such a promise must necessarily also be a legal obligation.

§ 1153. Illustrations.—A son is under the strongest moral obligation to support his infirm and indigent parents, but as he is under no legal obligation to do so, the law will not raise a promise on his part to do so.²⁴ So, a father may be under the strongest moral obligation to support his adult indigent child, but clearly a promise to do so will not be implied; because this moral obligation has been held not sufficient to support an express promise to pay expenses

²³ Fairchild v. Bell, 2 Brev. (S. C.) 129, 27 Am. Dec. 702.

²⁴ Edwards v. Davis, 16 Johns. (N. Y.) 281. A son being under no legal obligation to pay debts contracted by his indigent father for

the latter's necessary support, his written promise to pay such debts is without consideration, and therefore incapable of being enforced in law. Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79.

previously incurred on behalf of such a child.²⁵ So, parish officers may be under a moral obligation to support their indigent poor, who happen to fall sick or receive wounds while temporarily sojourning in another parish. But they are under no legal obligation to do so; and if such a pauper receives assistance from such other parish, no action can be sustained against the officers of the former parish for reimbursement.²⁶

§ 1154. Proposition 3: That a Request is Necessary to Raise an Implied Promise.—As a general rule, a man cannot make another man his debtor, without the consent of that other before or after the fact. If, therefore, one gratuitously or officiously do something which he may regard as beneficial to another, the law will not imply a promise on the part of that other to pay for it;²⁷ unless, having power either to keep or reject the benefit conferred, he elects to keep it; in which case he may be held liable to pay for it, on a principle somewhat similar to that upon which a party is often held to have ratified an unauthorized act done professedly on his behalf. The general rule is said to be that a request is necessary to raise an implied promise.²⁸ It has been so held where the plaintiff ren-

²⁵ Thus a son who was of full age and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and in distress, was relieved by the plaintiff. Afterwards the father wrote to the plaintiff promising to pay him the expenses incurred. It was held that this promise would not sustain an action. *Mills v. Wyman*, 3 Pick. (Mass.) 207.

²⁶ *Atkins v. Banwell*, 2 East, 505; *Wennall v. Adney*, 3 Bos. & P. 247 (overruling *Simmons v. Wilmott*, 3 Esp. 91, and *Scarman v. Castell*, 1 Esp. 270).

²⁷ *Watkins v. Trustees*, 41 Mo. 303; *Bailey v. Gibbs*, 6 Mo. 45; *Jones v. Wilson*, 3 Johns. (N. Y.) 434; *Beach v. Vandenburg*, 10 Johns. (N. Y.) 361; *Stokes v. Lewis*, 1 T. R. 20; *Child v. Morley*, 8 T. R. 613; *Winsor v. Savage*, 8 T.

R. 290; *Lewis v. Lewis*, 8 Strobb. L. (S. C.) 530.

²⁸ *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Dunbar v. Williams*, 10 Johns. (N. Y.) 249; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587, 602, per Colden, Senator; *Ibid.* 620, per Spencer, Senator; *Wennall v. Adney*, 3 Bos. & P. 247; *Atkins v. Banwell*, 2 East, 505; *Newby v. Wiltshire*, 2 Esp. 739; *Brooks v. Read*, 13 Johns. (N. Y.) 380; *Everts v. Adams*, 12 Johns. (N. Y.) 352; *Friedlander v. Lehman*, 101 N. Y. S. 252; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. 65. An exception was held to exist where one made an agreement to pay funeral expenses to the extent of a reasonable expenditure. *Ruggiero v. Tuffani*, 104 N. Y. S. 691, 54 Misc. Rep. 497. If one accepts services which create something of an agency, a promise is implied.

dered services necessary to save the defendant's property from destruction by fire;²⁹ where the plaintiff, a physician, administered medicine to the defendant's slave, in a case not of pressing necessity;³⁰ where the parish officer furnished surgical assistance to the defendant's servant who had sustained an accident;³¹ where the plaintiff and defendants were tenants in common of a building, and the plaintiff made repairs, but not at the request of the defendant;³² where the plaintiff without the request of the defendant, repaired a well and pump situated on the land of the defendant, which the plaintiff claimed the privilege of using;³³ where the plaintiff, owning the upper, and the defendant the lower floor of a house, repaired the roof, after requesting the defendant to join him in it, which the latter refused to do;³⁴ where the overseers of the poor of one town assisted a pauper belonging to another town, he being so sick that

Morrison v. Min. Co., 143 N. C. 251, 55 S. E. 611. The courts of Missouri have worked out a rule largely upon the equitable or ex *acquo et bono* idea, and have said, in effect, that an implied contract is co-ordinate and commensurate with duty, and, as duty directs, in the case of services performed for another of which he has received the benefit, the law enjoins. See *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74; *Moore v. Renick*, 95 Mo. App. 202, 68 S. W. 936.

²⁹ *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28.

³⁰ *Dunbar v. Williams*, 10 Johns. (N. Y.) 249.

³¹ *Newby v. Wiltshire*, 2 Esp. 739; *Gross v. Cadwell*, 4 Wash. 670, 30 Pac. 1052; *Kerr v. Cusenbary*, 60 Mo. App. 558.

³² *Mumford v. Brown*, 6 Cow. (N. Y.) 475. A tenant in common at common law, may compel his co-tenant to join him in making repairs, by writ de *reparatione facienda*, which remedy probably still survives in some form. *McClure v. Lenz*, 40 Ind. App. 56, 80 N. E. 988.

³³ *Doane v. Badger*, 12 Mass. 65.

The rigidity of former decision on the subject of request being necessary to raise an implied contract seems to have become much relaxed, as indicated by cases like *Ruggiero v. Tuffans*, *supra*; *Lillard v. Wilson*, *supra*, and *Moore v. Renick*, *supra*. It is also held that knowledge of continuous service being rendered without objection implies assent, equivalent to request. See *Silver v. Missouri, K. & T. R. Co.*, 125 Mo. App. 402, 102 S. W. 621; *Hood v. League*, 102 Ala. 228, 14 South. 572; *Norris v. Phillipot*, 12 Ky. Law Rep. 557; *Kiser v. Holladay*, 29 Or. 338, 45 Pac. 759. See also where party was led by decedent to believe she would be remembered in his will. *McDermott's Estate*, 123 Mo. App. 448, 100 S. W. 63; *Roberson v. Niles*, 7 Mackey (D. C.), 182. In Michigan, however, it is broadly declared, that, where no contractual relationship exists, mere acceptance of beneficial service creates no right of action. *Frank v. McGilvray*, 144 Mich. 318, 107 N. W. 886.

³⁴ *Loring v. Bacon*, 4 Mass. 575.

he could not be removed to such other town;³⁵ where a physician furnished medicine to a pauper, but not at the request of the overseers of the poor, and then sued them for payment;³⁶ and where the plaintiff rendered particular services as a mere kindness to the defendant, without any expectation of being paid therefor.³⁷ And where the plaintiff rendered services to the defendants, intending that they should be gratuitous,³⁸ or relying upon the generosity of the latter for compensation,³⁹ or rendered services in the mere expectation of being compensated by a legacy,⁴⁰ it was held that he could not recover compensation for them.

§ 1155. **Observations on this Proposition.**—A request being necessary to the existence of an implied promise, it follows that, in counting upon such a promise, the pleader must allege a request,⁴¹

³⁵ Brooks v. Read, 13 Johns. (N. Y.) 380; Wennall v. Adney, 3 Bos. & P. 247 (overruling Simmons v. Wilmott, 3 Esp. 91, and Scarman v. Castell, 1 Esp. 270; Atkins v. Banwell, 2 East, 505. Compare Wing v. Mill, 1 Barn. & Ald. 104.

³⁶ Everts v. Adams, 12 Johns. (N. Y.) 352. But where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper, he may maintain assumpsit therefor against the overseer, although no order has been made for the relief of the pauper. King v. Butler, 15 Johns. (N. Y.) 281. Compare Palmer v. Vandenburg, 3 Wend. (N. Y.) 193; Fox v. Drake, 8 Cow. (N. Y.) 191; Minklaer v. Rockefeller, 6 Cow. (N. Y.) 276; Gourley v. Allen, 5 Cow. (N. Y.) 644; Flower v. Allen, Id. 654; Olney v. Wickes, 18 Johns. (N. Y.) 122.

³⁷ James v. O'Driscoll, 2 Bay (S. C.), 101, 1 Am. Dec. 632.

³⁸ Gore v. Summersoll, 5 Monr. (Ky.) 513; Whaley v. Peak, 49 Mo. 80; Asbury v. Flesher, 11 Mo. 610.

³⁹ Jacob v. Ursuline Nuns, 2 Mart. (La.) 269, 5 Am. Dec. 730.

⁴⁰ Little v. Dawson, 4 Dall. (U. S.) 111; Osborne v. Governors of

Guy's Hospital, 2 Stra. 728; Le Sage v. Coussmaker, 1 Esp. 187; Plume v. Plume, 7 Ves. 258; Lee v. Lee, 6 Gill & J. (Md.) 316. Compare Patterson v. Patterson, 13 Johns. (N. Y.) 379; Gary v. James, 4 Desau. (S. C.) 185; Roberts v. Swift, 1 Yeates (Pa.), 209. But if, in such a case, both parties really intended that the services should be compensated in some way, an action upon a quantum meruit pro opere et labore will lie; and whether or not they so intended is a question of fact for a jury or other trier of facts. Osborne v. Governors of Guy's Hospital, 2 Stra. 728; Jacobson v. LeGrange, 3 Johns. (N. Y.) 199; Le Sage v. Coussmaker, 3 Esp. 187; Higginson v. Fabre, 3 Desau. 88, 91; Shakspeare v. Markham, 10 Hun (N. Y.), 322, 326, in Court of Appeals, 72 N. Y. 400, 406; Robinson v. Raynor, 36 Barb. (N. Y.) 131; in Court of Appeals, 28 N. Y. 497; Quackenbush v. Ehle, 5 Barb. (N. Y.) 472; Campbell v. Campbell, 65 Barb. (N. Y.) 644; Martin v. Wright, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468.

⁴¹ Durnford v. Messiter, 5 Maule & S. 446.

or at least, it must appear that the party promising was under a legal obligation to do the act himself, or to procure it to be done.⁴² And here again, we find ground for the conclusion that this rule, that a request is necessary to support an implied promise, is not of universal application; for we find that, under certain states of fact, the *request* itself will be *implied*.⁴³ This, however, is not a presumption of law, but a *conclusion of fact* to be drawn from the evidence in particular cases. But, like most other facts, it may be proved by circumstantial evidence; and the beneficial nature of the services, though not enough when standing alone, may be very important in a chain of circumstances tending to establish such a conclusion.⁴⁴

§ 1156. **Further Observations.**—It may be added to the foregoing that the law will never imply a promise *contrary to the manifest justice of the case*.⁴⁵ Indeed, this whole doctrine of implied promises appears to have been originally a fiction of law, devised for

⁴² Comstock v. Smith, 7 Johns. (N. Y.) 87; Parker v. Crane, 6 Wend. (N. Y.) 647; Hicks v. Burhans, 10 Johns. (N. Y.) 243; Livingston v. Rogers, 1 Caines (N. Y.), 583. Thus the discharge by one of a joint obligation of two. Payne v. Payne, 129 Wis. 450, 109 N. W. 105. Or where one, secondarily liable inter se, discharges, upon compulsion, the obligation. Thus where a city was sued and paid the judgment in an action from defective trap door on a sidewalk. The city recovered against abutting owner. City of Seattle v. Imp. Co., 47 Wash. 22, 91 Pac. 255.

⁴³ See Fairchild v. Bell, 2 Brev. (S. C.) 129, 27 Am. Dec. 702. If one accepts services of another, knowing they are being rendered under a mistake as regards their being within the purview of his duty to another. Thus where a railway mail clerk transferred mail at destination, which a railroad was obligated to do, a request is implied. Blowers v. Southern R. Co.,

74 S. C. 221, 54 S. E. 368. If a contract become unenforceable, because of the statute of frauds, the request is not thereby displaced. Cozard v. Elam, 115 Mo. App. 136, 91 S. W. 434.

⁴⁴ Ehle v. Judson, 24 Wend. (N. Y.) 97, 99; Hicks v. Burhans, 10 Johns. (N. Y.) 243; Oatfield v. Waring, 14 Johns. (N. Y.) 188; 1 Saund. Pl. & Ev. 264, n. 1. See also Doty v. Wilson, 14 Johns. (N. Y.) 378.

⁴⁵ Weir v. Weir, 3 B. Mon. (Ky.) 645; Skeen v. Johnson, 55 Mo. 24. On the contrary "manifest justice" has been built up under circumstances where ordinarily presumption would be to the contrary. Thus it was held in a Tennessee case, that despite the rule that services between members of a family are presumably gratuitous, yet, where one cared for an idiot sister during almost her entire life, she should be entitled to such compensation out of decedent's estate as deceased would have allowed her

the purpose of reaching substantial justice. The law in its development has passed through the age of fiction, and it is submitted that it is time to call this doctrine by another name. There can be no such thing as an implied promise. The very term involves a contradiction. The particular promise either was made by the party sought to be charged, or was not made by him. If it was made by him, it is matter to be pleaded and proved, like any other fact. I have shown that the doctrine involves the absurdity of creating a fictitious promise where no promise whatever was made, where a different promise was made, and where there was an entire repudiation of the promise which the law created. What, then, is the real substance of this doctrine? It is not that the law creates a promise where none existed, or where a different one existed, for that would be impossible and absurd; but it is that the law *raises a duty* or *creates an obligation*. Ought we not, then, to abolish this worn-out nomenclature, and in its stead to speak of the *duty* or *obligation* which the law creates and enforces in the situations named? If the common law should ever be codified, and the words "implied promise" or "implied assumpsit" should be found in the code, they would be a monument of reproach to its authors.

§ 1157. **Question of Law or Fact.**—Whether the law, under given circumstances, implies a promise is *for the court*, and not for the jury; since the jury are not judges of the law;⁴⁶ but where the law does not imply the promise, it is a *question for the jury*, what the parties really *intended*.⁴⁷ Thus a *step-father* is under no legal obligation to support a *step-son*; but where the step-son lives in the family of the step-father and labors for him as his own son would do, without any express understanding as to the terms upon which he so resides and labors with the latter, the law implies neither a promise on the part of the step-father to pay the step-son for his services, nor a promise on the part of the step-son to pay the step-father for his support; but it is assumed that the parties intended that the parental relation should exist between them.⁴⁸

had she have come into full possession of her faculties before dying and been imbued with ordinary sense of justice. *Key v. Harris*, 116 Tenn. 161, 92 S. W. 235.

⁴⁶ *Prickett v. Badger*, 37 Eng. L. & Eq. 428 (overruling, it seems, on

this point, *De Bernardy v. Harding*, 8 Exch. 822). Compare *Planch v. Colburn*, 8 Bing. 14.

⁴⁷ Ante, § 1154, last note.

⁴⁸ Ante, § 1151. The rule is that, between members of a family, services one to the other are presum-

But in such a case, it may be a question for the jury upon the facts, whether the stepson was living with the step-father upon his hospitality, as children ordinarily live with their parents.⁴⁹ In an action of assumpsit against a *married woman*, evidence that the plaintiff furnished materials and labor on the defendant's house, held by her in her own right, at the request of her husband, with no request on her part, but with her knowledge and consent, is not conclusive, in law, of a promise by her to pay for such labor and materials, but is evidence from which the jury may find such a promise.⁵⁰ On a similar theory, it has been held that a written acknowledgment of A., who is in the occupation of land, that he holds it as the *tenant* of B., does not raise a presumption of law that he *promises to pay rent*, nor transfer from B. to A. the burden of proof on the question of fact whether the understanding was that rent should be paid. "From the defendants' occupation and acknowledgment tenancy, the law does not imply a promise to pay rent. the question whether there was such a promise, is a question of fact." ⁵¹

ably gratuitous. *Finch v. Green*, 225 Ill. 304, 80 N. E. 318.

⁴⁹ *Myers v. Malcolm*, 20 Ill. 621.

⁵⁰ *Bickford v. Dane*, 58 N. H. 185.

⁵¹ *Savings Bank v. Getchell*, 55 N. H. 281, 285. In giving the opinion of the court, Doe, C. J., also reasons thus: "The practice of shifting the burden of proof by a legal presumption is largely abandoned in this state. It often materially encroached upon the province of the jury, but caused less injustice when parties were not allowed to testify than it would now. When

courts assumed the power of excluding the testimony of the parties, for reasons alleged to have been satisfactory in a certain state of society, they did not hesitate, by legal presumptions and other measures, to extensively control the jury in the decision of questions of fact. The tendency in this state is toward a correction of those errors, and the establishment and observance of the true line between law and fact, and between the duty of the court and the duty of the jury."

CHAPTER XXXVII.

SALES OF PERSONAL PROPERTY.

ARTICLE I.—WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.

ARTICLE II.—PRECEDENTS OF INSTRUCTION TO JURIES.

ARTICLE I.—WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.

SECTION

- 1160. Preliminary.
- 1161. Loosely said to be a Question of Law.
- 1162. Said to be a Question of Law where Facts proved or not Controverted.
- 1163. Question for Jury where Facts in Doubt.
- 1164. Cases where Ruled as a Question of Law.
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- 1170. Illustration.
- 1171. Bona Fide Purchaser for Value.
- 1172. Whether a Sale was Conditional.
- 1174. Whether a Sale and a Delivery of Collaterals were Parts of one Transaction.
- 1175. Delivery of Personal Property purchased with Land.
- 1176. Compliance with a Contract of Sale which contains the words "More or Less."
- 1177. Under what Circumstances Question withdrawn from the Jury.

§ 1160. Preliminary.—The subject of discussion in this chapter is little more than an illustration or amplification of a subject already discussed.¹ The question whether a sale at common law exists, stands on the same footing as the question whether any other contract exists, and is to be answered by the court or by the jury, according to principles already stated.² But the *statute of frauds* has introduced a special rule in regard to this species of contract.

¹ Ante, ch. 35.

Asphalt Co., 210 Mo. 260, 109 S. W.

² Ante, §§ 1112, 1114; 1 Brown v. 22.

There must be a *delivery* by the vendor, and an *acceptance* by the vendee, of the thing intended to be sold, where the contract is not in writing; and this complicates the question of sale or no sale with the further question whether or not there has been such a delivery and acceptance as satisfies the statute of frauds. Moreover, the law recognizes two kinds of contract in respect of sales of personal property: an agreement to make a future sale, and a present contract of sale.³ These elements sufficiently differentiate the contract of sale of personal property from other contracts, to justify a separate inquiry into the question under what circumstances the existence of such a contract is to be pronounced as a question of law and under what circumstances found as a conclusion of fact:

§ 1161. **Loosely said to be a Question of Law.**—It has been said that the question of sale or no sale is a question of law, and is not to be decided by the *opinions* of witnesses.* Certainly it is a sound conclusion that it is not to be decided by the opinions of witnesses; for whatever it may be, it is not a mere question of private opinion. It is also said to be a question of law, and very often a question extremely difficult to decide, what shall be deemed a delivery upon a sale of goods.⁵ This conception does not carry us any farther than the obvious conclusion that the *rule of sale*, like the rule or measure of damages, is a rule of law. If it is intended to convey the idea that the application of this rule to doubtful, complicated or equivocal facts is for the judge, and not for the jury, then it is a palpably erroneous conception.

§ 1162. **Said to be a Question of Law where Facts proved or not Controverted.**—Again it is said that, where the facts are proved or are not controverted, it is a question of law whether they show a sale.⁶ This is no more than a branch of the general rule which

³ Benj. on Sales, § 309.

⁴ Belt v. Marriott, 9 Gill (Md.), 331, 336.

⁵ Belt v. Marriott, *supra*.

⁶ Fuller v. Bean, 34 N. H. 299; Houdlette v. Tallman, 14 Me. 403; Burrows v. Stebbins, 26 Vt. 659. It was so held in Glasgow v. Nicholson, 25 Mo. 29, where a delivery of a certificate of the city weigher of the weight of five hogsheds of sugar which lay on the wharf, to-

gether with a bill of the price, was held to constitute a delivery of the sugar. In Bass v. Walsh, 39 Mo. 192, the delivery by the vendor of a ticket describing the goods (two hundred and twenty-three bales of hay lying on the Levee at St. Louis), and the price at which they were sold, the ticket authorizing the purchaser to take possession as soon as the hay could be weighed, was held sufficient evidence to war-

applies to all questions arising in judicial administration: the facts being ascertained, the judge pronounces the conclusion of law. But what are the *facts*, within the meaning of this rule? As elsewhere seen, in respect of various questions,⁷ they embrace not only what are termed *constitutive facts*, but they embrace also those *ulterior inferences of fact* which the court, and not the jury, are to draw. One of these ulterior inferences of fact is that of *intent*. The question of contract or no contract is involved ultimately in this question of intent,—that is, whether both parties *intended* that there should be a contract,—whether there was an *aggregatio mentium*, a meeting of minds, a concurrence of intent. In many cases the constitutive facts,—that is, all the facts which need be stated by the pleader or deposed to by the witnesses, will be indisputably established; but yet whether this concurrence of intent existed,—in other words, whether there was a sale,—will remain an inference of fact to be drawn by the jury. This, however, forms an *exception* to the general rule that the judge pronounces the law upon conceded or established facts; and undoubtedly, in the great majority of cases of this kind, the judge, and not the jury, will draw the conclusion. This introduces us to another conception, which is,—

§ 1163. **Question for Jury where Facts in Doubt.**—There is no doubt whatever upon the proposition that, where the facts are in doubt, the question is to be resolved by the jury in every case where they return a general verdict,—the court assisting them with instructions as to the applicatory principles of law, based upon hypothetical facts within the scope of the evidence. Whenever, then, the material facts are left in doubt, the question is to be decided by the jury, under suitable instructions as to the law.⁸ Or, to throw this rule into contrast with the preceding: “When the law can pronounce, upon a state of facts, that there is or is not a delivery and

rant the jury in finding that the hay had been delivered. *Van Valkenburgh v. Gregg*, 45 Neb. 654, 63 N. W. 949; *Adlam v. McKnight*, 32 Mont. 349, 80 Pac. 613; *Comegys v. Lumber Co.*, 8 Wash. 661, 36 Pac. 1087; *Main v. Tracy*, 86 Ark. 27, 109 S. W. 1015; *Garfield v. Proctor Coal Co.*, 199 Mass. 22, 84 N. E. 1020. 1163.

⁷ Ante, §§ 1112, 1114; post, § 1333.

⁸ *Fuller v. Bean*, 34 N. H. 299;

Riddle v. Varnum, 20 Pick. (Mass.) 283; *George v. Stubbs*, 20 Me. 250; *Draper v. Jones*, 11 Barb. (N. Y.) 269; *Smith v. Dennie*, 6 Pick. (Mass.) 266; *Bishop v. Shillito*, 2 Barn. & Ald. 329, note; *Llewellyn Steam Condenser Mfg. Co. v. Molter*, 76 Cal. 242, 18 Pac. 271; *Barwick v. Gast L. & E. Co.*, 58 Hun, 603, 11 N. Y. S. 373; *Isbell Porter Co. v. Heimman*, 126 App. Div. 713, 111 N. Y. Supp. 332.

acceptance, it is a question of law, to be decided by the court. But when there may be uncertainty and difficulty in determining the true *intent* of the parties respecting the delivery and acceptance, from the facts proved, the question of acceptance is to be decided by the jury."⁹ Again, it is said: "Where there is no dispute as to the facts, it is a question of law; when the evidence is conflicting, the jury must decide."¹⁰ In such a case the court should leave it to the jury, upon the evidence, to decide whether the facts which are adduced for the purpose of showing delivery and acceptance were true, and should direct them hypothetically that, if such facts are true, they do or do not constitute a delivery.¹¹

§ 1164. Cases where ruled as a Question of Law.—The last preceding statements undoubtedly embody the general rule; and cases are found where the question has been ruled as a matter of law, as indeed it should be where the facts are both settled and unequivocal. Thus, where a sale of wheat was made which had been consigned to B., and a delivery order was given to the vendee, and the wheat was burned in an elevator before the vendee had time to send the delivery order to F., it was held that the sale was incomplete, because the legal title was in F., through whose co-operation alone it could have been vested in the plaintiff. The legal title was held to be in F., because of the wheat having been placed in his elevator and mingled with his wheat, in conformity with a peculiar rule in regard to storage in elevators.¹² Indeed, there seems to be nothing

⁹ *Houdlette v. Tallman*, 14 Me. 400; *Glass v. Gelvin*, 80 Mo. 297, 300; *Gallup v. Fox*, 64 Conn. 491, 30 Atl. 756; *Hoeffler v. Carew*, 135 Wis. 605, 116 N. W. 241. Whether an acceptance of a part is an acceptance of the whole is governed by the same principle. *Ward F. M. Co. v. Isbell & Co. (Ark.)*, 99 S. W. 845. The principle of estoppel precludes sometimes objection to acceptance being final, e. g. where defect being known at the time no objection is made. *Carolina P. L. Co. v. Turpin*, 126 Ga. 677, 55 S. E. 925. See also, as to alleged shortage, *Hamilton-Brown S. Co. v. Mercantile Co.*, 80 Ark. 438, 97 S. W. 284.

Whether a contract of sale was not intended or was a mere banter and so understood was held to be a question for the jury. *Theiss v. Weiss*, 166 Pa. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

¹⁰ *Glass v. Gelvin*, *supra*; *Hatch v. Bailey*, 12 Cush. (Mass.) 29.

¹¹ *Williams v. Gray*, 39 Mo. 201, 206.

¹² *Perkins v. Dacon*, 13 Mich. 81. If an elevator company is both buyer and warehouseman and the custom of mingling all wheat is known to customers, the fact of mingling in no way tends to the determination of whether a particular transaction is one of storage

in the subject of sale and delivery to take the case out of the general principle, subject to the exception already and hereafter explained,¹³ that, where the facts are found or conceded, whether there has been a delivery to satisfy the statute of frauds and constitute a sale, is a question of law for the court. This in most cases is necessarily so; for we find that modern courts do not submit the question to the jury upon the whole evidence without instructions, but that they instruct them hypothetically whether a given state of facts, shown by the evidence, does or does not constitute a sale. Thus, in a case in Maine, it was held proper for the judge to charge the jury, under proper evidence, that, if they found that the defendant purchased all the logs charged in the plaintiff's account, and that the logs were all deposited at the same place, and that the defendant, at the time of the purchase, employed B. to haul them out, and he actually did haul out a portion of them on the same day in which the bargain was made, and as soon thereafter as could be conveniently done, and that they were received and used by the defendant under the contract,—this was such a delivery and acceptance as the law required, and that the defendant would be chargeable for the whole property sold.¹⁴ In this case the court did no more than apply to a hypothetical state of facts the principle that, where there has been a parol sale, a delivery and acceptance of a part is a delivery of the whole, so as to satisfy the statute of frauds and transfer the title.¹⁵

§ 1165. **Question Drawn to the Jury where a Question of Intent.**—The authorities agree that if, as between the buyer and the seller, *anything remains to be done* before the goods are to be delivered, the right of property does not pass.¹⁶ But while this is so,

or sale. *James v. Plank*, 48 Ohio St. 225, 26 N. E. 1107. See also *Bretz v. Diehle*, 117 Pa. 589, 11 Atl. 893, 2 Am. St. Rep. 706. A sale transaction was held to be complete on the transfer of the receipt of a bonded warehouse purporting to transfer whisky to buyer, though the receipt merely recited that there was stored in the warehouse a specified quantity of whisky. *Julius Kessler & Co. v. Lackie*, 146 Mich. 384, 109 N. W. 671. And also it has been ruled. that a sale of a specified number of bushels of flax mixed

with flax of like quality and grade may be a complete sale before separation, if the parties so intend. *O'Keefe v. Leistikow*, 14 N. D. 355, 104 N. W. 515.

¹³ Ante, § 1162; post, §§ 1165, 1333.

¹⁴ *Davis v. Moore*, 13 Me. 424.

¹⁵ *Waldron v. Chase*, 37 Me. 414; *Damon v. Osborn*, 1 Pick. (Mass.) 476; *Riddle v. Varnum*, 20 Pick. (Mass.) 280.

¹⁶ *Warren v. Buckminster*, 24 N. H. 336; *Outwater v. Dodge*, 7 Cow. (N. Y.) 87; *Draper v. Jones*, 11

it is conceded that the parties may agree, either expressly or tacitly, to change this rule, and that title to the property shall pass at once.¹⁷ "The question," said Lord Brougham, "must always be, what was the *intention* of the parties in this respect, and that is of course to be collected from the terms of the contract."¹⁸ Other authorities emphasize the idea that it is a question of intent.¹⁹ In-

Barb. (N. Y.) 263; Barrett v. Pritchard, 2 Pick. (Mass.) 512; Bishop v. Shillito, 2 Barn. & Ald. 329, note; Evans v. Harris, 19 Barb. (N. Y.) 416; Tarling v. Baxter, 6 Barn. & Cres. 360; Whitehouse v. Frost, 12 East, 614; Hanson v. Meyer, 6 East, 614; Rugg v. Minett, 11 East, 209; Simmons v. Swift, 5 Barn. & Cres. 857; Wallace v. Breeds, 13 East, 522; Macomber v. Parker, 13 Pick. (Mass.) 183. It is said that a contract of sale is not complete until the happening of an event expressly provided for, or so long as anything remains to be done to the thing sold, to put it in a condition for sale, or to identify it, or discriminate it from other things. McClung v. Kelly, 21 Iowa, 508, 511. Nor is the sale complete while anything remains to be done to determine the quality of the goods, if the price depends upon the quality, unless this is to be done by the buyer alone; and even if earnest money, or if part of the price be paid, the sale is not for that reason complete. It has been inaccurately said that "no sale is complete, so as to vest in the vendee an immediate right of property, so long as anything remains to be done between the buyer and seller in relation to the thing sold." McClung v. Kelley, *supra*. See Story on Sales, § 296 and note 2; Chitty Contr. (10th Am. ed.) 396, 397; Add. Contr. (2d Am. ed.) 225, 228; St. Louis I. M. & S. R. Co. v. Co-op-erage Co. (Ark.), 99 S. W. 375; Com-

v. Adair, 28 Ky. Law Rep. 657, 89 S. W. 1130. If goods are part of a mass, there is no sale until there is segregation and designation. American Metal Co. v. Daugherty, 204 Mo. 71, 102 S. W. 538; Conard v. R. Co., 214 Pa. 98, 63 Atl. 424. It was held in a late case in Michigan, where hay was contracted to be sold, the purchaser to bale and the seller to haul same to the cars, that the seller's obligation to haul did not by itself show that the contract remained executory after the baling. Wheelock v. Starkweather, 146 Mich. 53, 108 N. W. 1085. The price need not, however, be agreed on. Liest v. Dierseen, 4 Cal. App. 634, 88 Pac. 812.

¹⁷ Alexander v. Gardner, 1 Bing. N. Cas. 671; Schindler v. Houston, 1 Denio (N. Y.), 51; Mixer v. Cook, 31 Me. 340; Draper v. Jones, 11 Barb. (N. Y.) 263; Buskirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432. If the contract puts into possession of the joint agent of all parties the mass, from which there is to be assorting and delivering to respective parties, this constitutes such a change. Croze v. Mineral Land Co., 143 Mich. 514, 107 N. W. 313.

¹⁸ Logan v. Le Mesurier, 6 Moore P. C. 116.

¹⁹ Furniss v. Home, 8 Wend. (N. Y.) 256; Smith v. Dennie, 6 Pick. (Mass.) 266; Smith v. Lynes, 4 N. Y. 44; Elgee Cotton Cases, 22 Wall. (U. S.) 180, 187; Hatch v. Oil Co., 100 U. S. 124, 131; Terry v. Wheeler, 25 N. Y. 520, 525; Callahan v.

tent being generally a question for a jury, except where it is declared in a written instrument,²⁰ it follows as a necessary conclusion, that, in many cases, whether the title has passed will be a question of fact to be submitted to a jury upon all the evidence;²¹ though it has been said that when the facts are ascertained, either by the written agreement of the parties or by the findings of the court, * * * they are questions of law.²² This is in accordance with the views of the late Mr. Benjamin, who, after pointing out the distinction between a sale and a mere promise to sell, says: "Both these contracts being equally legal and valid, it is obvious that, whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio*. But parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean; and when this is the case, the courts have applied certain rules of construction, which, in most instances, furnish conclusive tests for determining the controversy."²³

Myers, 89 Ill. 566, 570; Sewell v. Eaton, 6 Wis. 490; Fletcher v. Ingram, 46 Wis. 191, 201. "It is," said Bigelow, C. J., "a question of intent, arising on the interpretation of the entire contract in each case." Briggs v. A. Light Boat, 7 Allen (Mass.), 287.

²⁰ Post, §§ 1333, et seq. If this is to be ascertained from a contract partly written and partly parol, it is a question for the jury. Ginsburg v. Lumber Co., 85 Mich. 439, 48 N. W. 952. If a course of business involves acceptance in one of two ways, i. e., as buyer or warehouseman, the intent as to a particular transaction is for the jury. Brown v. Gilliam, 53 Mo. App. 376. Where a canal company both sold lumber to boat builders for it and furnished them lumber, the value of which was to be deducted from the contract price of the boat, but was not intended as a sale, and the facts as to a particular boat

builder, who sometimes paid cash for lumber, leave room for inference as to a particular transaction, there is a question for the jury. Crosby v. Delaware & H. C. Co., 141 N. Y. 589, 36 N. E. 332.

²¹ Fuller v. Bean, 34 N. H. 290, 305.

²² Terry v. Wheeler, 25 N. Y. 520, 525.

²³ Benjamin on Sales (3d ed.), § 309. Whether a contract of sale is entire or separable; whether there has been refusal to accept; whether certain acts justify or not non-performance and, *generally*, whether or not there is a substantial breach of the contract, are generally questions of law. See California Canneries Co. v. Pacific Metal Works, 144 Fed. 886; Frohlich v. Glass Co., 144 Mich. 278, 107 N. W. 889; J. H. Larrabee & Co. v. Crossman, 184 N. Y. 586, 77 N. E. 589.

§ 1166. **Whether the Parties intended that Title should pass, although Something remains to be done to the Property.**—Restating the rule of the preceding section, it seems to be that the question whether a sale is completed or only executory, is usually one to be determined from the *intent* of the parties, as gathered from their contract, and from the situation of the thing sold and the circumstances surrounding the sale; that where the goods sold are designated so that no question can arise as to the thing intended to be sold, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined,—these being circumstances indicating intent, but not conclusive; but that, where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things, in the absence of anything indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they appear to be in a state in which they may be and ought to be accepted.²⁴ “Presumptively,” said Cooley, C. J., “the title does not pass, even though the articles be designated, so long as anything remains to be done to determine the sum to be paid; but this is only a presumption, and is liable to be overcome by such facts and circumstances as indicate an intent in the parties to be controverted.”

²⁴ *Lingham v. Eggleston*, 27 Mich. 324; restated by Cooley, J., in *Byles v. Collier*, 54 Mich. 1, 4, 19 N. W. 565. Other cases in affirmation of the same doctrine are: *Hatch v. Fowler*, 28 Mich. 205; *Hahn v. Fredericks*, 30 Mich. 223; *Wilkinson v. Holiday*, 33 Mich. 386; *Grant v. Merchants etc. Bank*, 35 Mich. 515; *Scotten v. Sutter*, 37 Mich. 526; *Carpenter v. Graham*, 42 Mich. 191; *Brewer v. Salt Asso.*, 47 Mich. 526, 11 N. W. 370; *Kelsea v. Haines*, 41 N. H. 246; *Southwestern Freight Co. v. Stanard*, 44 Mo. 71; *Shelton v. Franklin*, 68 Ill.

333; *Straus v. Minzesheimer*, 78 Ill. 494; *Crofoot v. Bennett*, 2 N. Y. 258; *Groat v. Gile*, 51 N. Y. 431; *Burrows v. Whitaker*, 71 N. Y. 291; *Dennis v. Alexander*, 3 Pa. St. 50; *Galloway v. Week*, 54 Wis. 608; *Caywood v. Timmons*, 31 Kan. 394, 2 Pac. 566; *Jones v. Bloomgarden*, 143 Mich. 326, 106 N. W. 891; *Ark. Mo. Zinc Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170; *Akers & Inman v. Elk Cotton Mills*, 116 Tenn. 141, 92 S. W. 760; *Conard v. Pennsylvania Co.*, 214 Pa. 98, 63 Atl. 424.

²⁵ *Byles v. Collier*, 54 Mich. 1, 5, 19 N. W. 565.

And it was held that the Circuit Court erred in treating the question as a question of law instead of deciding it as a question of fact.²⁵

§ 1167. Cases where Decided as a Question of Fact.—Upon conflicting or equivocal evidence, the question whether a sale of property has taken place is, then, a question of fact for a jury.²⁶ It has been ruled, in a good many cases, where the contract rested in parol, that, whether there has been a complete sale or not, is a question of fact for a jury.²⁷ On like evidence, it has been frequently held a question for a jury, whether there has been a delivery by the seller and an acceptance by the buyer, according to the contract or intent of the parties, so as to transfer title from one to the other and satisfy the statute of frauds.²⁸ It has been held that, when the facts and the intention of the parties are ascertained, it is for the court to decide whether in law they constitute an acceptance; but if they are disputed it is a question for the jury whether there has been a delivery and acceptance in point of fact, and their finding that there has been an acceptance puts an end to the question of law.²⁹ It has also been said: "Whether the passing of the sale note was symbolical of a delivery, or whether the buyer's request that

²⁵ *Ante*, § 1114. See, for illustration, *Globe National Bank v. Ingalls*, 130 Mass. 8. Compare *National Bank v. Ingalls*, 126 Mass. 209; *Jenkins & Reynolds Co. v. Cement Co.*, 147 Fed. 641, 77 C. C. A. 625; *Epstein v. Lumber Co.*, 117 App. Div. 467, 102 N. Y. S. 627. There need be no disputed facts, if those uncontroverted permit different inferences. *Claus-Sheer Co. v. Lee Hdw. Co.*, 140 N. C. 552, 53 S. E. 433.

²⁷ *De Ridder v. McKnight*, 13 Johns. (N. Y.) 293; *McClung v. Kelley*, 21 Iowa, 508, 511; *Gatzweiler v. Morgan*, 51 Mo. 47; *Morris & Co. v. Schaeffers & Sons*, 30 Ky. Law Rep. 1222, 100 S. W. 327; *Frazer & Houghton v. Mott*, 118 App. Div. 791, 103 N. Y. S. 851; *Watson v. Naugle Tie Co.*, 148 Mich. 675, 112 N. W. 752; *Lawall v. Lawall*, 150 Pa. 626, 24 Atl. 289. So where the

statute requires conditions precedent and the facts are such as to permit inference either way. *Jones v. R. Co.*, 97 Minn. 232, 106 N. W. 1048.

²⁸ *Kelsea v. Haines*, 41 N. H. 246, 253; *Phillips v. Bistolli*, 2 Barn. & Cres. 511; *Chaplin v. Rogers*, 1 East, 192; *Cunningham v. Ashbrook*, 20 Mo. 553; *Pratt v. Chase*, 40 Me. 269; *Jones v. Hook*, 47 Mo. 329; *Rhea v. Riner*, 21 Ill. 526, 531; *Weld v. Came*, 98 Mass. 152; *Ober v. Carson*, 62 Mo. 209, 214.

²⁹ *Chaplin v. Rogers*, 1 East, 192; *Gabril v. Kildare Elevator Co.*, 18 Okl. 318, 90 Pac. 10, 10 L. R. A. (N. s.) 638; *Coverdale v. Rickard & Watson* (Del. Sup.), 69 Atl. 1055. If two articles are embraced in an entire contract, acceptance of one makes an acceptance of both. *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077.

it [the goods] should not be weighed until the next morning, his agreeing to pay the charges and expenses from the time of the sale, and employing Hawley to see that it was properly covered on his account, amounted to an acceptance and receipt, were all matters of fact to be found by the jury."³⁰

§ 1168. **Illustrations of the Foregoing.**—After a bargain and sale of a stack of hay, between parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approbation, it was taken away), was held sufficient to warrant the jury in finding a delivery by the original and an acceptance by the vendee, such as to satisfy the statute of frauds.³¹ In an action by an administrator to recover possession of certain slaves, it was shown that the intestate, some forty years before, purchased one of the slaves and took a bill of sale for her to himself; that he subsequently sought to divest himself of the title and vest it in his wife; and that to that end, the original bill of sale was surrendered, the vendor substituting in place of it another written transfer to the testator's wife, under whom the defendants claimed title. It was held, on this evidence, that the court erred in directing a verdict for the defendant. The court said: "The title of Seals (the plaintiff's intestate) prior to March, 1830, is unquestioned. It is equally clear that he intended and attempted to effect a valid legal transfer to Mrs. Seals. Whether he succeeded in carrying his intention into effect is the question. There being no creditors to complain, it was his right to deal with his property as he pleased—to give it to whom he thought proper. The intention to part with his title and to vest that title in his wife being clear, it would require but slight evidence, after the lapse of nearly forty years, to satisfy the minds of either court or jury that the intention of the parties was effectuated by a proper delivery, even if it should be considered that the claim of the husband's representatives was not of too stale a nature to deserve consideration in a court of justice. Nevertheless, upon the issue of delivery or no delivery, title or no title, the facts should have been submitted to the judgment and finding of the jury."³² Where A. bought the

³⁰ *Bass v. Walsh*, 9 Mo. 192, 201. Where statute requires that property must be in a certain situation before it can be transferred without actual delivery, a jury may say,

if the condition precedent exists. *Swan v. Larkins*, 8 Tex. Civ. App. 221, 28 S. W. 217.

³¹ *Chaplin v. Rogers*, 1 East, 192.

³² *Jones v. Hook*, 47 Mo. 329, opinion by Currier, J.

boards to be made out of a certain quantity of logs in the possession of B., to be paid for at a stipulated price per hundred feet, when the boards should be sawed, and the boards were sawed, piled, and notice given to the purchaser,—it was ruled, seemingly as a matter of law, that, considering the nature of the articles sold, the delivery was sufficient to render the sale valid and to transfer the title to the purchaser.³³ By the condition of a sale at auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A. as highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid. It was held that it was a question of fact for the jury, whether there had been a delivery by the seller and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other.³⁴ In an action for the purchase price of lumber, the evidence being conflicting, it was held for the jury, not for the court, to determine: 1. Whether the lumber was delivered under one entire contract, so that the acceptance of a part would operate as an implied acceptance of the whole; 2. Whether the lumber delivered was of the kind and quality contracted for; and, if not, 3. Whether, after discovering the defects and notifying the plaintiff thereof, the defendant kept the lumber in a safe and suitable place, reasonably convenient for delivery to the plaintiff upon demand and the payment of lawful charges.³⁵

§ 1169. Whether Delivery of Part a Delivery of the Whole.—

A sale of personal property and a receipt, acknowledging payment with delivery of a *portion*, do not necessarily transfer to the vendee title in the whole property sold. Delivery of a part operates as a constructive delivery of the whole only in cases where it is *intended* by the parties that such shall be the result.³⁶ Whether delivery of a part is a delivery of the whole is therefore a question of fact to be *submitted to a jury*,³⁷ and it is error to instruct them that “a

³³ *Bates v. Conkling*, 10 Wend. (N. Y.) 389.

³⁴ *Phillips v. Bistolli*, 2 Barn. & Cres. 511. Compare *Blenkinsop v. Clayton*, 1 J. B. Moore, 328; *Carter v. Toussaint*, 5 Barn. & Ald. 255.

³⁵ *Rood v. Priestly*, 58 Wis. 255.

³⁶ *Pratt v. Chase*, 40 Me. 269, 273; *Dixon v. Yates*, 5 Barn. & Ad. 313, per Littledale, J.; *Bunny v. Poyntz*, 4 Barn. & Ad. 568; *Simmons v. Swift*, 5 Barn. & Cres. 857.

³⁷ As was done in *Shurtleff v. Willard*, 19 Pick. (Mass.) 202.

sale of the whole and receipt for payment and delivery of part, as between the vendor and vendee, would be a delivery of the whole, which was then manufactured, toward the contract," etc.³⁸

§ 1170. **Illustration.**—An agreement was made between A. and B., by which A. was to have the right to take possession of the goods of B., and sell them to pay a debt of B. to A. At the time when the agreement was made, B. kept the goods in a certain store, from which a portion was afterwards moved to a new store. A. went to the new store and told B. that he had a right to take possession and did take possession, and put B. in as keeper, and directed him to sell the goods for A. B. agreed to do it. It was held that this was sufficient evidence of a taking possession of the goods in both stores, to entitle A. to maintain replevin against an officer who subsequently attached the goods in the old store as the property of B., and it was for the jury to determine whether possession was taken of a part for the whole.³⁹

§ 1171. **Bona Fide Purchaser for Value.**—Where it is a material question, in an action of replevin for a chattel, whether the defendant is a *bona fide* purchaser for value, as where the defendant bought it from the plaintiff's vendee, who had paid counterfeit money to the plaintiff for it,—it has been held that the question was one *for the jury*.⁴⁰ This is obviously so, it being a question of *intent*.⁴¹

§ 1172. **Whether a Sale was Conditional.**—Whether a sale of personal property was an absolute or conditional one is upon a conflict of evidence a question of fact *for the jury*.⁴² In a contest touching title to a chattel, where the question depends upon whether the sale of the chattel was absolute or conditional, if the plaintiff

See also *Boynton v. Vezie*, 24 Me. 286; *Ward F. M. Co. v. Isbell & Co.* (Ark.), 99 S. W. 845. Except the contract of sale be construed as entire, then the delivery of a part becomes a question of law. *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077.

³⁸ *Pratt v. Chase*, 40 Me. 269, 273.

³⁹ *Wilson v. Russell*, 136 Mass. 211.

⁴⁰ *Green v. Humphrey*, 50 Pa. St. 212. See also *Pelham v. Grocery Co.*, 146 Ala. 216, 41 South. 12; *Shine v. Culver*, 42 Wash. 484, 85 Pac. 271.

⁴¹ Post, §§ 1333, et seq.

⁴² *Richey v. Burnes*, 83 Mo. 362; *Crabtree v. Segrist*, 3 N. M. 278, 6 Pac. 202.

claims under an absolute sale, the *burden* is upon him; or, if he claims under a conditional sale, the burden is equally upon him, to prove a compliance with the condition.⁴³ Where the evidence touching the agreement rests in parol, it is to be left to the jury, upon all the evidence, to decide which kind of a sale it was.⁴⁴

§ 1174. **Whether a Sale and a Delivery of Chattels were Parts of one Transaction.**—It has been held, under circumstances, that, whether a sale of personal property and a delivery of certain chattels were parts of the same transaction, or were separate transactions, is a question *for the jury*.⁴⁵

§ 1175. **Delivery of Personal Property purchased with Land.**—Where one purchases land and receives a conveyance therefor, and at the same time buys personal property situated on the land, the question whether the vendee had actual possession of the land, is an important one, in determining whether there was an actual delivery of possession of the personal property; which latter question is to be regarded, it seems, a question *for the jury*.⁴⁶

§ 1176. **Compliance with a Contract of Sale which contains the Words "More or Less."**—"In sales of merchandise, especially in large quantities, where it is impossible to ascertain with precise accuracy the number or weight of the articles, before concluding the contract for their purchase, it is necessary and usual to insert the words 'more or less,' or 'about,' in connection with the specific amount which forms the subject of the contract, in order to cover any variation from the estimate, which is likely to arise from differences in weight, errors in counting, diminution by shrinkage, or other similar causes. But in such cases, parol evidence is not ad-

⁴³ See *Whitwell v. Vincent*, 4 Pick. (Mass.) 449; *Reed v. Upton*, 10 Pick. (Mass.) 522; *Heath v. Randall*, 4 Cush. (Mass.) 195.

⁴⁴ *Sawyer v. Spofford*, 4 Cush. (Mass.) 598.

⁴⁵ *Keen v. Preston*, 24 Ind. 395.

⁴⁶ *Cahoon v. Marshall*, 25 Cal. 197. If purchaser looking at a lot or mass of personal property puts his own estimate on quantity, in written agreement to buy, and adds thereafter "more or less," the lot is

sold, though it very greatly exceeds the quantity stated. *Navassa Guano Co. v. Com. G. Co.*, 93 Ga. 92, 18 S. E. 1000. And so, under other circumstances, the words "more or less" may be construed not as limiting but as extending the quantity to whatever the seller had on hand. *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837; *Inman Bros. v. Dudley & Daniels Lumber Co.*, 146 Fed. 449, 76 C. C. A. 659.

mitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified; and the effect of the words 'more or less' is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold; or, as it is sometimes briefly expressed, it is 'an absolute contract for a specific quantity within a reasonable limit.' What is a reasonable limit, and a substantial compliance with such contract, if the facts are not in dispute between the parties, is a *question for the determination of the court.*"⁴⁷

§ 1177. **Under what Circumstances Question withdrawn from the Jury.**—It is said by Mr. Browne in his treatise on the statute of frauds: "Whether there has been a delivery and acceptance sufficient to satisfy the statute of frauds is a mixed question of law and fact. But it is for the court to withhold the facts from the jury, when they are not such as can afford good ground for finding an acceptance; and this includes cases where, though the court might

⁴⁷ Cabot v. Winsor, 1 Allen (Mass.), 546, 550, opinion by Bigelow, C. J. See also Bourne v. Seymour, 16 Com. Bench, 336; Pembroke Iron Co. v. Parson, 5 Gray (Mass.), 589. In the case first cited, under the circumstances, five per cent in five hundred bundles of gunny bags was held not to be such a deficiency as to fall outside of a fair and reasonable limit of short delivery; and that, by proof of a delivery of a portion of the 475 bundles, and a readiness to deliver the residue of the lot, the plaintiff proved a full compliance with the terms of his contract. In Cross v. Eglin, 2 Barn. & Adolph. 106, the question was likewise ruled as a question of law, and it was held that where the contract was for "about 300 quarters more or less,"

and 350 quarters were tendered, the vendee was not bound to receive such a large excess, at least in the absence of evidence showing that an excess above the quantity named was in contemplation. Compare Moore v. Campbell, 10 Exch. 323; Stebbins v. Eddy, 4 Mason (U. S.), 414; Thomas v. Perry, 4 Pet. C. C. (U. S.) 49; Nelson v. Matthews, 2 Hen. & M. (Va.) 164; Quesnel v. Woodlief, Id. 173, note; Hall v. Cunningham, 1 Munf. (Va.) 330; Twiford v. Wareup, Finch, 311; Winch v. Winchester, 1 Ves. & B. 375; Smith v. Evans, 6 Binn. (Pa.) 109; Boar v. McCormick, 1 Serg. & R. (Pa.) 166; Glenn v. Glenn, 4 Serg. & R. (Pa.) 488; Anon., 2 Freem. (Miss.) 107; Joliffe v. Hite, 1 Call (Va.), 301.

admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance upon that evidence.”⁴⁸ Quoting this language, it was said in a case in Massachusetts: “What this scintilla is, needs to be stated a little more definitely; otherwise it may be understood to include all cases where, on a motion for a new trial, a verdict would be set aside, as against the weight of evidence. It would be impossible to draw a line theoretically, because evidence, in its very nature, varies from the weakest to the strongest, by imperceptible degrees. But the practical line of distinction is that, if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions. This rule throws upon the court a duty which may sometimes be very delicate; but it seems to be the only practicable rule which the nature of the case admits.”⁴⁹

ARTICLE II.—PRECEDENTS OF INSTRUCTION TO JURIES.

SECTION

1180. How a Jury Instructed in such Cases.

§ 1180. **How a Jury Instructed in such Cases.**—It is for the court to instruct the jury what would amount in law to a sale; and where a custom of trade has been proved, governing the particular transaction, it is proper to refer them to the custom as the standard by which to determine whether the contract was completed; but the ultimate question whether a sale in fact took place is, where the evidence is conflicting, a question for the jury.⁵⁰ It has been held error for the court to instruct the jury, in substance, in a case where the question related to a sale of hogs, that, if the hogs were sold by

⁴⁸ Browne, St. of Frauds, ch. 15, § 321.

⁴⁹ Denny v. Williams, 5 Allen (Mass.), 1, 5. The court then proceeded to set out a state of facts on which it was held that there was not even a scintilla of evidence to prove an act of delivery and accept-

ance, and that a verdict for the defendant should have been directed. Schmidt v. Rozier, 121 Mo. App. 306, 98 S. W. 791.

⁵⁰ Erisman v. Walters, 26 Pa. St. 467. For forms of instructions see Vol. III.

the net weight, to be ascertained by weighing after they were slaughtered and cleaned, then the presumption that the sale was completed by the delivery is met and repelled, and the loss falls on the plaintiff as owner, unless he shows that the parties intended the sale to be complete upon the delivery,—there being no such presumption, but the circumstance being merely for the consideration of the jury, in determining the intention of the parties.⁵¹ On the other hand, proceeding upon the conception that, “what amounts to a delivery of the goods sold, when the facts are given, is a question of law,” an instruction was approved which directed the jury that if a given state of facts, presented by the evidence, was true, they constituted a good delivery.⁵² The language of Chancellor Kent would seem to form a good text for a hypothetical instruction to a jury in such a case: “The good sense of the doctrine on this subject would seem to be that, in order to satisfy the statute [of frauds], there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and an actual acceptance by the vendee, with the intention of taking possession as owner.”⁵³

⁵¹ *Cunningham v. Ashbrook*, 20 Mo. 297, 300; *Hatch v. Bayley*, 12 Mo. 554.

⁵² *Williams v. Gray*, 39 Mo. 202, 206. So held in *Glass v. Gelvin*, 80

Cush. (Mass.) 27.

⁵³ 2 Kent, Com. 504.

CHAPTER XXXVIII.

WARRANTIES IN SALES OF CHATTELS.

SECTION

- 1195. What Constitutes an Express Warranty.
- 1196. Court to Declare the Legal Effect of Written Warranties.
- 1197. Jury to Interpret Oral Warranties.
- 1198. Whether Statement a Warranty or a mere Expression of Opinion.
- 1199. Jury to Determine whether Purchaser relied on Statement.
- 1201. Whether Quality equal to Warranty.
- 1202. What Constitutes "Unsoundness" in an Animal.

§ 1195. What constitutes an express Warranty.—“It is well settled that neither the word ‘warrant,’ nor any precise form of expression, is necessary to create an express warranty; but it may, under certain circumstances, result from any affirmation of the quality or condition of personal chattels, made by the vendor at the time of the sale. A bare affirmation, not intended by the vendor to have that effect, will not constitute a warranty; and this, for the plain reason that a warranty in its nature is a contract, and no contract or agreement can be made or entered into without the consent and co-operation of two contracting parties.”¹ The rule of law on this subject has been well said to be, that “any affirmation of the quality or condition of the thing sold, made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty.”²

¹ *Edwards v. Marcy*, 2 Allen (Mass.), 486, 489, opinion of the court by Merrick, J.; *Staiger v. Soht*, 191 N. Y. 527, 84 N. E. 1120. Delivery upon an order for goods to be “delivered guaranteed” amounts to an express warranty. *Kimball-Towler Cereal Co. v. Lumber Co.*, 125 Mo. App. 326, 102 S. W. 625.

² *Csgood v. Lewis*, 2 Harr. & G. (Md.) 495; *Edwards v. Marcy*, 2 Allen (Mass.), 486, 489. See *Henshaw v. Robins*, 9 Metc. (Mass.) 83,

where the same principle is asserted in substantially the same terms. Also *Nauman v. Overlee*, 90 Mo. 666, 3 S. W. 380; *Dulaney v. Rogers*, 64 Mo. 201; *Walsh v. Morse*, 80 Mo. 568; *Jones v. Railroad Co.*, 79 Mo. 92; *Blaney v. Pelton*, 60 Vt. 275, 13 Atl. 564; *McClintock v. Emick*, 87 Ky. 100, 7 S. W. 903; *Warder v. Bowen*, 31 Minn. 335, 17 N. W. 943. To constitute a warranty, neither the word “warrant,” nor any equivalent word, is indis-

“To prove, in any particular instance, that there was a warranty by the vendor, it is therefore not sufficient to show merely that, at the time of the sale, he affirmed in clear and definite language a fact relative to the essential qualities or condition of the goods or things sold; but to this there must be superadded proof that he intended thereby to influence the mind of the purchaser and to induce him to buy, and that the latter did buy upon the faith of and in reliance upon the affirmation. This is essential to show that there was in fact a contract between the parties upon the subject.”³

§ 1196. Court to Declare the Legal Effect of Written Warranties.—“When the contract is in writing, and the affirmation is incorporated into or makes a part of it, the court is to declare its legal effect; the exposition of it involving a mere question of law.⁴ * * * But in all oral contracts, it is within the province of the jury to determine, in view of all the circumstances attending the transaction, whether the necessary ingredients to constitute such warranty, namely, the intention of the vendor that his affirmation

pensable. *Warder v. Bowen*, 31 Minn. 335, 17 N. W. 943. It is sufficient if the language used by the vendor amounts to an undertaking that the goods are as represented. *Patrick v. Leach*, 8 Neb. 530, 1 N. W. 853; *Neave v. Arntz*, 56 Wis. 174, 14 N. W. 41. That the representation of the vendor, to become a warranty, must have been relied upon by the purchaser. *Halliday v. Briggs*, 15 Neb. 219, 18 N. W. 55; *Torkelson v. Jorgenson*, 28 Minn. 383, 10 N. W. 416; *Afflick v. Streater*, 125 Mo. App. 703, 103 S. W. 112. A sale by sample with stipulation that goods to be delivered are “as good in quality” amounts to an express warranty. *Christian v. Knight & Co.*, 128 Ga. 501, 57 S. E. 763.

³ *Edwards v. Marcy*, supra.

⁴ *Edwards v. Marcy*, 2 Allen (Mass.), 486, 490. This was done in the following cases: *Henshaw v. Robins*, 9 Metc. (Mass.) 83; *Hastings v. Lovering*, 2 Pick. (Mass.)

214; *Rice v. Codman*, 1 Allen (Mass.), 377; *Shepherd v. Kain*, 5 Barn. & Ald. 240. See also *Borrekens v. Bevin*, 3 Rawle (Pa.), 23; *Batturs v. Sellers*, 5 Harr. & J. (Md.) 117; and 6 Harr. & J. (Md.) 249; *Yates v. Pym*, 6 Taunt. 446; *Chandelor v. Lopus*, Cro. Jac. 4; *Power v. Barham*, 4 Ad. & El. 573; *Freeman v. Baker*, 2 Nev. & Man. 446; *Chapman v. Murch*, 19 Johns. (N. Y.) 290; *Swett v. Colgate*, 20 Johns. (N. Y.) 196; *Seixas v. Woods*, 2 Caines (N. Y.), 48; *Listman Mill Co. v. Miller*, 131 Wis. 393, 111 N. W. 49. And so the question of whether there arises out of a particular character of sale an implied warranty. *Depew v. Hdw. Co.*, 121 App. Div. 28, 105 N. Y. S. 390; *Prewett v. Richardson*, 79 Ark. 66, 95 S. W. 787; *Dorsey v. Watkins*, 151 Fed. 340. And to what it does not extend—e. g. latent defects. *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. 466.

should operate as an inducement to the purchaser to buy, and the acceptance of or reliance to some extent upon it by the vendee, as one of the grounds, motives or reasons for making the purchase, do actually exist.”⁵

§ 1197. Jury to Interpret Oral Warranty.—In conformity with the principles already stated,⁶ the interpretation of oral warranties is generally left to the jury. “A warranty may be verbal or written. When it is reduced to writing, it is the province of the court to expound it; but when it is merely verbal, it is for the jury to interpret the words of the witness who testifies concerning it. The court may explain to the jury what constitutes a warranty, when it rests altogether on oral proof; but as no particular form of words is essential, and it is mostly a question of intention on the part of both the vendor and vendee, that question, like any other question of fact, must be left to the jury.”⁷

§ 1198. Whether Statement a Warranty or a mere Expression of Opinion.—The rule is that, whenever the vendor, at the time of the sale, makes an assertion or representation, respecting the kind, quality or condition of the thing sold, upon which he intends that

⁵ *Edwards v. Marcy*, 2 Allen (Mass.), 486, 490. See to the same effect *Osgood v. Lewis*, 2 Harr. & G. (Md.) 495; *Register-Gazette Co. v. Larosh*, 123 Ill. App. 453. Where there was oral warranty at the time of agreement to buy and, upon delivery the buyer accepted a writing containing a different warranty, it was a question for the jury as to the existence and breach of the former. *Hallowell v. McLaughlin*, 136 Iowa, 279, 111 N. W. 428.

⁶ Ante, § 1105.

⁷ *Lindsay v. Davis*, 30 Mo. 406, 410, opinion by Napton, J.; *McLennen v. Ohmen*, 75 Cal. 558, 17 Pac. 687; *Shippen v. Bowen*, 122 U. S. 575, 30 L. Ed. 1172; *Homer v. Parkhurst*, 71 N. d. 110, 17 Atl. 1027; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228. Where question, dependent

on conflicting evidence, is whether there was waiver of implied warranty on a sale by grade in the making of a partial inspection and abandonment because of statement that remainder was not up to the inspection, was held a question for the jury. *Prewett v. Richardson*, 79 Ark. 66, 95 S. W. 787. Also whether a subsequent conversation, eventuating in a sale, related back to a former, in which an oral warranty was expressed, there being no reference thereto between the parties, was held to be a question for the jury, where both conversations referred to same matter and was between the same parties. It was for the jury to say, if they had the former conversation in mind. *Powers v. Briggs*, 139 Mich. 664, 103 N. W. 194.

the vendee shall rely, and upon which the vendee does rely in making the purchase, it amounts to a warranty.⁸ If, however, the vendor, by what he says, merely intends to express an *opinion* or *belief* about the matter, and not to make an affirmation of a fact, then the statement will not amount to a warranty;⁹ and where doubts exist upon the evidence whether, in the case of an oral statement, the vendor intended to assert a fact, or merely to express an opinion or belief, that question must be left to the jury to decide.¹⁰ Where the representation is in writing, but is not incorporated into or made a part of the contract of sale, the question whether it amounted to a contract of warranty, or whether it was the mere expression of an opinion, not accepted or acted upon by the vendee so as to constitute a contract, has been held equally a question for the jury. Thus, in an action upon an alleged warranty in the sale of a horse, it appeared that the plaintiff wrote to the defendant: "You will remember that you represented the horse to me as five years old," etc., and the defendant replied: "The horse is as I represented it."

⁸ Ante, § 1195; *Lamme v. Gregg*, 1 Metc. (Ky.) 444. See also as to what amounts to a warranty. *Smith v. Miller*, 2 Bibb (Ky.), 617; *Bacon v. Brown*, 3 Bibb (Ky.), 35; *Dickens v. Williams*, 2 B. Monr. (Ky.) 374; *Duffee v. Mason*, 8 Cow. (N. Y.) 25; *Vernon v. Keys*, 12 East, 632, 639; *Morrill v. Wallace*, 9 N. H. 111; *Chapman v. Murch*, 19 Johns. (N. Y.) 290; *Cook v. Moseley*, 13 Wend. (N. Y.) 278; *Foggert v. Blackweller*, 4 Ired. L. (N. C.) 238; *Baum v. Stephens* 2 Ired. L. (N. C.) 411; *Hoover & Allison v. Wirtz*, 15 N. D. 477, 107 N. W. 1078.

⁹ *Henson v. King*, 3 Jones L. (N. C.) 419; *Rogers v. Ackerman*, 22 Barb. (N. Y.) 134; *Congar v. Chamberlain*, 14 Wis. 258; *Osgood v. Lewis*, 2 Harr. G. (Md.) 495; *Bond v. Clark*, 35 Vt. 577; *Foster v. Estate of Caldwell*, 18 Vt. 176; *Bee-man v. Buck*, 3 Vt. 53; *Thornton v. Thompson*, 4 Gratt. (Vt.) 121; *Buswell v. Roby*, 3 N. H. 467; *Tuttle v. Brown*, 4 Gray (Mass.), 457, 460; *DeSchawnberg v. Buchanan*, 5 Carr.

& P. 343; *Power v. Barham*, 4 Ad. & El. 473. At least, upon proper instructions as to the effect of the language which the jury may find to have been used. *Denning v. Foster*, 42 N. H. 165, 176. Compare, as to the difference between warranties and expressions of opinion, *Salmon v. Ward*, 2 Carr. & P. 211; *Jendwine v. Slade*, 1 Esp. 572; *Omrod v. Hath*, 14 Mees. & W. 664; *Dunlop v. Wright*, 1 Peake N. P. 123; *Budd v. Fairmaner*, 5 Carr. & P. 78; *Richardson v. Brown*, 8 Moore, 338, 1 Bing. 344. The statement must be such as to justify the vendee in relying upon it as a statement of fact, as distinguished from an opinion. *Manufacturing Co. v. Thomas*, 53 Iowa, 558, 5 N. W. 737; *Worth v. McConnell*, 42 Mich. 473, 4 N. W. 198. But whether he so intends or not is for the jury to say. *Beasley v. Surles*, 140 N. C. 605, 53 S. E. 360.

¹⁰ *Lamme v. Gregg*, 1 Metc. (Ky.) 444.

Here it was left to the jury to determine whether the defendant, at the sale, gave an undertaking to the effect mentioned in the letter.¹¹

§ 1199. Jury to Determine whether Purchaser relied on the Statement.—So, where an action for damages is predicated upon the ground that a certain statement, made by the vendor touching the character or quality of the thing sold, was a warranty, it is for the jury to determine whether the purchaser accepted and acted upon the statement as such; since, as already seen,¹² this acceptance and action are necessary to give to the statement the quality of a contract,—in other words, to lift it out of the character of a mere representation and to make it a warranty. Thus, where a railroad company issued and sold bonds which bore on their face a certificate, signed by persons describing themselves as trustees, that the bonds were secured by a first mortgage to such persons in trust for the bondholders,—it was held that there was no absolute presumption that a purchaser of such a bond relied upon the certificate, and that, in an action upon a note given by him as a part of the consideration of the purchase, the defense being a breach of this assumed contract of warranty, the question should be submitted to the jury, to determine whether the defendant accepted the bond relying to any extent on the certificate.¹³

§ 1201. Whether Quality Equal to Warranty.—In an action for the purchase price of a manufactured article, sold with warranty, the question of the strength and capacity of the article to undergo the service for which it was intended, is a pure *question of fact*. So is the question what is proper management in the use of such an article.¹⁴

¹¹ *Salmon v. Ward*, 2 Carr. & P. 211. It has been held, as matter of law, in a case where the consideration repelled the idea of warranty, that a representation was to be deemed "seller's talk." *Morley v. Consol. Mfg. Co.*, 196 Mass. 257, 81 N. E. 993.

¹² Ante, § 1195.

¹³ *Edwards v. Marcy*, 2 Allen (Mass.), 460; *Woods v. Thompson*, 114 Mo. App. 38, 88 S. W. 1126. Where it was as apparent to pur-

chaser as to seller whether a machine set up to do certain work could do so in the position it was to be placed, any statement by seller as to whether or not it would work satisfactorily could not be deemed a warranty, as not being relied on. *Logeman Bros. Co. v. R. J. Preuss Co.*, 131 Wis. 122, 111 N. W. 64.

¹⁴ *Tyson v. Tyson*, 92 N. C. 288; *Wyandotte P. C. Co. v. Bruner*, 147 Mich. 400, 110 N. W. 949; *Fraternal Const. Co. v. Jackson F. & M. Co.*, 28

§ 1202. What Constitutes "Unsoundness" in an Animal.—On like grounds, in an action for a breach of warranty of the soundness of an animal, it has been laid down that what constitutes an unsoundness is a matter for the jury. "It is not the province of the judge to determine the character of diseases. When we say, therefore, that distemper would have been an unsoundness as well as glanders, we mean, of course, if the jury should so consider it from the evidence submitted to them. Whether glanders is an aggravated form of distemper or a distinct disease, or whether either of the diseases would constitute an unsoundness, are questions of fact with which the court has nothing to do."¹⁵ So, it has been ruled, in an action for a breach of warranty, that the question whether corns in a horse's feet constitute unsoundness, is a question of fact, to be determined upon the evidence, and the general legal definition of unsoundness. The court say: "The law gives a general definition of unsoundness, and leaves it to the trier of the facts to find whether the infirmity of corns, in the particular case, is within the general definition of unsoundness,—whether that defect materially diminishes the value of the horse and his ability to perform service. Such a diminution of value and ability is an unsoundness, although it be temporary and curable."¹⁶

Ky. Law Rep. 383, 89 S. W. 265. So also whether a test was sufficient and did or not show compliance with the warranty. *Arkwright Mills v. Machinery Co.*, 145 Fed. 783.

¹⁵ *Lindsay v. Davis*, 30 Mo. 406, 412. A warranty of soundness of a horse, unless expressly restricted, extends to all manner of unsoundness, whether known to the vendor or not. *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. 609. A warranty that a horse is sure-footed,

and all right in every way, excepting only stumbling from temporary causes, is broken if he has such an organic defect that his stumbling can only be avoided by a peculiar mode of shoeing, which the vendee, using reasonable diligence, cannot discover. *Morse v. Pitman*, 64 N. H. 11, 4 Atl. 880.

¹⁶ *Alexander v. Dutton*, 58 N. H. 282. Compare *Kiddell v. Burnard*, 9 Mees. & W. 668; *Roberts v. Jenkins*, 21 N. H. 116, 119.

CHAPTER XXXIX.

NEGOTIABLE INSTRUMENTS.

SECTION

- 1215. Reasonable Diligence in Presenting Commercial Paper.
- 1216. In Presenting Bill of Exchange for Acceptance.
- 1218. In Presenting Sight Drafts for Payment.
- 1219. This Rule, how Applied.
- 1220. In Presenting a Demand Note, or a Note in which Time of Payment is not fixed.
- 1221. When a Demand Note is Overdue.
- 1222. Reasonable Hours for Presentment of Commercial Paper.
- 1223. Reasonable Notice of Dishonor of Commercial Paper: View that this is a Question of Fact.
- 1224. View of Lord Mansfield and his Associates that it is a Question of Law.
- 1225. This View generally Adopted in America.
- 1226. No Reversal if the Jury decide it Rightly.
- 1227. This Rule, how Applied in England.
- 1228. Further Illustrated.
- 1229. Another Illustration.
- 1233. Whether the Circumstances of a Particular Case are Sufficient to Dispense with Demand and Notice.
- 1234. Effect of Insolvent inserting the Bill in his Schedule.
- 1235. Waiver of Notice to Indorser.
- 1236. Whether Notice of Protest probably reached the Indorser.
- 1237. "Second of Exchange, First Unpaid."
- 1238. Refusal to Pay or Accept.
- 1239. Whether the Holder took in Good Faith and without Notice of Prior Equities.
- 1240. Whether the Plaintiff has Assigned the Note sued on to Another for the Benefit of his Creditors.
- 1241. Whether Note an Extension of Time or Collateral Security.
- 1242. Whether Notes are Renewals of Former Notes.

§ 1215. Reasonable Diligence in Presenting Commercial Paper.

The right of the holder of a bill of exchange which has not matured, or of a bill of exchange or promissory note which has matured, to hold the drawer in case of a bill of exchange, or the maker in case of a promissory note, for the amount named in the instrument, in the case of non-acceptance before maturity or non-payment after maturity,—seems to depend upon the exercise of reasonable diligence upon the part of the holder in presenting the paper, for acceptance or payment as the case may be, and in giving notice to the

indorser of its non-acceptance or non-payment. Active diligence, it has been said, is imposed upon the obligee in pursuing the obligor, for a recovery of the sum due on a bill assigned to him, so that nothing shall be lost by his laches; and the question is whether he did use due diligence, which is a *question for the decision of the court*.¹ This measure of diligence is discharged by making presentment within what the law calls a *reasonable time*.

§ 1216. **In presenting Bill of Exchange for Acceptance.**—A bill of exchange must be presented for acceptance within a *reasonable time*, with reference to the interest of the drawer to put the bill in circulation, or the interest of the drawee to have the bill speedily presented; and what constitutes a reasonable time is a *mixed question of law and fact*, for the determination of the court and jury,²—which means that the question must be submitted to the jury under proper instructions.³ Where there was no evidence of a *general usage*, and the testimony as to the *opinion of merchants* on the point was conflicting, the court refused to disturb a verdict, in which it was found that a delay of *five months*, in presenting a bill drawn upon Rio de Janeiro, was not unreasonable. In giving the opinion of the court, Tindal, C. J., said: “There is no definite time prescribed by the law of England, within which such presentment for acceptance must take place. In some countries, as in France, the times within which a foreign bill, payable at sight, or at any certain time after, must be presented for acceptance to the drawee, are fixed by positive law, according to the place where, and the place on which the bill is drawn. Thus, for instance, where it is drawn from the continent of Europe, or the isles of Europe, and payable within the European possessions of France, such presentment for acceptance must be made within six months from the date, in default of which, the holder can have no remedy against the drawer or indorsers.* But there is no such law in England; and, in the absence of any such positive regulation, or of any general usage or course of trade, no other rule, as it appears to us, can be laid down as the limit within which the bill must be forwarded to its destina-

¹ Crawford v. Berry, 6 Gill & J. (Md.) 63, 70; Brooks v. Elgin, 6 Gill (Md.), 254, 260; Westbay v. Stone, 112 Mo. App. 411, 87 S. W. 34; Solomon v. Cohen, 94 N. Y. S. 502; Vogel v. Star, 132 Mo. App. 430, 112 S. W. 27.

² Mullick v. Radakissen, 9 Moore P. C. 46.

³ Mellish v. Rawdon, 9 Bing. 416, 421; ante, § 1031.

⁴ Citing Code de Commerce, liv. 1. tit. 8, § 11.

tion, than that it must take place within a reasonable time, under all the circumstances of the case, and that there must be no unreasonable or improper delay. Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixing question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case."⁵

§ 1218. In presenting Sight Drafts for Payment.—The rule as to bills of exchange drawn payable at sight, is that they must be presented for payment within a *reasonable time*.⁶ It has been said in one case,⁷ and held in others,⁸ that what is a reasonable time for the presentment of such a draft is a *question of fact*; but the better opinion, supported by the decisions of the best courts, and by the opinions of the most approved writers on negotiable paper, is that, where the facts are clear and uncontradicted, the *question* is one of *law*, to be decided by the court.⁹ This view is to be preferred, because it results in giving the mercantile community definite rules by which to govern their actions, instead of remitting the question to the uncertain discretion of juries.

§ 1219. This Rule, how Applied.—In the application of this principle, it has been held, as a matter of law, that, where a bank has received a sight draft for collection, drawn upon a party or another bank, having a place of business in the same city in which

⁵ Mellish v. Rawdon, 9 Bing. 416, 422.

⁶ Salisbury v. Renick, 44 Mo. 554; Phoenix Ins. Co. v. Allen, 11 Mich. 501, 511.

⁷ Fugitt v. Nixon, 44 Mo. 295, opinion by Wagner, J.

⁸ Mohawk Bank v. Broderick, 13 Wend. (N. Y.) 137; Phoenix Ins. Co. v. Allen, 11 Mich. 501, 511.

⁹ Prescott Bank v. Caverly, 7 Gray (Mass.), 217; Aymar v. Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; Gough v. Staats, 13 Wend. (N. Y.) 549; Dyas v. Hanson, 14 Mo. App. 363; Byles on Bills, 163; Edwards on Bills, § 546; Dan.

Neg. Instr., § 466. But while it is error to submit this question to the jury, yet if the jury decide it rightly, there will be no ground for reversing the judgment. Dyas v. Hanson, supra; ante, § 1020; Ward v. Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703; First Nat. Bank v. Buchannon Bank, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332; Sylvester v. Crohan, 138 N. Y. 494, 34 N. E. 273; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859; Noble v. Doughten, 72 Kan. 336, 83 Pac. 1048. If the circumstances are in dispute, what is a reasonable time becomes a jury question. Oley v. Miller, 74 Conn. 304, 50 Atl. 744.

the collecting bank is situated, the collecting bank does not use due diligence if it fail to present the draft to the payee for payment *before the close of the following day*;¹⁰ and it has been held that a custom among banks, of doing business among themselves through a clearing house, does not alter the rule that a check must be presented to the bank on which it is drawn at least during banking hours on the next succeeding day.¹¹ And although there has been some difference of opinion as to whether the same measure of diligence is required in the presentment of sight bills of exchange as in the presentment of bank checks, the better opinion seems to be that there is no sound reason for a distinction. "The fact that one instrument is drawn upon a bank and the other upon an individual, can make no difference in principle concerning the duty of the holder; what will be due diligence in the one case will be due diligence in the other."¹²

§ 1220. In presenting a Demand Note, or a Note in which Time of Payment is not fixed.—A bill or note may be transferred as well after, as before it is due.¹³ The difference is said to be that if it is transferred after due, as there is no time fixed for payment, the indorser undertakes that it will be paid on demand, which means that it will be paid within a *reasonable time* after demand of payment is made; and what is a reasonable time is a *question of fact* for the jury under all the circumstances of the case.¹⁴ It has been so

¹⁰ *Dyas v. Hanson*, 14 Mo. App. 363, 370.

¹¹ *Rosenblatt v. Haberman*, 8 Mo. App. 486. See also *Alexander v. Burchfield*, 1 Carr. & M. 75, 7 Man. & G. 1061. Nor is the rule altered by the fact, that the check was received after banking hours on the previous day. *Edmisten v. Herpolsheimer*, 66 Neb. 94, 92 N. W. 138, 59 L. R. A. 934.

¹² *Smith v. Janes*, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527, per Bronson, J. See also *St. John v. Homans*, 8 Mo. 382, 385; *Harker v. Anderson*, 21 Wend. (N. Y.) 372. As to the question of diligence, so in respect to negligence, the matter has been ruled to be one of law. Thus it

was held, that for a bank in one town to send a check directly to drawee bank in another, which, receiving it in time, failed to remit, and a few days later suspended, there being no evidence of custom or usage to support such act and there being another public agent in the latter town for collection of checks. *R. H. Herron Co. v. Mawby*, 5 Cal. App. 39, 89 Pac. 872.

¹³ *Story on Bills*, §§ 220, 223; *Naef v. Potter*, 226 Ill. 628, 80 N. E. 1084.

¹⁴ *Union Bank v. Ezell*, 10 Humph. (Tenn.) 385; *Jacobs v. Gibson*, 77 Mo. App. 244. This has been held a question of law under uniform negotiable instruments act. *Schlesinger v. Schultz*, 110 App. Div. 356,

held, where the note was drawn and dated in New York, on the 4th of August, 1857, by a person living in Pennsylvania, and was presented about the 12th of September following. The court held that, under the circumstances, whether the delay of presentment for between five and six weeks was reasonable or not, ought to have been submitted to the jury. The court conceded the general rule that, where all the facts are entirely undisputed, what is a reasonable time is a question of law, but added: "In a case like the present, involving various considerations, and particularly the laws of a sister State, it appears to us that this question should have been submitted to the jury under proper instructions of the court."¹⁵ The question whether demand has been made upon the maker within a *reasonable time*, so as to *charge an indorser*, is reasoned upon the same principles. It is said, that it has never been attempted to fix the time with any degree of precision, except in reference to the circumstances of each particular case; which circumstances go merely to show the *intention* of the parties in respect to the time of payment, and amount therefore to no more than evidence of their agreement. This being a question of intent, and the intent not being expressed on the face of the instrument, it is a question, like other questions of intent, to be determined by a jury under all circumstances surrounding the transaction.¹⁶

§ 1221. When a Demand Note is Overdue.—In England "a note payable on demand is not considered as overdue without some evidence of payment having been demanded and refused; although it be several years old, and no interest has been paid on it."¹⁷ "It

96 N. Y. S. 383; Com'l Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020.

¹⁵ Barbour v. Fullerton, 36 Pa. St. 105, opinion by Read, J. The court added: "The distinction between the two classes of cases is often a nice one, and is carefully marked by Chief Justice Shaw in Wyman v. Adams, 12 Cush. (Mass.) 210."

¹⁶ Tomlinson Carriage Co. v. Kinsella, 31 Conn. 269, 273. In England the very sensible conclusion has been reached that the word "*demand*," in such a note, is synonymous with "*request*" and that the

promise is therefore a promise to pay when requested to do so. Brooks v. Mitchell, 9 Mees. & W. 15; Barough v. White, 4 Barn. & Cress. 325. But the American cases seem to hold that the undertaking of an indorser of such a note is that he will be bound, provided the payee, without success, uses due diligence to collect the same within a *reasonable time*. Castle v. Candee, 16 Conn. 224; Lockwood v. Crawford, 18 Conn. 361; Culver v. Parish, 21 Conn. 408.

¹⁷ Byles on Bills (7th ed.), 145, 179, 180; Chitty on Bills (10th ed.).

has been a question," says Chancellor Kent, "when a note payable on demand is to be deemed a note out of time, so as to subject the indorsee, upon a subsequent negotiation of it, to the operation of the rule,"—meaning the rule which lets in proof of *equities* between the original parties, where the note is negotiated after it becomes due. And he proceeds to state that, "when the facts and circumstances are ascertained, the reasonableness of time is a matter of law, and every case will depend upon its special circumstances."¹⁸ American cases are found which proceed upon the ground that it is a question which is to be *decided by the court*.¹⁹ A statute of Massachusetts²⁰ put the matter at rest in that State, by enacting that a demand made at the expiration of sixty days from the date of the note, without grace, is deemed to be made within a *reasonable time*.²¹

§ 1222. Reasonable Hours for Presentment of Commercial Paper.—Moreover, it seems that what are to be deemed *reasonable hours*, within which a bill of exchange or other commercial instrument may be presented for payment, is a question of law for the court. Accordingly, it has been held that, where the bill is made payable at a particular bank, the holder impliedly agrees to ascertain the usual hours within which such banker does business, and to present it within those hours; and hence a presentment *after the close of banking hours*, when the house is shut and the clerks are

155; *Brooks v. Mitchell*, 9 Mees. & W. 15, and American note.

¹⁸ 3 Kent. Com. 120, 121, The sufficiency of a demand so as to mature a demand note in order to charge the indorsers is a question of law. *Nat'l H. R. Bank v. Moffett*, 162 N. Y. 623, 57 N. E. 1118.

¹⁹ *Thurston v. McKown*, 6 Mass. 428; *Wethey v. Andrews*, 3 Hill (N. Y.), 582; *Agawan Bk. v. Strever*, 18 N. Y. 502, 16 Barb. (N. Y.) 82; *Oleson v. Wilson*, 20 Mont. 544, 52 Pac. 372. There are cases which hold that such a note becomes due, and an action lies against the *maker*, immediately and without any demand. *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep.

605; *Caldwell v. Rodman*, 50 N. C. 139. And upon such no days of grace are allowed. *First Nat. Bank v. Price*, 52 Iowa, 570, 3 N. W. 639; *Brown v. Chancellor*, 61 Tex. 437. In Rhode Island it was held of a note one and a half years old that it was overdue. *Guckian v. Newbold*, 23 R. I. 553, 51 Atl. 210. A certificate of deposit payable to order of depositor on its return does not mature until then. *Tobin v. McKinney*, 15 S. D. 257, 88 N. W. 572.

²⁰ Mass. Act of April 6th, 1839 (Laws Mass. 1839, p. 56, ch. 121).

²¹ See *Rice v. Wesson*, 11 Met. (Mass.) 400; *Sacket v. Loomis*, 4 Gray (Mass.), 148.

gone, is not a sufficient presentment to charge the drawer.²² The rule in regard to presentment at the office of a banker is established with reference to a well known rule of trade that a presentment out of the hours of business is not sufficient;²³ but the English courts do not apply this rule in the case of the presentment at other places than at banking houses; nor in such cases do they require that the presentment should be made *within business hours*.²⁴ Where the bill was presented at a house in London, where it was made payable, at 8 o'clock in the evening of the day when it fell due, it was held that the presentment was sufficient to charge the drawer, although at that hour the house was shut up and no person answered to the bell;²⁵ though it was conceded that a presentment *at midnight* would be unreasonable.²⁶ But, although the presentment be made at a bank and *after banking hours*, yet if a person has been stationed there for the purpose of returning an answer to the person making the presentment, and an answer that the bank has "no orders" is returned, the presentment will be as good as though made within banking hours; since the purpose of presenting it has been subserved.²⁷

§ 1223. **Reasonable Notice of Dishonor of Commercial Paper: View that this is a Question of Fact.**—Most of the analogies,²⁸ which relate to the question whether what is reasonable time is for the decision of the judge or of the jury, would remit this question to the jury as a question of fact; and while the rule that it is to be decided as a question of law is undoubtedly more beneficial to commerce than the rule which would remit it to the varying opinions of jurors, yet it said that the former is not an inflexible rule. There are many cases where it will be a fair question for the jury or the

²² *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 Maule & S. 28; *Grange v. Reigh*, 93 Wis. 552, 67 N. W. 1130. It is sufficient presentment for the holder to place a note in the hands of the cashier of the bank and there have it at maturity for the maker to call for it and pay it. *Carrington v. Odom*, 124 Ala. 529, 27 South. 510.

²³ *Wilkins v. Jadiz*, 2 Barn. & Adolph. 188. If there are special circumstances or a special custom,

the rule may not obtain. *Temple v. Carroll*, 75 Neb. 61, 105 N. W. 989.

²⁴ *Jameson v. Swinton*, 2 Taunt. 224; *Barclay v. Bailey*, 2 Camp. 527.

²⁵ *Barclay v. Bailey*, 2 Camp. 527.

²⁶ *Wilkins v. Jadiz*, supra. Or *between 6 and 7 in the evening*, when no one but a girl was left to take care of the counting house. *Morgan v. Davison*, 1 Stark. 114.

²⁷ *Garnett v. Woodcock*, 6 Maule & S. 44, 1 Stark. 475.

²⁸ Post, §§ 1530, et seq.

trier of the facts, whether the holder or the notary exercised reasonable business diligence in endeavoring to find out the proper address of the indorser when a non-resident.²⁹ An examination of the cases shows that the courts are in the frequent habit of putting this question to juries under proper instructions.³⁰

§ 1224. View of Lord Mansfield and his Associates that it is a Question of Law.—It was laid down by Lord Mansfield, who may be justly called the father of the English law of commercial paper, that what is reasonable notice to an indorser of non-payment by the maker of a promissory note, or to the drawer in case of a bill of exchange, is a question of law, which for the sake of certainty and uniformity in commercial transactions, should be decided by the court. “It is of great consequence,” said that eminent judge, “that this question should be settled. Certainty and diligence are of the utmost importance in mercantile transactions. It is extremely clear that the holder of a bill, when dishonored by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law. It may depend, in some measure on facts; such as the distance at which the parties live from each other, the course of the posts, etc. But wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court and adhered to by every one, for the sake of certainty.” Ashurst, J., in the same case said: “It is of dangerous consequence to lay it down as a general rule that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty.” Buller, J., added the following

²⁹ *Bank of Commerce v. Chambers*, 14 Mo. App. 152, 154. Generally, however, it is ruled as a matter of law, if the facts are clear. *Bacon v. Hanna*, 137 N. Y. 379, 33 N. E. 303, 20 L. R. A. 495.

³⁰ In *Barbishire v. Parker*, 6 East, 2, Lord Ellenborough, C. J., considering the question of reasonable notice as compounded of law and fact, left the whole question to the jury; advising them that it was not necessary, in his opinion, for a person to leave all other business and attend

solely to one transaction; but they were to consider whether, upon the whole reasonable dispatch had been used by the plaintiffs in communicating notice of the dishonor of the bill to the drawer. A rule for a new trial was made absolute, and two of the judges expressed the opinion that the question was a question of law; but the decision seems not to have turned upon that point. *Martin v. Grabinski*, 38 Mo. App. 359; *Wilson v. Williams*, 16 R. I. 242, 14 Atl. 878.

opinion: "The numerous cases on this subject reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world, and this evil can only be remedied by doing what the court wished to do in the case of *Medcalf v. Hall*,³¹ by considering the reasonableness of time as a question of law, and not of fact. Whether the post goes out this or that day, at what time, etc., are matters of fact; but when those facts are established, it then becomes a question of law on those facts, what notice shall be reasonable."³² The rule thus laid down seems finally to have been established as a rule of the common law of England,³³ and is now codified by statute in England in the Bills of Exchange Act, 1882.³⁴

§ 1225. **This View generally Adopted in America.**—This view has been established by the best judicial opinion in this country.³⁵ It may be formulated in the statement that the question of due diligence in giving notice of protest to the drawer of a bill of exchange, is, for commercial reasons, *a question of law, where the facts are undisputed*.³⁶ The meaning is that, upon a given state of facts the court may rule conclusively that the notice was insufficient.³⁷ It is a mere variation in the expression of this rule to say that the *sufficiency* of demand and notice of non-payment, to charge the in-

³¹ Trin. Term, 22 Geo. 3, B. R. 3; Doug. 113.

³² Tindal v. Brown, 1 T. R. 167.

³³ Hirschfield v. Smith, Harr. & Ruth. 284, 288, per Erle, C. J.

³⁴ 45 & 46 Vict., ch. 61, § 49, subsec. 12.

³⁵ Brenzer v. Weightman, 7 Watts & S. (Pa.) 264; Bank of Columbia v. Lawrence, 1 Pet. (U. S.) 578, 583; Sanderson v. Reinstadler, 31 Mo. 483; Stanley v. Bank of Mobile, 23 Ala. 652, 657; Ricketts v. Pendleton, 14 Md. 321, 330. "The sufficiency of service [of notice to charge an indorser], upon fact shown, is a question of law; and any rule which leaves it indefinite must always leave parties in doubt concerning their legal rights and liabilities." Nevins v. Bank of Lansingburg, 10 Mich. 547, 550, 551, per Campbell, J. German Security

Bank v. McGarry, 106 Ala. 633, 17 South. 704; Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093.

³⁶ Carroll v. Upton, 3 N. Y. 272. Compare Hunt v. Maybee, 7 N. Y. 266; Swampscott Mach. Co. v. Rice, 159 Mass. 404, 34 N. E. 520; Martin v. Smith, 108 Mich. 275, 66 N. W. 61; Albany Trust Co. v. Frothingham, 99 N. Y. S. 343, 50 Misc. Rep. 598.

³⁷ Etting v. Schulkill Bank, 2 Pa. St. 355; Sherer v. Easton Bank, 33 Pa. St. 134, 141; Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Corbin v. Planter's Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673. The court should tell the jury definitely the time within which a notice should be given. Marks v. Boone, 24 Fla. 177, 4 South. 532.

dorser of a promissory note or the drawer of a bill of exchange, is a question of law for the court,³⁸ or to say that it is error to submit to a jury the question whether the protest of a dishonored negotiable instrument, and notice to the drawer or indorser, were *regular* or *legal*.³⁹ As the facts will not be specially found except in those jurisdictions where special verdicts are in practice, or where special interrogatories are submitted to juries, it will, under the operation of this rule, be the office of the court to instruct the jury that certain facts in evidence do or do not, in law, amount to sufficient notice of non-payment to charge the indorser;⁴⁰ and the cases are very numerous where, upon conceded facts or upon hypothetical instructions, the courts have decided this question as one of law. It was well said that "any rule adopted must be in some respects an arbitrary one," and the courts proceed upon the idea that it is better to apply an uniform rule in commercial transactions, than to leave each case to the shifting discretion of juries.⁴¹

§ 1226. No Reversal if the Jury Decide it Rightly.—But, on a principle already stated,⁴² no prejudicial error will accrue to the indorser from leaving this question to the jury, where they decide it rightly. It was so held, where it was shown that a notice, accompanied by a protest of a note for non-payment, was left at the office of an indorser, who was an attorney at law and who kept no clerk, in the afternoon of the day on which, by law, it was required to be given. Here the *law presumed* that the indorser received the notice, and it was hence sufficient to charge him as a matter of law; and the decision of the jury that it did so charge him was therefore correct in point of law, and the intermediate steps by which that decision was reached became immaterial. It was a case of error without injury, which does not authorize a reversal.⁴³

³⁸ Ricketts v. Pendleton, 14 Md. 321, 330; Read v. Spear, 107 App. Div. 144, 94 N. Y. S. 1007.

³⁹ Watson v. Tarpley, 18 How. (U. S.) 517. See also Bank of Columbia v. Lawrence, 1 Pet. (U. S.) 578; Dickins v. Beale, 10 Id. 572; Rhett v. Poe, 2 How. (U. S.) 457; Camden v. Doremus, 3 Id. 515; Harris v. Robinson, 4 Id. 336; Lambert v. Ghiselin, 9 Id. 552; and see the English decisions cited in Rhett

v. Poe, *supra*; Marshall v. Sonnetman, 216 Pa. 65, 64 Atl. 874.

⁴⁰ Sherer v. Easton Bank, *supra*.

⁴¹ Townsend v. Lorain Bank, 2 Ohio St. 345; Dale v. Golds, 5 Barb. (N. Y.) 490; Reamer v. Downer, 23 Wend. (N. Y.) 626; Brenzer v. Wightman, 7 Watts & S. (Pa.) 266; Bank of Columbia v. Lawrence, 1 Pet. (U. S.) 583.

⁴² Ante, § 1020.

⁴³ Stanley v. Bank of Mobile, 26 Ala. 652.

§ 1227. **This Rule, how applied in England.**—In the application of this rule, to state the English cases as they have been collected and stated by the late Judge Taylor in his work on evidence,⁴⁴ the *reasonable time* within which such notice must be given means, “according as the parties live in the same or in different places, either that the letter containing notice should be so posted that, in due course of delivery, it would arrive on the day following that on which the writer has received intelligence of dishonor;⁴⁵ or that such letter should be posted before the departure of the mail on the day following receipt of intelligence;⁴⁶ or, if there be no post on that day,⁴⁷ or if it starts at an unreasonable hour in the morning,⁴⁸—then the writer shall have an additional day. If, too, the bill be presented through a banker, one day more is allowed for giving notice of dishonor, than if it were presented by the party himself.⁴⁹ At one time a doubt seems to have been entertained whether, in the event of there being several indorsers to a bill, the holder would have a separate day allowed him for giving notice to each; but it is now expressly decided that he has in general but one day to give notice to all the parties against whom he intends to enforce his remedy, though each of the indorsers in turn has *his* day,⁵⁰ and though the holder may avail himself of a notice duly given by any other party to the bill.⁵¹ Again, the holder of a cheque, or of a bill or note payable on demand, must, in general, present the instrument for payment on or before the day following that on which it was received.⁵² But, in these cases, the term ‘reasonable time’ may

⁴⁴ 1 Tayl. Ev. (8th Eng. ed.) § 30.

⁴⁵ Stocken v. Collin, 7 Mees. & W. 515; Smith v. Mullett, 2 Camp. 208, per Lord Ellenborough; Hilton v. Fairclough, Id. 633, per Lawrence, J.; Rowe v. Tipper, 13 Com. Bench, 249, 256, per Maule, J.

⁴⁶ Williams v. Smith, 3 Barn. & Ald. 496. Compare Shelton v. Braithwaite, 7 Mees. & W. 436.

⁴⁷ Geill v. Jeremy, Mood. & M. 61, per Lord Tenterden.

⁴⁸ Hawkes v. Salter, 4 Bing. 715, 1 Moore & P. 750; Bray v. Hadwen, 5 Maule & S. 68; Wright v. Shawcross, 2 Barn. & Ald. 501, note.

⁴⁹ Alexander v. Burchfield, 7 Man. & G. 1061, 1066; Haynes v. Birks, 3

Bos. & P. 599; Scott v. Lifford, 9 East, 347, at nisi pruis, 1 Camp. 246; Langdale v. Trimmer, 15 East, 291. See also the recent English statute, 45 & 46 Vict., ch. 61, § 49, sub-sec. 13.

⁵⁰ Rowe v. Tipper, 13 Com. Bench, 249; Dobree v. Eastwood, 3 Car. & P. 250. See, however, Gladwell v. Turner, 39 L. J. Exch. 31; L. R. 5 Exch. 59.

⁵¹ Chapman v. Keane, 3 Ad. & El. 193, 4 Nev. & M. 607.

⁵² Rickford v. Ridge, 2 Camp. 537; Boddington v. Schlencker, 4 Barn. & Ad. 752; Moule v. Brown, 4 Bing. N. C. 266. See Bailey v. Bodenham, 16 Com. B. (N. S.) 288, 33 L. J. (C. P.) 252.

sometimes receive a different construction, regard being had to the nature of the instrument, the usage of trade, and the particular facts.⁵³ This last rule applies, not only as between the parties to a cheque,⁵⁴ but as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present at an earlier, or to defer presentation to a later period, can be inferred."⁵⁵ But the rule does not apply to cases where the action is brought by the holder of a banker's cheque against the drawer, unless, during the delay, the fund has been lost, as by the failure of the banker,⁵⁶—the rule being that, as between the drawer of a cheque and the holder, any time less than the period of the statute of limitations is unreasonable for presentment for payment, unless some loss is occasioned to the drawer by the delay.'

§ 1228. Further Illustrated.—The holder of a bill of exchange, on the day after it became due, called at the office of the drawer, and, on being told that he was engaged, wrote on a scrap of paper and sent to him the following notice: "B.'s acceptance to J., 500 £., due 12th Jan. is unpaid: payment to R. & Co. is requested before 4 o'clock." The clerk of J., who took in the notice, said that "it should be attended to." Upon these facts appearing, the court directed a verdict for the plaintiff against the indorser, reserving leave to the defendant to move to enter a verdict for him. It was held that this direction was right.⁵⁷

⁵³ Statute 45 & 46 Vict., ch. 61, § 45, sub-sec. 2; § 74, sub-sec. 2; § 86, sub-sec. 2.

⁵⁴ *Hopkins v. Ware*, L. R. 4 Exch. 268.

⁵⁵ *Hare v. Henty*, 30 L. J. (C. P.) 302; 10 Com. Bench (N. S.), 65. See *Prideaux v. Criddle*, L. R. 4 Q. B. 455, 38 L. J. (Q. B.) 232, 10 Best & Sm. 515.

⁵⁶ *Robinson v. Hawksford*, 9 Ad. & El. (N. S.) 52; *Serle v. Norton*, 2 Mood. & Rob. 401; and see note *Id.* 404; *Laws v. Rand*, 27 L. J. (C. P.) 76; 3 Com. Bench (N. S.), 442. See also *Alexander v. Burchfield*, 7 Man. & Gr. 1061; *Heywood v. Pickering*, L. R. 9 Q. B. 428, 43 L. J. (Q. B.) 145.

⁵⁷ *Paul v. Joel*, 3 Hurl. & N. 455, 460; qualifying *Solarte v. Palmer*, 7 Bing. 530, and following *Bailey v. Porter*, 14 Mees. & W. 440, an authority in point. The peculiarity of this decision is that, while the question was *decided* as a question of law, it was held by the judges proper to leave it to the jury. Chief Baron Pollock said: "It would have been proper to leave it to the jury to consider whether, under all the circumstances, the defendant had not reasonable information that the bill had been presented and dishonored, and that he was called upon to pay it." *Ibid.*, 460. Mr. Baron Martin concluded his opinion by saying: "It is said that is a

§ 1229. **Another Illustration.**—It has been held error, in an action upon a bill of exchange for non-acceptance and non-payment, to instruct the jury “that the plaintiff was not entitled to recover on the count in the declaration on the protest of the bill for non-acceptance, unless due and regular notice was proved of the protest of the bill for non-payment, though the jury might be satisfied from the proof, that the bill had been regularly protested for non-acceptance, and due notice thereof given to the defendant; that, to entitle the plaintiff to recover, notwithstanding the proof of protest for non-acceptance and due notice thereof, the plaintiff must prove protest for non-payment and due notice thereof, to the defendant; and that the jury were the judges of the testimony, and could give to the witnesses such credit as they thought them entitled to, looking to all the circumstances of the case.”⁵⁸

§ 1233. **Whether the Circumstances of a Particular Case are Sufficient to Dispense with Demand and Notice.**—Whether the circumstances of a particular case are sufficient to dispense with demand of payment, and notice to the drawer or indorser of non-payment, is said to be always a *question of law* addressed to the judgment of the court. If the facts on which this question arises be admitted, or are not denied, or are undeniable, then it is said to be exclusively a matter of law, to be pronounced upon by the court; but if the facts be traversed, or the proof be equivocal or contradictory, then it is said that the question should be submitted to the jury upon hypothetical instructions, by which the court declares the inferences of law which arise upon such states of fact as the jury may find.⁵⁹

question for the jury.” Ibid., 461. Baron Bramwell concluded his opinion by saying: “I hold, therefore, that, in this particular case, there was evidence for a jury, according to the law as laid down in *Solarte v. Palmer* (5 Moore & P. 475, 7 Bing. 540), that the notice so given conveyed an intimation that the bill had been presented and was dishonored. And I am prepared to go further, and say that in every case where the demand of payments is made on a drawer or indorser by the holder of a bill on a proper

day, it ought to be left to the jury to say whether, under the circumstances, there was sufficient notice of dishonor.” Ibid., 463.

⁵⁸ *Watson v. Tarpley*, 18 How. (U. S.) 517.

⁵⁹ *Orear v. McDonald*, 9 Gill (Md.), 350, 359; following *Cathell v. Goodwin*, 1 Harr. & G. (Md.) 470; *Lester-Whitney Shoe Co. v. Oliver Co.*, 1 Ga. App. 244, 58 S. E. 212; *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421; *Perkins v. Cheney*, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495. That a note is payable at

§ 1234. **Effect of Insolvent Inserting the Bill in his Schedule.**—Contrary, it would seem, to the foregoing conceptions, it has been held that, where the drawer of a bill of exchange afterwards becomes insolvent, surrenders his property to his creditors under a statute, and inserts the bill in his schedule of assets, this is evidence to go to a jury upon the fact of notice, and the sufficiency of the evidence is a question for them to decide, and is not subject to review or error.⁶⁰

§ 1235. **Waiver of Notice to Indorser.**—Whether the question whether an indorser has waived his right to notice of the dishonor of the bill, is a question of law or of fact, seems, like many other questions relating to the law of *waiver*,⁶¹ to depend upon the nature of the evidence which is adduced to support the contention that there has been a waiver. In the first place, it is to be observed that the law conclusively ascribes to certain acts, by the indorser of a note or the drawer of a bill, the effect of a waiver of the right to such notice. That a *subsequent promise to pay* the note by an indorser, who has full knowledge of all the facts, amounts to a complete waiver of the want of due notice, is settled as a matter of law.⁶²

a bank of which the indorser is president does not dispense with notice. *Ennis v. Reynolds*, 127 Ga. 112, 56 S. E. 104. If indorser states before delivery of note or shows by conduct that presentment for payment is not expected, then it is excused or waived. *Baumeister v. Kuntz*, 53 Fla. 340, 42 South. 886.

⁶⁰ *Hyde v. Stone*, 20 How. (U. S.) 170, 175. In the opinion of the court by Mr. Justice Campbell, it is said: "A plaintiff may prove, by admissions of a defendant, that all the steps necessary to charge him as an indorser or drawer of a bill of exchange have been taken. Proof of a direct or conditional promise to pay after a bill becomes due, or of a partial payment, or of an offer of a composition, or of an acknowledgment of his liability to pay the bill, has been held to be competent evidence to go to a jury, of a regular

notice of the dishonor of the bill. and to warrant a jury in presuming that a regular notice had been given. *Thornton v. Wynn*, 12 Wheat. (U. S.) 183; *Rogers v. Stevens*, 2 T. R. 713; *Patterson v. Beecher*, 6 J. B. Moore, 319; *Campbell v. Webster*, 2 Man. G. & Sc. 253; *Union Bank v. Grimshaw*, 15 La. 321. The effect of such evidence in the particular case must be determined by the jury, and their decision, cannot be reviewed by an appellate court."

⁶¹ *Post*, §§ 1435, et seq.

⁶² *Sherer v. Easton Bank*, 33 Pa. St. 134, 141, per Strong, J.; *Bowling v. McKenzie*, 89 Ala. 470, 7 South. 658; *McMonigal v. Brown*, 45 Ohio St. 499, 15 N. E. 860; *Lau-meier v. Hollock*, 103 Mo. App. 116, 77 S. W. 347. If the promise is conditional and the condition happens, it becomes absolute. *Turnbull v.*

So, of a *subsequent part payment* of the note by the indorser, with knowledge of the precedent facts. While some of the cases assert that it is evidence from which a jury may infer that demand was duly made and notice given, many others declare it to be a waiver of notice itself.⁶³ So, a *subsequent promise*, with full knowledge of the facts, although not founded on any new consideration, is deemed to hold the indorser to his liability, on the principle of *waiver*.⁶⁴ But it must be shown by the plaintiff, affirmatively and clearly, that the drawer or indorser knew, when he made the subsequent promise, that he had not received regular notice. This is a fact to be proved, and it is not to be inferred, from the mere fact of a subsequent promise, that regular notice had been given, or was intended to be waived.⁶⁵ So, if the indorser agree to extend the time of payment beyond the maturity of the note, such an agreement amounts to a guaranty that he will hold himself bound at the expiration of that time, and is in law a waiver in advance of his right to notice.⁶⁶ So, where the holder of a negotiable note, by an agreement with the maker, and for a valuable consideration, extended the

Maddox, 68 Md. 579, 13 Atl. 334; Davis v. Miller, 88 Iowa, 114, 55 N. W. 189.

⁶³ Levy v. Peters, 9 Serg. & R. (Pa.) 125, 128; Reed v. Wilkinson, MS., opinion of Mr. Justice Washington at Circuit (cited in Whart. Dig. 87); Vaughan v. Fuller, 2 Strange, 1246; Sherer v. Easton Bank, 33 Pa. St. 134, 142; Shaw v. McNeill, 95 N. C. 535.

⁶⁴ Duryee v. Dennison, 5 Johns. (N. Y.) 248; Trimble v. Thorne, 16 Johns. (N. Y.) 151; Miller v. Hackley, 5 Johns. (N. Y.) 375, 383; Crain v. Colwell, 8 Johns. (N. Y.) 384; Agan v. McManus, 11 Johns. (N. Y.) 180; Donaldson v. Means, 4 Dall. (U. S.) 109; Rogers v. Stephens, 2 T. R. 713; Hospes v. Alder, 6 East, 16 n.; Lundie v. Robertson, 7 East, 231; Anson v. Bailey, Bul. N. P. 276; Whittaker v. Morris, Esp. Dig. 58; Wilkes v. Jacks, Peake N. P. Cas. 203; Porter v. Rayworth, 13 East, 417; Haddock v. Bury, MS. (cited 7 East, 236). Compare Fors-

ter v. Jurdison, 11 East, 104; Turnbull v. Maddox, 68 Md. 579, 13 Atl. 334; Hobbs v. Staine, 149 Mass. 212, 21 N. E. 365; Lockwood v. Bock, 50 Minn. 142, 52 N. W. 391. It has been held to the contrary in some states. See Sebree Deposit Bank v. Moreland, 96 Ky. 150, 28 S. W. 153, 29 L. R. A. 305.

⁶⁵ Trimble v. Thorne, 16 Johns. (N. Y.) 152; Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Parks v. Smith, 155 Mass. 76, 28 N. E. 1044.

⁶⁶ Ridgway v. Dey, 13 Pa. St. 203, 211. If the indorser offer in advance of maturity, this shows that he does not expect it to be paid and waiver is inferred, because no injury could ensue from failure to give it. See Jenkins v. White, 147 Pa. 303, 23 Atl. 556; Natl. H. R. Bank v. Reynolds, 57 Hun, 307, 10 N. Y. S. 669. Also if indemnity has been taken. Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283.

time for its payment, and afterwards indorsed the same to a third person, without giving him notice of the agreement for such extension, it was held that he was liable to the indorsee without demand of payment upon the maker, protest, or notice; since, to hold otherwise would be to allow him, by his secret agreement, to perpetrate a fraud upon the indorsee. In other words, the law, upon such facts, conclusively ascribes a waiver of his right of notice.⁶⁷ On the other hand, it has been held that, whether certain *conversations* amounted to a waiver of the right of demand and notice, is a question of fact for a jury;⁶⁸ and it was held proper to refuse to instruct the jury that, if the indorser, after knowing the fact of his discharge from liability by reason of the failure to make demand and give notice, said "that he meant to pay the note, but should take his own time for it, and would not put himself in the power of the bank," rendered him liable to pay the note.⁶⁹ Referring to this case, a modern writer of reputation expresses the view that, whether or not distinct words used would amount to a waiver, is a question of law; although he concedes that, if intermixed with others about which the testimony is clear and concurrent, it would make a question of fact for a jury.⁷⁰ Contrary to much that is said above, it was held in Massachusetts that the statement by an indorser who had received no notice of non-payment, upon being asked what he was going to do about the note, that "the note will be paid," was not equivalent to a waiver of notice,—the court being of opinion that the expression fell short of a promise by him, either to pay the note or to see it paid.⁷¹

§ 1236. Whether Notice of Protest probably reached the Indorser.—Although the certificate of notice in a protest of a notary may be so drawn as not to be evidence to charge the indorser, yet it has been held that the court may, under circumstances, instruct the jury that they may connect with it the other evidence on the part of the plaintiff, and that, if they believe from the evidence that the notice was left in such a way that in all probability it

⁶⁷ Williams v. Brost, 10 Watts (Pa.), 111.

⁶⁸ See ante, §§ 1105, et seq.; Glazer v. Ferguson, 48 Kan. 157, 29 Pac. 396.

⁶⁹ Union Bank v. Magruder, 7 Peters (U. S.), 287, 290.

⁷⁰ 2 Dan. Neg. Instr., § 1100; Lyndon Sav. Bank v. International Co., 78 Vt. 169, 62 Atl. 50.

⁷¹ Creamer v. Perry, 17 Pick. (Mass.) 332, 335; Trader's Nat. Bank v. Rogers, 167 Mass. 315.

reached the defendant, it was sufficient to charge him: "It was for the jury to say, from the whole proof thus taken together, whether the facts would justify the conclusion that the defendant had received the notice left at his office." ⁷² This holding is based upon a conception which is not supported by the current of authority. The rule established by judicial authority generally is that the fact whether notice was received is immaterial; since it is not a question of actual notice but a question of diligence in giving notice. ⁷³

§ 1237. "**Second of Exchange, First Unpaid.**"—The meaning of these words in a bill of exchange has been held, under certain circumstances, a question of law for the court, and not of fact for the jury. ⁷⁴

§ 1238. **Refusal to Pay or Accept.**—But the refusal to pay or accept commercial paper is, of course, a question of fact; and, where this is in doubt or dispute, the court errs in giving an instruction which assumes that there was such a refusal. ⁷⁵

§ 1239. **Whether the Holder took it in Good Faith and without Notice of Prior Equities.**—On grounds of public policy, with the view of protecting those who deal in commercial paper and of upholding the character of these instruments of commerce, the courts in England and in this country have, after some conflicting decisions, united in the conclusion that, whoever, purchases a negotiable security from the holder before maturity, gets a good title thereto, discharged of any equities which may have existed between the original parties to the instrument, in the absence of knowledge on the part of the purchaser of circumstances affecting the title of the holder, provided the purchaser acts in good faith. It is not sufficient to destroy his title that there were circumstances sufficient to put a prudent man upon inquiry, or that he may have been

⁷² Stanley v. Bank of Mobile, 23 Ala. 652, 657. Compare Rives v. Parmley, 18 Ala. 261; Caster v. Thomason, 19 Ala. 721. So it has been held a question of fact whether a draft was forwarded for acceptance under the facts in the case. See Westberg v. Chicago L. & C. Co., 117 Wis. 589, 94 N. W. 572.

⁷³ Ante, §§ 1223-1225.

⁷⁴ Bank of Pittsburg v. Neal, 22 How. (U. S.) 96, 108. Compare Andrews v. Pond, 13 Pet. (U. S.) 5; Fowler v. Brantley, 14 Pet. (U. S.) 318; Goodman v. Simonds, 20 How. (U. S.) 343. See ante, § 1075, et seq.

⁷⁵ Brooks v. Elgin, 6 Gill & J. (Md.) 254, 259; Weeton v. Hodd, 26 Eng. L. & Eq. 278.

negligent in failing to avail of himself of his means of knowledge. The test of his liability is not negligence or diligence, but it is good faith or bad faith; although the fact of negligence may, under circumstances, be regarded as evidence tending to show bad faith.⁷⁶ It is obvious that, in cases which call for the application of this rule, the question whether the purchaser of the paper had notice of prior equities will, if the evidence is conflicting, be a question of fact for

⁷⁶ *Gill v. Cubit*, 3 Barn. & Cres. 466; 10 Eng. C. L. 154; *Goodman v. Harvey*, 4 Ad. & El. 870; *Swift v. Tyson*, 16 Pet. (U. S.) 1; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Pringle v. Philips*, 5 Sandf. S. C. (N. Y.) 157 (where the decisions are ably reviewed); *Hamilton v. Marks*, 63 Mo. 178; *Edwards v. Thomas*, 66 Mo. 483; *Mason v. Bank of Commerce*, 16 Mo. App. 275. Compare *Roth v. Colvin*, 32 Vt. 125; *First Nat. Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636; *First Nat. Bank v. Moore*, 148 Fed. 953, 78 C. C. A. 581; *Hutchins v. Langley*, 27 App. D. C. 234. That a check is post dated is not a circumstance that would interfere with one's acquiring the status of an innocent purchaser for value. *Symonds v. Riley*, 188 Mass. 470, 74 N. E. 926, For the indorser to tell an intending purchaser, that there was something wrong about the note and his reply that he would not purchase it, was held to prevent an exclusion of indorser's defense thereto. *Vette v. Sacher*, 114 Mo. App. 363, 89 S. W. 360. And a transaction may be so altogether out of the usual course of business, e. g. the holder being an officer of maker corporation, such fact being known to purchaser, as to compel inquiry before purchasing. *Orr v. Terra Cotta Co.*, 94 N. Y. S. 524, 47 Misc. Rep. 604. Under the provisions of the Uniform Negotiable Instruments Act, which requires actual notice or knowledge of

such facts as would make purchase an act of bad faith, it was held, as matter of law, that one could not purchase a certificate due at a future date made out to the trustee of another, the certificate on its face showing it represented a trust fund. *Ford v. H. C. Brown & Co.*, 114 Tenn. 467, 88 S. W. 1036, 1 L. R. A. (N. S.) 188. Under this statute also it has been ruled, that the purchaser from a holder having a vitiated title has the burden of showing that he paid value and without notice, but he must also present the facts constituting good faith. *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884. See also *Cook v. Am. Tubing & W. Co.*, 28 R. I. 41, 65 Atl. 641; *Stouffer v. Fletcher*, 146 Mich. 341, 109 N. W. 684; *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708. Where corporation is accommodation party, this shifts the burden both to prove value and that purchaser did not know nor have reason to suspect the corporation so signed. *Nat. Bank v. Snyder Mfg. Co.*, 117 App. Div. 370, 102 N. Y. S. 478. As contra to the rule of burden shifting where paper was obtained by fraud see *First Nat. Bank v. Moore*, *supra*. If a note suggests a possible want of power, e. g. the secretary of a corporation indorsing a note by himself as maker in the name of a corporation by himself as secretary, a purchaser buys subject to such an infirmity *Wheeling I. & S. Co. v. Connor*, 61

the jury; and, upon a principle elsewhere stated, that *fraud*⁷⁷ and *intent*⁷⁸ are in general questions of fact, it will also follow that the question whether the purchaser acquired title to the paper in good faith, within the meaning of the rule, will generally be a question of fact for the jury. It is said, in a case in Vermont, that "the questions, whether the holder of current negotiable paper has taken it with or without notice of defenses between prior parties,—whether he has exercised good faith in the transaction, or has been guilty of negligence or a want of proper caution,—are always questions of fact to be submitted to and determined by the jury. All the circumstances attending the transaction, the condition of the several other parties, and all other facts that bear upon such an issue, are only evidence for the jury to weigh in deciding it;"⁷⁹ and it was held that, in respect of such an inquiry, a *referee* stands in the place of a jury.⁸⁰

§ 1240. **Whether the Plaintiff has Assigned the Note sued on to Another for the Benefit of his Creditors.**—In an action upon a promissory note, it has been held that an answer averring that plaintiff has assigned the note to another for the benefit of his creditors, raises an issue in the nature of a dilatory plea, which, if found true, would not result even in an abatement of the action, but would furnish ground for an order of court requiring the additional party to be made plaintiff, on pain of a dismissal without prejudice; that the issue thus raised is *triable by the court*, and not by the jury; and that the *onus probandi* is on the party making the objection. It was added that, where no other defense is set up, and the court finds for the plaintiff on such an issue, the court should render judgment on the merits, without the intervention of a jury.⁸¹

W. Va. 111, 55 S. E. 982. If a note contains no words of negotiability, the purchase is at the peril of the purchaser. *Barrow v. Blasingame*, 1 Ga. App. 358, 57 S. E. 926.

⁷⁷ Post, §§ 1933, et seq.

⁷⁸ Post, §§ 1333, et seq.

⁷⁹ *Roth v. Colvin*, 32 Vt. 125, 133; *Williams v. Huntington*, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; *Joy v. Diependorf*, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484; *Natl. Bank v. Stever*, 169 Pa. 574, 32 Atl. 603. *Penfield Inv. Co. v. Bruce*, 132 Mo.

App. 257. If interested witnesses testify, the question of fraud being involved, there need be no conflict of evidence to carry the issue to the jury. Their credibility is nevertheless to be judged of by the jury. *Iowa Nat. Bank v. Sherman v. Brat-tager*, 19 S. D. 238, 103 N. W. 19; *Engle v. Hyman*, 104 N. Y. S. 390, 54 Misc. Rep. 251.

⁸⁰ *Ibid.*

⁸¹ *Vanbuskirk v. Levy*, 3 Met. (Ky.) 133. Compare, as to the na-

§ 1241. **Whether Note an Extension of Time or Collateral Security.**—This question is closely allied to the question of *payment*, which is discussed in a future chapter.⁸² Where a new note is given to the holder of an old note part due, upon which an *indorser* or *surety* is liable, the question may arise whether the giving of the new note operated to extend the time of payment of the debt, and thereby to *discharge the indorser or surety*; and it has been held that the question should be submitted to a jury, to determine whether there was an agreement to extend the time of payment on the dishonored note, or whether the new note was given and received as *collateral security* to the old one.⁸³ The importance of the rule is found in the other rule of law that the receipt of a bill or note having a time to run, from the party primarily liable on a bill or note then overdue, does not discharge an indorser on the bill or note overdue, unless there is an agreement, express or implied, that the new bill or draft is in payment of the former, or an extension of the time of payment of the former, in favor of some party who is liable thereon prior to such indorser.⁸⁴ Where it has been expressly agreed that the new note is received as collateral security to the overdue note, the right of immediate action upon the overdue note is not suspended, and the indorser or surety is not discharged.⁸⁵

§ 1242. **Whether Notes are Renewals of Former Notes.**—Where it was claimed that certain notes were *renewals* of former notes, and those again of others, in a *continuous series*, all for the same debt, it was held proper to submit the question to the jury as a *question of fact*. And it was held that the question was, whether or not they were renewals, and not what the parties *intended* or *considered*. A *renewal* was defined in the instructions, approved on appeal, to be “a new security given for a debt due, or falling due,—in fact, sub-

ture of such a defense, *Carpenter v. Miles*, 17 B. Mon. (Ky.) 602.

⁸² See especially §§ 1254, 1255, 1257.

⁸³ *Taylor v. Allen*, 36 Barb. (N. Y.) 294.

⁸⁴ *Taylor v. Allen*, *supra*.

⁸⁵ *Myers v. Welles*, 5 Hill (N. Y.), 463; *Fellows v. Prentiss*, 3 Denio (N. Y.), 512; *Hart v. Hudson*, 6 Duer (N. Y.), 294; *Huffman v. Hulbert*, 13 Wend. (N. Y.) 375; *McLane*

v. Lafayette Bank, 3 McLean (U. S.), 589; *Witz v. Fite*, 91 Va. 446, 22 S. E. 171. Where the collateral is a certificate of membership in an association and by arrangement between holder and maker it has been made over to the former, its value may be shown under plea of payment. *Montgomery v. Schenck*, 82 Hun, 24, 31 N. Y. S. 42.

stituting one security for another, whether it is the same debt or not;" and the court added: "If the securities now held, are the notes or the securities given for the same debt, they are renewals;" and it was held that this was a correct and comprehensive view of the law.⁸⁶

⁸⁶ Appeal of the Bank of Commerce, 44 Pa. St. 423, 430; Wheelock v. Berkley, 138 Ill. 153, 27 N. E. 942.

CHAPTER XL.

PAYMENT: ACCORD AND SATISFACTION.

SECTION

- 1250. Accord and Satisfaction a Question of Fact.
- 1251. Payment a Question of Fact.
- 1252. View that it is a mixed Question of Law and Fact.
- 1253. View that it is a Question of Law.
- 1254. Purpose for which a Note is Delivered and Accepted.
- 1255. Payment or Purchase of a Note.
- 1256. Character in which a Person to whom Money is Paid Receives and Holds it.
- 1257. Order Delivered as Payment or for Collection.
- 1258. As between Landlord and Tenant.
- 1259. Another Illustration.
- 1260. What will repel the Presumption of Payment from Lapse of Time.
- 1261. Whether a Payment was Voluntary.

§ 1250. Accord and Satisfaction a Question of Fact.—To constitute an accord and satisfaction, that which is received by the creditor must be accepted by him in satisfaction; he must *intend* to accept it as a satisfaction. Whether there was such an acceptance is a question of fact for a jury;¹ and the conclusion reached by the jury in such a case, upon conflicting testimony, sustained in the trial court, will not be disturbed in an appellate tribunal.²

¹ *Frick v. Algeier*, 87 Ind. 255; *Hardman v. Bellhouse*, 9 Mees. & W. 596; *Hall v. Flockton*, 16 Ad. & El. (N. s.) 1039; *Jones v. Johnson*, 3 Watts & S. (Pa.) 276; *Hart v. Baller*, 15 Serg. & R. (Pa.) 162; *Brenner v. Herr*, 8 Pa. St. 106; *Stone v. Miller*, 16 Pa. St. 450; *Hearn v. Kiehl*, 38 Pa. St. 147; *State Bank v. Littlejohn*, 1 Dev. & B. (N. C.) 563; *Maze v. Miller*, 1 Wash. (U. S.) 328; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 442, 9 Am. Rep. 744; *Beattie Mfg. Co. v. Heinz*, 120 Mo. App. 465, 97 S. W. 188; *Huger v. Cunningham*, 126 Ga. 684, 56 S. E. 64; *Mayo v. Leighton*, 101 Me. 63, 63 Atl. 298. Mere appropriation of money put to

one's credit in a bank by another does not constitute accord and satisfaction as a matter of law, the appropriator claiming a larger amount. *Rustler Realty Co. v. Swecker*, 134 Iowa, 679, 112 N. W. 679. If a settlement is reached not predicated on a claim made in good faith so as to constitute a legitimate dispute, it is not accord and satisfaction. *Farmers & M. L. Assn. v. Caine*, 224 Ill. 599, 79 N. E. 956; *Schlessinger v. Schlessinger*, 39 Colo. 44, 88 Pac. 970, 8 L. R. A. (N. s.) 863; *Weldner v. Ins. Co.*, 130 Wis. 10, 110 N. W. 246.

² *Frick v. Algeier*, 87 Ind. 255.

§ 1251. **Payment a Question of Fact.**—Whether a debt has or has not been paid, is generally a question of fact for the jury,³ since it is generally a question of *intent*.⁴ Thus, whether a judgment entered by a wife against her husband has been paid, is a question of fact for the jury, although the wife died seven years afterwards, her estate was not administered upon and a *scire facias* to sue out execution was not issued on the judgment until twelve years after the death of the wife.⁵ Where a debt is to be paid in kind—as for instance, rent in cotton—and the debtor becomes liable to the creditor *on another account*, and goods of the particular kind are delivered by the debtor to the creditor, it will be a question for a jury to determine to which debt it was intended by the parties that it should be applied.⁶

§ 1252. **View that it is a Mixed Question of Law and Fact.**—Payment has been said to be a mixed question of law and fact. Accordingly, it is not proper for the court to submit such a question to the determination of a jury, in a case in equity.⁷ But a sounder view is that, upon a *feigned issue* to ascertain whether a judgment has been paid or not, the question of payment exclusively for the jury.⁸

§ 1253. **View that it is a Question of Law.**—All this has been regarded as compatible with the idea that it is competent for the judge to say, as a matter of law, whether a given state of evidence, assuming it to be true, amounts to proof of payment; the rule being that the legal sufficiency of the evidence, in other words, the conclusion of law to be drawn from the evidence, is, in general, a question for the court.⁹ It has therefore been held proper for the court to

³ *Barnes v. Brown*, 69 N. C. 439; *Germania Ins. Co. v. Davenport* (Pa.), 9 Atl. 517; *Union Bank v. Smizer*, 1 Sneed (Tenn.), 501.

⁴ *Post*, § 1333. It is a rule of law that whenever there is an acceptance of the supposed equivalent of money for money itself, for example, a check, and this proves otherwise, no payment results. See *Lester-Whitney Shoe Co. v. Oliver Co.*, 1 Ga. App. 244, 58 S. E. 212; *Pruitt v. Brown*, 101 Mo. App. 254, 93 S. W. 897. But if failure to realize

money from the equivalent is from lack of diligence on the part of the creditor, for example, not promptly presenting check for payment, it is. *R. H. Herron Co. v. Mawby*, 5 Cal. App. 39, 89 Pac. 872.

⁵ *Hess v. Frankenfield*, 106 Pa. St. 440.

⁶ *Phillips v. McGuire*, 73 Ga. 517. Compare *Pritchard v. Comer*, 71 Ga. 18.

⁷ *Adams v. Helm*, 55 Mo. 468.

⁸ *Horner v. Hower*, 49 Pa. St. 475.

⁹ *Frost v. Martin*, 29 N. H. 307;

decline to instruct the jury that, if they believe that a payment, which the evidence shows to have been made, was not in law a payment of the note, etc., the plaintiff might recover.¹⁰ But the only ground on which this instruction could have been properly refused was, that it was not aptly framed, so as to bring the question to the minds of the jurors. There is no *rule of law* as to what is or what is not payment. Payment is simply the doing of what a man has agreed to do. It is, therefore, a pure question of fact; and where a man has agreed to pay, and tenders what he understands to be performance of his agreement, and the other party accepts it, it is a naked question of fact and intent, whether it was accepted as performance. In every such case the ultimate point of inquiry does not touch a rule of law, but stops at a conclusion of fact.

§ 1254. Purpose for which a Note is Delivered and Accepted.—

This has been held necessarily a question of fact for a jury.¹¹ It has been held, under circumstances, that, whether a note was given and accepted in *satisfaction* of a judgment, that is, in absolute payment of it, or was merely given for the purpose of fixing the amount due and as an additional or *collateral security*, is a *question of fact* for a jury.¹² So, it has been held that the question whether a note, given for the settlement of a suit against a third person, is an extinguishment of the original claim, or collateral to it, is a question of fact.¹³ The taking of a note of an individual partner for a partnership debt, where it is agreed to be taken as payment, extinguishes the *partnership debt*; and the question whether the note is taken in payment of the debt, or as collateral security only, is, in an action

post, §§ 2242, et seq. Where one sends a claim to a bank for collection in another state, it was held that he was presumed to intend or consent that it be collected in accordance with accepted methods. Therefore, payment by a draft made out to the president of the collecting bank, with the abbreviation of "Pt." after his name exonerated the debtor, the proceeds of the draft being embezzled by the president of such bank. *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13. Where payment is made upon express condition, that the amount is for a pay-

ment in full, in a case where there is a legitimate dispute between the parties, demand not being liquidated, the law annexes to acceptance such condition. *Crawford v. Traveling Men's Assn.*, 226 Ill. 57, 80 N. E. 736, 10 L. R. A. (N. S.) 264; *St. Regis Paper Co. v. Board & Paper Co.*, 186 N. Y. 563, 79 N. E. 1115; *Andrews v. Stubbs Contracting Co.*, 100 Mo. App. 599, 75 S. W. 178.

¹⁰ *Ibid.*

¹¹ *Sellers v. Jones*, 22 Pa. St. 423.

¹² *Schilling v. Durst*, 42 Pa. St. 126.

¹³ *Wilson v. Hanson*, 20 N. H. 375.

of *assumpsit* against the partnership, a question of fact for the jury.¹⁴ Under circumstances, it has been held a question of fact whether a sum of money was paid in satisfaction and discharge *pro tanto* of a note, to take immediate effect as payment, or was merely advanced to and deposited with the party by way of security, to be applied in payment of the note, only in case the whole amount of the debt should not be obtained out of the property, by a mortgage by which the note was secured,—the question depending upon the intention of the parties.¹⁵ And, in general, it may be said that the question whether a note or bond is given and accepted in satisfaction of the original debt, is for the jury; and it is error for the court to decide it as a matter of law.¹⁶ This is merely a branch of the rule that,

¹⁴ *Bonnell v. Chamberlain*, 26 Conn. 487; *Walker v. Tupper*, 152 Pa. 1, 25 Atl. 172.

¹⁵ *Dean v. Toppin*, 130 Mass. 517.

¹⁶ *Stone v. Miller*, 16 Pa. St. 450, 456; *Jones v. Johnston*, 3 Watts & S. (Pa.), 276; *Wallace v. Fairman*, 4 Watts (Pa.), 379; *Hart v. Bolter*, 15 Serg. & R. (Pa.) 162. It seems that the rule as stated in the text is too broad. It should rather indicate what is the presumption arising ordinarily from the giving of a note or bond where there is a pre-existing debt and upon whom the burden of proof rests in such a case, considering the matter from this twofold aspect, in two or three states the ruling is that the giving of a negotiable promissory note carries the presumption of payment, and the burden lies upon the creditor to overcome this presumed intention. See *Hadley v. Bordo*, 62 Vt. 285, 19 Vt. 476; *Mason v. Douglas*, 6 Ind. App. 558, 33 N. E. 1009. The weight of authority, however, is that presumptively it is a conditional payment to become effectual upon the notes being paid, and generally it operates to extend the time for payment of the original debt. See *Crenshaw v. Duff's Exr.*, 31 Ky. Law Rep. 773,

103 S. W. 287; *Hoar v. Ins. Co.*, 118 App. Div. 416, 103 N. Y. S. 1059; *Johnston v. Barrills*, 27 Ore. 251, 41 Pac. 656, 50 Am. St. Rep. 717; *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558. It is readily seen that in the courts where the latter view obtains it would not be error for the court to determine, as matter of law, that a note was not a payment where the debtor submitted no accompanying proof. Equally it may be said, that in the courts where the former view obtains, it would not be error for the court to decide, as matter of law, that it was payment where the creditor fails to rebut the presumption held to exist. Decisions seem to show that the courts of both views regard the principle each acknowledges as more or less flexible. Thus there is found a New York Case which decides that the negotiation by transfer of such a note operates as an absolute payment so long as it remains in the hands of the transferee with the right in the creditor to resume his original rights by again becoming the holder of the note. *McLean v. Griot*, 118 App. Div. 100, 103 N. Y. S. 129. In Massachusetts it has been held that presumption of payment, though the

when a matter is to be determined according to the *intention* of parties, it is for the jury to determine what their intention was.¹⁷ So, where a person is indebted to a bank, and gives his promissory notes for the amount of the debt, the mere acceptance of the notes by the bank will not necessarily operate as a satisfaction of the debt; and whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transaction warranted such an inference, are questions of fact for a jury.¹⁸ So, where a firm, consisting of three persons, was sued upon an account, for which it appeared that two of the firm had executed to the plaintiff their note, and the suit was dismissed as to these two, and stood against the third partner alone,—it was held that it was a question of fact for the jury whether the note of the other two was received by the plaintiff in extinguishment and satisfaction of the debt of the three. If it were, the third partner would be discharged from the debt; otherwise not.¹⁹ So, payment and satisfaction of an account or a note may be made by the delivery and acceptance of an account against a stranger; and the question

note be negotiable, will not be applied where this would displace a mechanic's lien, and, if the note is negotiated, it may be taken up by the creditor and foreclosure be had of the lien. *Moore v. Jacobs*, 190 Mass. 424, 76 N. E. 1041. The theory of this case is, that the giving up of a secured claim for one that is unsecured requires proof of consideration for such a relinquishment. This requirement being one of law naturally overcomes a mere presumption of fact. In California the presumption against the payment rule appears to have something of a relative aspect. Thus it has been ruled that, if the note is unsecured, the presumption is strong against its being payment. *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922, while in Wisconsin a departure from the rule against presumption of payment is recognized in the fact of the note being secured. *Challoner v. Boyington*, 83 Wis. 399, 53 N. W. 694. In Minnesota it is

ruled as matter of law that a receipt specifying that the note is "in payment" is of itself insufficient to rebut the presumption, that a note is not in payment. *Combination S. & I. Co. v. Ry. Co.*, 47 Minn. 207, 49 N. W. 744. In South Dakota giving a note secured by chattel mortgage is held not to change the presumption against payment. *Baker v. Baker*, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

¹⁷ Post, §§ 1333, et seq.; *Dille v. White*, 132 Iowa, 327, 109 N. W. 909. This statement is subject to the principle that in a proper case the court may declare intention as a matter of law. See *Conde v. Min. Co.*, 3 Cal. App. 583, 86 Pac. 825; *Titcomb v. McAlister*, 31 Me. 399, 17 Atl. 315.

¹⁸ *Lyman v. Bank of U. S.*, 12 How. (U. S.) 225, 243; *Witte v. Weinberg*, 37 S. C. 579, 17 S. E. 681.

¹⁹ *Keerl v. Bridgers*, 10 Smedes & M. (Miss.) 612.

whether payment was intended is a question of fact for the jury.²⁰ Proof of the acceptance of a promissory note or bill of a third person, if it appear to be the voluntary act and choice of the creditor, and not a measure forced upon him by necessity, when nothing else could be obtained, will support a defense of payment; ²¹ but whether it will amount to payment is a question of fact for a jury.²²

§ 1255. **Payment or Purchase of a Note.**—The question, under many states of fact, will be properly a question for the jury, whether a transaction by which a note passed from one party to another was a purchase of the note by the transferee, such as did not extinguish it, or a payment such as did.²³ It frequently becomes a material inquiry, where a third person takes up a note which has matured in bank or elsewhere, whether he does it in payment of the note or merely to purchase it; and this is a *question of fact*, for a jury, depending upon the *intention* of the holder and the person thus taking it up.²⁴

§ 1256. **Character in which a Person to whom Money is paid receives and holds it.**—The character in which a person to whom money is paid receives it, is a *question of fact*, unless the law annexes a definite character to him under the circumstances, as in the case of a public officer receiving and dealing with public moneys. This seems to have found an illustration in a case in Maine, where money was paid to the person who held the place of agent of a school district, the same being sufficient to pay the school teacher what was due him, provided the school teacher had qualified himself to receive it and had become entitled to it, by obtaining a certificate of his qualification as a teacher, as required by the governing statute. Here it was held that, although the school teacher had performed his duty acceptably, yet it was the pleasure of the town, under the statute, to withhold from him his salary until he had procured the

²⁰ Willard v. Germer, 1 Sandf. S. C. (N. Y.) 50.

²¹ 2 Greenl. Ev., § 523; Union Bank v. Smizer, 1 Sneed (Tenn.), 501, 514.

²² Ibid.; Johnson v. Weed, 9 Johns. (N. Y.) 310; Acme Harvester Co. v. Axtell, 5 N. D. 315, 65 N. W. 680; Case Mfg. Co. v. Soxman, 138 U. S. 431, 34 L. Ed. 619.

²³ Comstock v. Savage, 27 Conn. 184. In the absence of proof that payment was intended, the obligation is not extinguished. Bradley v. Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426.

²⁴ Runyon v. Clark, 4 Jones L. (N. C.) 52. Compare Sherwood v. Collier, 3 Dev. L. (N. C.) 380.

statutory certificate, and that he could not maintain an action against the town therefor; yet if the town elected not to refuse to pay him his wages for this reason, but paid the money to the person who held the place of agent of the district, and it was so received by the latter, it would be the property of the instructor, and he might maintain an action against the agent to recover it; and whether the agent received the money of the town for the use of the teacher would be a question of fact rather than of law,—the inquiry being in what character and for what purpose he received it.²⁵

§ 1257. Order delivered as Payment or for Collection.—So, it is for a jury to decide whether an order on a third person was taken for collection merely, by a creditor of the person by whom it was delivered, or as payment when the amount thereof should be collected. In other words, whether or not such an order was accepted by a creditor from his debtor in satisfaction of the debt and in discharge of his debtor, should be left to the jury.²⁶

§ 1258. As between Landlord and Tenant.—A tenant being indebted to his landlord for rent, the agent of the landlord, without the authority or knowledge of the landlord, took a bill of exchange from the tenant for the rent, and paid over the amount of the rent to the landlord in his settlement of account. The bill was afterwards dishonored whilst in the hands of a third party, and the rent was not paid by the tenant, whereupon the landlord distrained. It was held to be a *question for the jury*, whether the bill was discounted for the tenant, or whether the money was loaned to the tenant by the agent, or whether it was advanced by the agent to the landlord; and that if the bill was discounted for, or the money was loaned to the tenant, the landlord was not entitled to distrain; otherwise he was.²⁷ So, in another case where, on the rent becoming due, the agent of both tenant and landlord paid the amount of the rent to the landlord, without any authority from either party, and the tenant afterwards failed to pay the rent, and the landlord distrained,—it was a question for the jury whether the payment was made by the agent on behalf of the tenant, or by way of advance to the landlord.²⁸ In a case in New York, the lessee of a farm, on the

²⁵ Dore v. Billings, 26 Me. 56.

²⁶ Stephens v. Thornton, 26 Ill.

323.

²⁷ Parrott v. Anderson, 14 Eng. L. & Eq. 371.

²⁸ Griffiths v. Chichester, 14 Eng. L. & Eq. 372, note.

day after \$65.00 had become due and payable for an installment of rent, entered into a written contract with his lessor for the surrender of his unexpired term, in consideration of which, and other stipulations, the lessor agreed to pay at a subsequent day, and actually did pay, \$550.00. In an action to recover the \$65.00 of rent due when this agreement was made, it was held: 1. That the contract did not operate as a release or extinguishment of the rent which had become due. 2. That, from the contract and a receipt thereon indorsed, of the subsequent payment of the \$550.00, no legal presumption arose, either that the rent had been previously paid, or that the amount was allowed when the receipt was executed. 3. That these facts were properly *submitted to the jury*, with instructions that it was a question of fact for them to determine whether, considered in connection with all the evidence in the case, they did not warrant a presumption of the payment of the rent.²⁹

§ 1259. **Another Illustration.**—In a suit on a recognizance, in the Orphans' Court of Pennsylvania, by an heir who took one of three purparts at the appraisement, executed in favor of the Commonwealth, for the payment to the other heirs of their proportional shares in the purpart, it was held permissible for the recognizer, the defendant, under a plea of "payment with leave," to show that one of the purparts not taken at the appraisement, was sold by a trustee under order of the Orphans' Court, that all the balance of the proceeds, after payment of the debts of the intestate, was paid to the plaintiff, and that the defendant in the suit never made any objection; and the fact whether or not it was received in payment, depending upon a question of *intent*, should have been *submitted to the jury*.³⁰

§ 1260. **What will repel the Presumption of payment from Lapse of Time.**—It has been held that, what will repel the artificial presumption of payment arising from the lapse of a great length of time, is a *question of law*, and that it is error to submit it to a jury.³¹ Contrary to this, and on sounder grounds, it has been held that the question whether the presumption of payment has been repelled, is a *question of fact* for a jury;³² and the sound rule seems to be that,

²⁹ Sperry v. Miller, 16 N. Y. 407.

³⁰ Kidd v. Com., 16 Pa. St. 426.

³¹ Woodbury v. Taylor, 3 Jones L. (N. C.) 504. See also McKinlay v. Gaddy, 26 S. C. 573, 2 S. E. 497.

³² Grantham v. Canaan, 38 N. H.

268; McQuesney v. Heister, 33 Pa.

St. 435; Joy v. Adams, 26 Me. 330,

333; People v. Freeman, 110 App.

Div. 915, 97 N. Y. S. 343; George v.

notwithstanding the legal presumption of payment arising from the lapse of time, the question of payment remains a pure question of fact for the jury, and any evidence tending to satisfy them that no payment has actually been made, is competent and admissible.³³ This is in accordance with what is said by Dr. Greenleaf: "In all these cases, the presumption of payment may be repelled by any evidence of the situation of the parties, or other circumstance, tending to satisfy the jury that the debt is still due."³⁴ There is possibly room for a distinction, in respect of this question, between the presumption of payment which the jury are authorized to draw from a great lapse of time less than *twenty years*, and the presumption which the law draws where the lapse of time is greater than twenty years. In the North Carolina case first cited, the lapse of time was less than twenty years, but a statute of that State had cut down the time which raises this protection against stale demands, from twenty to ten years, and the demand had been in existence for more than that length of time.³⁵ In a case in Pennsylvania, more than twenty years had elapsed since the creation of the obligation. It was held that, whether the facts were sufficient to rebut the presumption was a question for the court and not for the jury. "The presumption," said Strong, J., "is one drawn by the law itself from a given state of facts, and whether it exists or not, is necessarily *for the court*."³⁶

§ 1261. Whether a Payment was Voluntary.—Where a party sues to recover money which he has paid to a sheriff under execu-

Downey, 79 Cal. 140, 21 Pac. 527; Courtney v. Staudenmayer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 292; Knight v. McKinney, 84 Me. 107, 24 Atl. 744. This presumption is a rule of evidence and not of limitation and obtains as well in favor of one against whom the statute of limitations does not run, by reason of absence from the jurisdiction, as of him against whom it does run. Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299.

³³ Grantham v. Canaan, 38 N. H. 268; Chiles v. Buckner School Dist., 103 Mo. App. 244, 77 S. W. 82. It seems to be a safe presumption to go upon in the matter of a lien upon land purchased after a great

length of years. See *Re Smith's Estate*, 152 Pa. 102, 25 Atl. 315; *Foot v. Lilliman*, 77 Tex. 268, 13 S. W. 1032. An exception has been held to exist, however, as to legacy made a charge thereon. *Williams v. Williams*, 82 Wis. 393, 52 N. W. 429.

³⁴ 1 Greenl. Ev., § 39. See also Cowan & Hill's important note to 1 Phil. Ev., p. 676, note 193, where many cases are collected.

³⁵ Woodbury v. Taylor, 3 Jones L. (N. C.) 504.

³⁶ Reed v. Reed, 46 Pa. St. 239, 243. The learned judge cited *Delany v. Robinson*, 2 Whart. (Pa.) 503, as an authority for the proposition.

tion, and the state of the case is such that he can recover it back if it was paid under compulsion, but not if it was paid voluntarily, the question whether the payment was voluntary will, of course, be a question of fact *for the jury*.³⁷

³⁷ Ewing v. Peck, 26 Ala. 413. So where pledgor alleges payment under threat of illegal sale of collateral. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034. So as to any other alleged duress.

Cribbs v. Sowle, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 160. So also whether payment was induced by fraud. Klien v. Boyer, 81 Mich. 233, 45 N. W. 991.

CHAPTER XLI.

STATUTE OF LIMITATIONS: BANKRUPTCY: NEW PROMISE AND PART PAYMENT TO REVIVE BARRED DEBT.

SECTION

- 1267. Promise to revive Debt Discharged by Bankruptcy.
- 1268. Promise to revive Debt Barred by Limitation.
- 1269. Submitted to Jury on what Evidence.
- 1270. What Indebtedness the New Promise refers to.
- 1271. Part Payment to take a Debt out of the Statute of Limitations.
- 1272. Right of Creditor to apply the Payment.
- 1273. Which Debt Intended.

§ 1267. Promise to revive Debt Discharged by Bankruptcy.—

Where an oral promise is relied upon to revive a debt which is discharged by *bankruptcy*, the question whether such a promise is proved will generally be a *question of fact* for the jury;¹ but where the words relied on to take the case out of the statute of limitations amount in law to an express promise, the meaning of the words will not be referred to the jury, but the court may instruct them as to their legal effect,—² as where the new promise or acknowledgement is *in writing*, indorsed on the instrument which is the evidence of the precedent indebtedness.³ In a very elaborate judgment upon this subject in Maryland, the tenth proposition ruled by the court was: “What kind of promise or acknowledgment is sufficient to take a case out of the act of limitations, is for the court to decide; and the evidence offered to prove such promise or acknowledgment is proper

¹ Bennett v. Everett, 3 R. I. 152, 155; United Society v. Winkley, 7 Gray (Mass.), 460; Pearsall v. Ta-
bour, 98 Minn. 248, 108 N. W. 808;
Farmers & M. Bank v. Richards, 119
Mo. App. 18, 95 S. W. 290.

² Evans v. Carey, 29 Ala. 99;
Towle v. Sweeney, 2 Cal. App. 29, 83
Pac. 74; Walker v. Freeman, 209 Ill.
17, 70 N. E. 595; Finn v. Seegmiller,
134 Iowa, 15, 111 N. W. 314; Rogers
v. Robson, 147 Mich. 656, 111 N. W.
193; Levy v. Popper, 186 N. Y. 600,
79 N. E. 1109.

³ Beasley v. Evans, 35 Miss. 192,
196; Morrell v. Frith, 3 Mees. & W.
403. Compare Curzon v. Edmond-
son, 6 Mees. & W. 295, where it was
held that whether a writing
amounts to an acknowledgment of
title within a statute is a question
for the judge and not for the jury to
decide. Brown v. Hayes, 146 Mich.
474, 109 N. W. 845. Or where a
deed recites that the grantee as-
sumes an incumbrance. Christian
v. John, 111 Tenn. 92, 76 S. W. 906.

to be submitted to the jury, as in other cases, under the direction of the court." ⁴ A better statement of the rule could not be drawn. It is merely a statement of the general rule in regard to the existence and interpretation of promises, which is that, whether the promise to pay the barred debt was made, is a question of fact for the jury to determine, but what is the construction and effect of the promise, if made, is a question of law to be decided by the court; ⁵ which means that, where there is any dispute as to the facts which go to prove the making of the new promise, the question must be submitted to the jury, upon hypothetical instructions, framed so as to apply the law to the state of facts which the evidence tends to prove. But where there is no dispute as to the facts, that is, as to the character of the promise and the circumstances under which it was made, and the circumstances are such that different inferences of fact could not be fairly drawn from them, then the court is to declare, as matter of law, whether the promise operated to revive the barred debt. ⁶

⁴ *Oliver v. Gray*, 1 Harr. & G. (Md.) 204, 219.

⁵ *Clark v. Sigourney*, 17 Conn. 511; ante, §§ 1105, 1106.

⁶ This, somewhat expanded by the author, is the doctrine of *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674, 679; *Hancock v. Bliss*, 7 Wend. (N. Y.) 267, and *Miller v. Lancaster*, 4 Me. 159. Compare *Burghaus v. Calhoun*, 6 Watts (Pa.), 219, where it is laid down that, "to avoid the uncertainty and insensible encroachments on the statute that would ensue, did we attempt to shape our course as to this statute by former decisions, we may require the acknowledgment of the demand, as a debt of legal obligation, to be so distinct and palpable in its extent and form, as to preclude hesitation." It has been said: "This promise [to pay a debt discharged by bankruptcy] need not be to the holder of the debt, but it must refer to the debt without question. No particular form of words need be used to constitute this promise.

Any words, or perhaps signs or acts, which signify a present willingness to pay the debt, and which are intended to convey that idea to the hearer, are sufficient. The natural import of the words used must be a contract to discharge by payment the moral obligation that remains, whatever the debt discharged by the certificate. A bare acknowledgment of the justness of the debt, of its present existence as a debt formerly contracted and now unpaid, is not sufficient. Such statements as these will remove the bar of the statute of limitations; for from these the law will imply a promise to pay. Not so, as relates to the bar of the bankruptcy certificate. The bankrupt must make the promise, and not leave it to the law to imply it. In this sense the promise must be express. It must also be unqualified and unconditional, or else the party seeking to avail himself of it must show the condition performed." *Bennett v. Everett*, 3 R. I. 152, 155. See also

§ 1268. **Promise to revive Debt Barred by Limitation.**—Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations, is a *question for the court*; but whether the debt sued for is the one thus acknowledged, is a *question for the jury*.⁷

§ 1269. **Submitted to Jury on what Evidence.**—But every kind of evidence conducing to show a recognition of the claim or claims in suit, as still subsisting, and the debt as one of the debts referred to and spoken of by the defendant in his acknowledgment or promise, should be submitted to the jury.⁸ Thus, where two independ-

Fleming v. Lullman, 11 Mo. App. 104; Graham v. Hunt, 8 B. Mon. (Ky.) 7; Stewart v. Reckless, 24 N. J. L. 427; Field's Estate, 2 Rawle (Pa.), 351, 356; Dusenbury v. Hoyt, 53 N. Y. 521; Reith v. Lullman, 11 Mo. App. 254; Cambridge Sav. Inst. v. Littlefield, 6 Cush. (Mass.) 213; Allen v. Ferguson, 18 Wall. (U. S.) 13; Egbert v. McMichael, 9 B. Mon. (Ky.) 45; Fleming v. Hayne, 1 Stark. 370; Mosely v. Caldwell, 59 Tenn. 208; Shockey v. Mills, 71 Ind. 288, 292; Randidge v. Lyman, 124 Mass. 361; Underwood v. Eastman, 18 N. H. 582, 585; Bank v. Boykin, 9 Ala. 320, 322; Hückabee v. May, 14 Ala. 263; Wynne v. Raikes, 5 East, 515; Soulden v. Van Rensselaer, 9 Wend. (N. Y.) 297; Besford v. Saunders, 2 H. Bl. 116; Edson v. Fuller, 22 N. H. 183; Haines v. Stauffer, 33 Pa. St. 541; McKinley v. O'Keson, 5 Pa. St. 369; Comfort v. Eisenbeis, 11 Pa. St. 13; Way v. Sperry, 6 Cush. (Mass.) 238; Cogburn v. Spence, 15 Ala. 549; Hern-don v. Givens, 19 Ala. 313.

⁷ Mastin v. Branham, 86 Mo. 643, 648; Warlick v. Peterson, 58 Mo. 408; Dickinson v. Lott, 29 Tex. 173, 179; Kimball v. Estate of Baxter, 27 Vt. 623, 632; Door v. Swartwout, 1 Blatchf. (U. S.) 179, 184. Under the Missouri statute (R. S. Mo.,

1909, § 1909), such an acknowledgment must be in writing and signed by the party making it; and in order to be effective it must be either in the form of an express promise to pay, or of an acknowledgment of an actual, subsisting debt on which the law would imply a promise. Boyd v. Hurlbut, 41 Mo. 264; Chambers v. Rubey, 47 Mo. 99; Mastin v. Branham, *supra*. See, on the subject generally, Smith v. Eastman, 3 Cush. (Mass.) 355; Bell v. Morrison, 1 Pet. (U. S.) 351, 362; Woonsocket Inst. for Sav. v. Ballou, 16 R. I. 351, 16 Atl. 144, 1 L. R. A. 555; George v. Vermont Mach. Co., 65 Vt. 287, 26 Atl. 722. It has been held that, if there are several claims, the written promise must indicate the one. Opp v. Wack, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743. Where a letter promised to pay "those old notes" it was held insufficient. Stout v. Marshall, 75 Iowa, 498, 39 N. W. 808; Chiles v. School Dist., 103 Mo. App. 240, 77 S. W. 82; Iowa L. & T. Co. v. McMurray, 129 Iowa, 65, 105 N. W. 361; Graham v. Stanton, 177 Mass. 321, 58 N. E. 1023.

⁸ Cook v. Martin, 29 Conn. 63; Wilcox v. Wilcox, 139 Mich. 365, 102 N. W. 954; Michigan Ins. Bank v. Eldred, 130 U. S. 693, 32 L. Ed.

ent claims were held by the plaintiff against the defendant—one on an account, and the other on a note,—a statement of which, on a single piece of paper, was presented to the defendant soon after they fell due, and admitted by him as so presented, and, five years afterwards, the defendant made a general acknowledgment of indebtedness to the plaintiff, and promised to pay him what he owed him, and a suit was thereafter brought on the note and account, to which the defendant pleaded the statute of limitations, and in which the plaintiff offered evidence of the new promise,—it was held, that the evidence was not to be rejected on the ground that the promise was too general and indefinite, but that the question of its application was for the jury.⁹

§ 1270. **What Indebtedness the New Promise Refers to.**—The question what particular indebtedness is referred to by the new promise, is obviously a question of fact for a jury.¹⁰

1080. Where date of beginning of the running of the statute is the discovery of fraud, it is a question for the jury, both as to when that was or when by the exercise of reasonable diligence the fraud should have been discovered. *New England M. L. Ins. Co. v. Swain*, 100 Md. 558, 60 Atl. 469; *Brock v. Wildey*, 125 Ga. 82, 54 S. E. 195. Where the date of the occurrence of an injury is in dispute, the jury decides. *Merchants L. & T. Co. v. Boucher*, 115 Ill. App. 101. Or when possession began, when prescription is relied on. *Moore & McFerrin v. Lumber Co. (Ark.)*, 102 S. W. 385. Or when evidence is conflicting on question of residence. *Eldridge v. Matthews*, 87 N. Y. S. 652. Where a corporation pleaded the statute on an obligation to pay when it was able, it was competent to show its inability down to a period within the statute. *Porter v. Separator Co.*, 115 App. Div. 333. The evidence as to this being conflicting, it was for the jury to decide.

⁹ *Cook v. Martin*, 29 Conn. 63.

¹⁰ *Whitney v. Bigelow*, 4 Pick. (Mass.) 110, 112; *Buckingham v. Smith*, 23 Conn. 453; *Cook v. Martin*, 29 Conn. 63. *Hancock v. Melloy*, 189 Pa. 569, 42 Atl. 292; *Becker v. Oliver*, 111 Fed. 672, 49 C. C. A. 533. In *Baillie v. Inchiquin*, 1 Esp. 435, Lord Kenyon, ruled at nisi prius, that, where a debt is established against a defendant who relies on the statute of limitations, if the plaintiff gives any general evidence of acknowledgment, it shall be taken to apply to the debt in question; and that it lies on the defendant to explain the promise so made and to show that it applies to some other demand. Compare *Whitney v. Bigelow*, 4 Pick. (Mass.) 110. Per contra, in *Buckingham v. Smith*, 23 Conn. 453, it was ruled that the burden was on the plaintiff to show that the promise related to notes in suit. *Wilcox v. Clarke*, 18 R. I. 324, 27 Atl. 219. Payment on a book account has been held not taking the unpaid part out of the statute, where the account was never recog-

§ 1271. Part Payment to take a Debt out of the Statute of Limitations.—The rule under this head seems to be that a part payment which will take a debt out of the operation of the statute of limitations must be made under circumstances such as will warrant a finding, as a question of fact, that the debtor intended to recognize the debt in question as a subsisting debt, and one which he was willing to pay.¹¹ Therefore, the mere endorsement, by the creditor, of a credit upon the note, without the privity of the debtor, is not evidence of part payment for this purpose.¹²

§ 1272. Right of Creditor to apply the Payment.—But this rule is subject to the exception that, where there are several debts having different periods of limitation, and the debtor makes part payments without specifying to which item of indebtedness they are to be applied, the creditor may apply them to any item which he

nized in its entirety. *Rogers v. Newton*, 71 N. J. L. 469, 58 Atl. 1100. And that a question of fact might arise as to whether payments were to specific items instead as a credit on the account. *Howe v. Hammond*, 76 Vt. 437, 58 Atl. 724.

¹¹ *Miller v. Talcott*, 46 Barb. (N. Y.) 168, 172. Compare *Bloodgood v. Bruen*, 8 N. Y. 362; *Shoemaker v. Benedict*, 11 N. Y. 176; *Peck v. N. Y. etc. Steamship Co.*, 5 Bosw. (N. Y.) 226. See *Bridgeton v. Jones*, 34 Mo. 411; *Callaway Co. Court v. Craig*, 35 Mo. 395; *Block v. Dormon*, 51 Mo. 31; *Vernon Co. v. Stewart*, 64 Mo. 408; *Shannon v. Austin*, 67 Mo. 485. If the credit is denied by the payor, the burden of proof is on holder. *Owsley v. Boles Admr.*, 30 Ky. Law Rep. 1016, 99 S. W. 1157.

¹² *Phillips v. Mahan*, 52 Mo. 197; *Loemer v. Haug*, 20 Mo. App. 163; *Goddard v. Williamson*, 72 Mo. 131; *Wannamaker & Brown v. Plank*, 117 Ill. App. 327; *Re Salisbury Estate*, 84 N. Y. S. 215, 41 Misc. Rep. 274. The statute is not tolled by payment of a dividend by the assignee of an assigned estate. Would

Mowing & R. M. Co. v. Harris, 212 Pa. 452, 61 Atl. 996. Nor where a creditor applies proceeds of collateral as a credit under instructions, where done after death of debtor. *Divine v. Miller*, 70 S. C. 225, 49 S. E. 479. Nor for a trustee to apply proceeds of foreclosure sale. *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959. It was also held, in this case, that payments of interest by the grantee assuming deed of trust, who by such assumption became principal and his grantor surety, did not constitute payments tolling the statute so far as the surety was concerned. See also *Maddox v. Duncan*, 143 Mo. 1, ch. 621, 45 S. W. 688, 41 L. R. A. 581, 65 Am. St. Rep. 678; *Cottrell v. Shepperd*, 85 Wis. 649, 57 N. W. 983, 39 Am. St. Rep. 919. This principle has been applied to payment by a debtor on a renewal note, which the principal regards as valid, but the surety as invalid. *St. ex rel. v. Allen*, 132 Mo. App. 98, 111 S. W. 622. Nor will payment of interest by volunteer even though he be the owner of the equity of redemption toll the statute. *Frase v. Lee* (Mo. App.), 134 S. W. 10.

may choose, and the application so made will save the bar of the statute.¹³ This conclusion, though sanctioned by many authorities, is not supported by any underlying basis of sense. The theory upon which part payment takes the case out of the statute is, as already seen,¹⁴ that it is a *recognition* by the debtor of the obligatory force of *the particular debt*; but a payment not made with reference to any particular debt is not in fact a recognition of the obligatory force of any particular debt. This rule is a good illustration of the results which are reached by judges when proceeding according to purely technical modes of reasoning—which in many cases are no reasoning at all. This conclusion involves the solecism that, while statutes of limitation are favored by the courts because they are statutes of repose (and this is the doctrine of all courts), yet a creditor may, by his mere volition, keep alive a particular indebtedness, although the debtor may regard it as barred.

§ 1273. **Which Debt Intended.**—Where there are two debts, one of which is barred by limitation, and there is a part payment not specifically appropriated by the debtor or creditor, it is a question for the jury whether the payment was made generally on account of what might be due from the debtor at the time, or on a particular account.¹⁵

¹³ Jackson v. Burke, 1 Dill. C. C. (U. S.) 311; Wills v. Fowkes, 5 Bing. N. C. 455; Harrison v. Davies, 23 La. Ann. 216; Ramsay v. Warner, 97 Mass. 8; Peck v. N. Y. etc. Steamship Co., 5 Bosw. (N. Y.) 226; Davis v. Amey, 2 Grant Cas. (Pa.) 412; Whipple v. Blackington,

97 Mass. 476; Beck v. Haas, 31 Mo. App. 180; Williams v. Griffith, 5 Mees. & W. 300; McDowell v. McDowell's Estate, 75 Vt. 401, 56 Atl. 98.

¹⁴ Ante, § 1271.

¹⁵ Walker v. Butler, 6 El. & Bl. 506, 37 Eng. L. & Eq. 13.

